

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JARED FLANNERY,
Grievant,

v.

Docket No. 2020-1526-CONS

**DIVISION OF CORRECTION AND REHABILITATION/
BUREAU OF PRISONS AND JAILS/SOUTHWESTERN
REGIONAL JAIL AND CORRECTIONAL FACILITY,**
Respondent.

DECISION

Jared Flannery, Grievant, is employed by Respondent, Division of Correction and Rehabilitation, ("DCR") and assigned to the Southwestern Regional Jail and Correctional Facility ("SWRJ"). He is employed as a Correctional Counselor 2. Mr. Flannery filed a level one grievance form dated January 22, 2020 alleging the following:

There is a significant gap between myself and Donna Secreto who is a Correctional Counselor 1. I feel that this gap devalues my required education needed for this position.¹

As relief Grievant seeks "financial compensation for [the] pay gap". A level one conference was held and Grievant was informed by letter dated March 20, 2020, that his grievance was denied. Grievant appealed to level two on March 26, 2020, and a mediation was conducted on September 23, 2020. Mr. Flannery appealed to level three on October 2, 2020.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employee Grievance Board on July 13, 2021. Grievant appeared *pro se* and Respondent appeared through Lori Lynch, DCR Director of Staffing Services.

¹ The grievance statement is written herein as it appears on the grievance form except on the form it is typed in all capital letters.

Respondent was represented by Mark S. Weiler, Assistant Attorney General. The parties waived submission of post-hearing proposals. Consequently, this matter became mature for decision on July 13, 2021.

Synopsis

Grievant holds a position in the Correctional Counselor 2 classification. He notes that a coworker in the Correctional Counselor 1 classification is paid an annual salary which is higher than his, even though she is paid in a lower pay grade. He believes this is unfair and specifically devalues the education that he was required to obtain to meet the minimum qualification for the Correctional Counselor 2 classification.

ssalary. Rather Respondent offers a practical explanation relating to the coworker having much more experience than Grievant and that she transferred into the Correctional Counselor 1 position from a classification with a higher pay grade.

Grievant was unable to point to any law, policy, or rule that prohibited Respondent from paying the coworker a higher salary. Additionally, it has been held in many cases that employees are not being treated differently for pay purposes as long as they all are being paid within the pay grade appropriate to their classifications. Accordingly, the grievance must be **DENIED**.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Jared Flannery, Grievant, was initially employed by DCR starting on February 26, 2013. He was assigned to the SWRJ in the Correctional Counselor 2

classification.² He has been continuously employed in that classification since that date. He has more than eight years of experience with Respondent.

2. Grievant holds a Bachelor of Arts degree from Marshall University in Psychology and Criminal Justice. (Grievant Exhibit 1).

3. On his most recent annual Employee Performance Appraisal ("EPA-3"), Grievant received an overall rating of "Exceeds Expectations". (Grievant Exhibit 2). He has received good ratings on all his EPAs and has not been subjected to discipline.

4. The Correctional Counselor 2 classification specifications minimum qualifications require the employee to hold:

A Bachelor's degree from an accredited college or university with a major in criminal justice, corrections, psychology, sociology, counseling, counseling and guidance, education, therapeutic recreation, or closely related field.

The salary for the position is set in pay grade 11 with a range of \$26,406 to \$48,851 annually. (Respondent Exhibit 1).

5. Grievant is presently paid \$17.28 per hour as a Correctional Counselor 2. This amounts to approximately \$36,000 per year.³ That annual salary is within the salary range for a Correctional Counselor 2

6. Donna Secreto is presently employed by the DCR as a Correctional Counselor 1 at the SWRJ. She was originally employed by Respondent in 1998 as a Correctional Officer 2. (Respondent Exhibit 6). She has been employed by Respondent for about fifteen more years than Grievant.

² Respondent Exhibit 1, initial appointment letter dated February 21, 2013.

³ Multiplying the hourly rate by 40 hours per week and multiplying again by 52 weeks per year.

