

JOHN AUSTIN, JR.

Grievant,

v.

Docket No. 96-HHR-216

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/DONATED FOODS PROGRAM

and DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant, John Austin, Jr., an Equipment Operator with Department of Health and Human Resources' ("HHR") Donated Foods Program ("DFP"), grieves his "salary and classification". He seeks as relief to be "reclassified and promoted to Equipment Operator II [\(See footnote 1\)](#), to receive a comfortable salary, merrett [sic] increases, and to be compensated as we were promised by Sue Sergi, Director of Bureau of Families and Children, in May, 1994." Through the lower level proceedings, and again at the Level IV hearing, Grievant's main contention appears to be that he was "hired in" at entry level in October 1993, and was not told he could have negotiated a higher salary. At Level I, Grievant's immediate supervisor said he thought this grievance was "justified", but he did not have authority to grant a pay increase. The grievance was denied at Levels II and III. After an appeal to Level IV, a hearing was held on August 13, 1996. This case became mature for decision on September 3, 1996, the deadline for the parties' proposed findings of fact and conclusions of law.

The material facts in this case are not in dispute and will be set out below.

Findings of Fact

1. Grievant first came to work for the DFP from Shawnee Hills as a temporary employee.
2. In October 1993, a permanent Equipment Operator's ("EO") position was posted at DFP. Grievant was number 3 on the register out of approximately 30 qualified employees.
3. This EO position was planned and budgeted at an entry level salary. For Ms. Delores

Phillips, the Director of DFP, to hire anyone at a higher salary, she would need prior approval.

4. Grievant applied for and accepted the position at the entry level salary. In 1995, he found out it was possible to attempt to negotiate a larger salary than the one offered. He filed this grievance in 1996 after he did not receive a merit increase.

5. Grievant has not received a merit increase since he was hired, although he was considered for one as were all employees in DFP. [\(See footnote 2\)](#)

Issues

Grievant argues he does a good job, has good evaluations and job skills; and thus he should be paid more money. He specifically states he should have received a higher starting salary and was promised a merit increases. Respondent argues it did not violate any statutes, rules, and/or regulations.

Discussion

Grievant alleges he was promised a merit raise. The evidence reveals Grievant was told he would be “considered” for a merit increase, and he was. Grievant did not receive this merit increase and did not present any evidence to demonstrate that the giving of DFP's merit raises violated any rules or regulations, or resulted from an act of discrimination, favoritism, or retaliation, thus this argument must fail.

Grievant's next issue is that he should have received a higher starting salary when he began permanent employment at DFP. This issue is governed by West Virginia Division of Personnel Administrative Rule 5.04(b) which states:

The entry salary for any employee shall be at the minimum salary for the class. However, an individual possessing pertinent training or experience above the minimum required for the class, as determined by the Director, may be appointed at a pay rate above the minimum, up to the mid-point of the salary range, unless otherwise prescribed by the Board. For each increment above the minimum, the individual must have in excess of the minimum requirements at least six months of pertinent experience or equivalent pertinent training . . . **(Emphasis Added.)**

Clearly, the use of the word “may” indicates the employer has no duty to hire an applicant above the minimum starting salary, and Respondent did not do so.

Ms. Phillips testified at Level IV, that the position was budgeted for an entry level salary, and she would not have hired an EO at a higher salary. Mr. Lowell Basford, Division of Personnel's Assistant Director of Classification and Compensation, stated the other EO's at DFP started at entry level salaries, and there was no need to pay a higher salary as there were no retention and recruitment problems with the EO position. He explained there are currently three EO's at DFP; one employee has a lower salary, and the other employee, with more seniority, has a higher salary. Thus, he opined Respondent HHR did not violate any statutes, rules, or regulations in their hiring of Grievant.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. In a non-disciplinary action the grievant has the burden of proving his case by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).
2. A state employer "may" start new employees above the minimum starting salary, but this act is discretionary. W. Va. Div. of Personnel Admin. Rule 5.04(b).
3. No rules or regulations require a state employer to inform an applicant that he can attempt to negotiate a higher salary.
4. Grievant failed to demonstrate Respondents violated any statute, rule, or regulation when he did not receive a merit raise.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 30, 1996

[Footnote: 1](#)

There is currently no Equipment Operator II classification within the State system and has not been since before Grievant was permanently hired in 1993. As Grievant presented no evidence that his current classification was in any way improper, the issue is without merit.

[Footnote: 2](#)

Grievant alleged, at the lower levels, that he should have received a merit increase. At the Level IV hearing he stated that this issue was no longer part of his grievance. In his post-hearing submission he continued to argue he was promised and should receive a merit increase; this issue will be briefly discussed.