

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**JARROD M. WILSON,  
Grievant,**

**v.**

**Docket No. 2019-0901-DOT**

**DIVISION OF HIGHWAYS,  
Respondent.**

**DECISION**

Grievant, Jarrod Wilson, is employed by the Division of Highways as a Transportation Engineering Technologist, Maintenance Assistant, in District Five. On January 30, 2019, he filed this action seeking a salary increase that two other Maintenance Assistants had received in District Five. Grievant asserts this inequity is \$698.88 per month and approximately \$9,714.32 to date. A level one conference was held on March 26, 2019, and the grievance was denied by decision dated April 15, 2019. A level two mediation was conducted on November 4, 2019. A level three evidentiary hearing was conducted before the undersigned on December 8, 2020, at the Grievance Board's Westover office. Grievant appeared *pro se*. Respondent appeared by its counsel, Keith A. Cox, Legal Division. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on January 22, 2021. Grievant did not file proposals.

**Synopsis**

Grievant has been employed by the Division of Highways since September 10, 1990 as a Maintenance Assistant. In 2017, some classifications of Maintenance Assistants received a pay raise. Grievant did not. There are different classifications that

have the working title Maintenance Assistant. Some are Highway Administrators, some are Technicians, such as Grievant, and others are Engineers. Despite Respondent's efforts, and while being paid within his paygrade, Grievant did not receive a pay raise until December 2, 2020. The record is somewhat unclear as to what legal basis Grievant is asserting in relation to seeking a back pay award. In any event, Grievant's raise was within the discretion of the Division of Highways and the record does not support a finding that Grievant is entitled to any back pay for any delay in receiving this raise.

The following Findings of Fact are based upon the record of this case.

### **Findings of Fact**

1. Grievant has been employed by the Division of Highways since September 10, 1990, as a Transportation Engineering Technologist in District Five.
2. Grievant's working title is Maintenance Assistant and he oversees four Division of Highway's counties.
3. In 2017, some classifications of Maintenance Assistants received a pay raise. Grievant did not.
4. There are different classifications that have the working title Maintenance Assistant. Some are Highway Administrators, some are Technicians, such as Grievant, and others are Engineers.
5. It is undisputed that Grievant was being paid within the parameters of his pay grade.
6. Despite Respondent's efforts, Grievant did not receive a pay raise until December 2, 2020.

7. The Division of Highways was aware of the different salary ranges of the Maintenance Assistants since the changes made in 2016 and 2017. Grievant has always been paid correctly for his classification and he is currently paid on the higher end of employees in his classification.

8. The Division of Highways made attempts to increase Grievant's salary since 2016, but met resistance from the Division of Personnel and the State Personnel Board. The Division of Highways was not able to implement many of the salary increases until its removal from the jurisdiction of the Division of Personnel. Nevertheless, the Division of Highways still needed approval from the State Personnel Board to award the salary increase to Grievant.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant's argument appears to be that he has been the victim of discrimination. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);
- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

It is not discriminatory for employees in the same classification to be paid different salaries." *Thewes and Thompson v. Dep't of Health and Human Resources/Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003).

Grievant appears to contend that he has been the victim of discrimination because there are other Maintenance Assistants that have had larger salaries. Grievant's argument lacks merit because all of the Division of Highways' Maintenance Assistants are not similarly-situated. While the working titles may be the same, the Division of Highways has several different kinds of Maintenance Assistants, as Grievant has acknowledged. In short, there are simply insufficient facts in evidence for the undersigned to make a proper assessment of a discrimination claim under the applicable law.

The holding of the West Virginia Supreme Court of Appeals in *Largent v. West Virginia Division of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994), continues to be instructive in examining the issue raised by Grievant. The West Virginia Supreme Court of Appeals held that “employees who are performing the same tasks with the same responsibilities should be placed within the same job classification,” but a state employer is not required to pay these employees at the same rate. *Largent* at Syl. Pts. 2 & 3. Additionally, 128 C.S.R. 62, states any classified employee “whose base salary is at least at the equity step for that pay grade, shall be deemed to be equitably and uniformly compensated in relation to other classified employees within the pay grade . . . .” As noted by the West Virginia Supreme Court of Appeals in *Largent*, 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.” *Id.* at 246. A State employee’s salary is the result of many factors, especially when the employee has worked for the State for many years. See *White, et al. v. W. Va. State Police and Div. of Personnel*, Docket No. 05-DPS-168 (July 28, 2005).

It is well established that employees in the same classification, who are performing the same duties, need not be paid the same salary, as long as they are paid within the pay range for the pay grade to which their classification is assigned. Consistent with *Largent, supra*, Grievant and other Maintenance Assistants are being paid in accordance with the pay scale for their employment classification.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. For purposes of the grievance procedure, discrimination is defined as “any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

3. “It is not discriminatory for employees in the same classification to be paid different salaries.” *Thewes and Thompson v. Dep’t of Health and Human Resources/Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003).

4. WEST VIRGINIA 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 v. West Virginia Division of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

5. The record did not support a finding that Grievant is the victim of discrimination.

Accordingly, this 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: March 1, 2021**

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**Ronald L. Reece**  
**Administrative Law Judge**