7. Prior to 2018, Ms. Secreto had been promoted to the classification of Correctional Officer 3. Like the Correctional Counselor 2 classification, the Correctional Officer 3 ("CO 3") classification is paid in pay grade 11, with the same annual salary range. See FOF 4 *supra*. (Respondent Exhibit 3).

8. In early 2018, Officer Secreto applied for and was awarded a position at the SWRJ in the Correctional Counselor 1 classification. She received an appointment letter dated March 8, 2018, advising her that she had been selected for the position and that her pay of \$3,310.23 monthly (\$19.10 per hour) would remain the same even though the Correctional Counselor 1 classification was paid at pay grade 10 rather than pay grade 11. (Respondent Exhibit 5).

9. The Division of Personnel Administrative Rule states a "demotion without prejudice" occurs when there is "[a] reduction in pay and/or a change in job class to a lower job class . . . for which [the employee] applied." W. VA. CODE ST. R. § 143-1-3.28(b).

10. The Division of Personnel Administrative Rule also states the following:

5.6.a. Demotion Without Prejudice. -- The appointing authority has the discretion to reduce or not reduce the pay rate of any employee who is demoted without prejudice if the employee's pay rate is within the compensation range of the job class to which the employee is demoted.

W. VA. CODE ST. R. § 143-1-5.6(a).

11. The Correctional Counselor 1 classification specifications minimum qualifications require that an employee holds the following:

A Bachelor's degree from an accredited college or university with a major in criminal justice, corrections, psychology,

sociology, counseling, counseling and guidance, education, therapeutic recreation, or closely related field.⁴

12. The annual salary range for a Corrections Counselor 1 is \$25,147.00 to \$46,521.00. In her appointment letter, Ms. Secreto was paid \$19.10 per hour or roughly \$39,728 annually.⁵ (Respondent Exhibit 5). That amount is within the salary range for a Correctional Counselor 1.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant notes that Ms. Secreto is paid an annual salary which is much higher than his even though she is in a lower classification with a lower pay grade. He believes this is unfair and specifically devalues the education that he is required to hold to meet the minimum qualification for the Correctional Counselor 2 classification.

Respondent does not deny that Ms. Secreto's position is in the Correctional Counselor 1 classification with a pay grade 10 compared to Grievant's classification which

⁴ The only difference between this requirement and the training requirement or the Correctional Counselor 2 is that experience in corrections may be substituted for the training requirement on a year-to-year basis to qualify as a Correctional Counselor 1.

⁵ Multiplying the hourly rate by 40 hours per week and multiplying again by 52 weeks per year.

is higher and paid within pay grade 11. Respondent explains that Ms. Secreto has been employed by Respondent at least fifteen years longer than Grievant in which time her salary was increased for various reasons, including promotions and raises.

Additionally, Ms. Secreto held a CO 3 classification immediately prior to taking the Correctional Counselor 1 job. The CO 3 classification was paid in pay grade 11, one step higher than her new job. Pursuant to the Division of Personnel Administrative Rule, her transfer to the Correctional Counselor 1 constituted a demotion without prejudice since she applied for and received a position in a lower pay grade than the position from which she was moving.⁶ The Division of Personnel Administrative Rule specifically allowed Respondent to place Grievant in the Correctional Counselor 1 position with the same salary she was receiving in her CO 3 position as long as the salary was within pay grade 10 salary range.⁷ Ms. Secreto's annual salary was about \$39,700, which was well within the pay grade 10 salary range. See FOF 12 *supra*. Grievant did not prove that Respondent violated any law, rule or policy by placing Ms. Secreto at a higher salary than his when she took the Correctional Counselor 1 position.

Ultimately, the issue of whether a state agency is required to pay employees in the same classification the same salary has long been settled by the West Virginia Supreme Court of Appeals in *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994). Since the issuance of that decision the Grievance Board has consistently held:

The principle of "equal pay for equal work" is embraced by W. Va. Code § 29-6-10. See *AFSCME v. Civil Serv. Comm'n.*, 181 W. Va.

⁶ See W. VA. CODE ST. R. § 143-1-3.28(b). FOF 9 *supra*.

⁷ See W. VA. CODE ST. R. § 143-1-5.6(a). FOF 10 *supra*.

8, 380 S.E.2d 43 (1989). In *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994) the West Virginia Supreme Court of Appeals noted that W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, **but a state employer is not required to pay these employees at the same rate.** *Largent, supra.*, at Syl. Pts. 2, 3 & 4. Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Largent, supra* at 246. It is not discriminatory for employees in the same classification to be paid different salaries as long as they are paid within the appropriate pay grade. See *Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009); *Buckland v. Div. of Natural Res.*, Docket No. 2008-0095-DOC (Oct. 6, 2008); *Boothe, et al., v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2009-0800-CONS (Feb. 17, 2011); *Lott v. Div. of Highways and Div. of Personnel*, Docket No. 2011-1456-DOT (Sept. 9, 2014); *Bowser, et al., v. Dep't of Health & Human Ser./William R. Sharpe, Jr. Hosp.*, Docket No. 2013-0247-CONS (Feb. 13, 2014). **In essence, the employees are not being treated differently for pay purposes as long as they all are being paid within the pay grade appropriate to their classifications.**

Deem et al. v. Div. of Motor Vehicles, Docket No.2016-1041-CONS (Nov. 30, 2016).

(Emphasis added).

This case is slightly different in as much as Ms. Secreto is in a Correctional Counselor 1 position which is one step below Grievant's Correctional Counselor 2 position. But the essential rule remains the same. Grievant and Ms. Secreto are not being treated differently for pay purposes as long as they are both "being paid within the pay grade appropriate to their classifications." *Id.* Grievant did not prove by a preponderance of the evidence that either he or Ms. Secreto is not being paid within the pay grade appropriate to their respective classifications. Accordingly, the Grievance is **DENIED**.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. The Division of Personnel Administrative Rule states a "demotion without prejudice" occurs when there is "[a] reduction in pay and/or a change in job class to a lower job class . . . for which [the employee] applied." W. VA. CODE ST. R. § 143-1-3.28(b). The transfer of Ms. Secreto from a classification in pay grade 11 to a classification in pay gr 10 constituted a demotion without prejudice.

3. The Division of Personnel Administrative Rule also states the following:

5.6.a. Demotion Without Prejudice. -- The appointing authority has the discretion to reduce or not reduce the pay rate of any employee who is demoted without prejudice if the employee's pay rate is within the compensation range of the job class to which the employee is demoted.

W. VA. CODE ST. R. § 143-1-5.6(a). Respondent was specifically authorized by this rule to place Ms. Secreto in the Correctional Counselor 1 position with the same salary she was earning in the CO 3 position she was leaving.

4. It is not discriminatory for employees in the same classification to be paid different salaries as long as they are paid within the appropriate pay grade. *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994). See


also, *Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009); *Buckland v. Div. of Natural Res.*, Docket No. 2008-0095-DOC (Oct. 6, 2008); *Boothe, et al., v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2009-0800-CONS (Feb. 17, 2011); *Lott v. Div. of Highways and Div. of Personnel*, Docket No. 2011-1456-DOT (Sept. 9, 2014); *Bowser, et al., v. Dep't of Health & Human Ser./William R. Sharpe, Jr. Hosp.*, Docket No. 2013-0247-CONS (Feb. 13, 2014).

5. Even though Grievant and his coworker are in different classifications, they are not being treated differently for pay purposes as long as they are both “being paid within the pay grade appropriate to their classifications.” See generally, *Deem et al. v. Div. of Motor Vehicles*, Docket No. 2016-1041-CONS (Nov. 30, 2016).

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 § 6.20 (2018).

DATE: August 4, 2021


WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE