EDWARD B. BOYLES,

Grievant,

v. Docket No. 98-BEP-027

WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS,

WORKERS' COMPENSATION DIVISION,

and

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION,

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Pursuant to W. Va. Code §§ 29-6A-1, et seq., Edward B. Boyles (Grievant), an employee of Respondent West Virginia Bureau of Employment Programs (BEP), filed a grievance on July 29, 1997, alleging the following:

> I am aggrieved by the reclassification process. By experience, training, education, workload, and responsibility I believe my duties and qualifications exceed that required of a “District Claims Manager” and I believe my salary should be increased accordingly. I have seen other people hired during the last several months in the same position as I currently hold for a considerably higher salary with no training and less responsibility. After six years without a raise, I am due.

After the grievance was denied at Levels I and II, Grievant appealed to Level III where an evidentiary hearing was conducted on October 27, 1997. BEP Commissioner William F.Viewig denied the grievance at Level III on January 5, 1998, and Grievant appealed to Level IV. On February 3, 1998, the West Virginia Division of Personnel (DOP) was joined as an indispensable party pursuant to Rule 4.13 of the Procedural Rules of the West Virginia Education and State Employees Grievance Board,

156 C.S.R. 1 § 4.13 (1996), and the matter was set for hearing. A Level IV hearing was held in this Grievance Board's office in Charleston, West Virginia, on April 22, 1998. (See footnote 1) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on June 16, 1998, following receipt of the parties' post-hearing submissions.

There is no significant dispute regarding the facts in this matter. Accordingly, the following Findings of Fact are made based upon the record created at Levels III and IV.

FINDINGS OF FACT

1. Grievant is employed by Respondent BEP in its Workers' Compensation Division.

2. Grievant was first employed by BEP on November 1, 1991, in the classification of Technical Assistant II, Pay Grade 14, at an annual salary of $16,908.

3. Shortly thereafter, Grievant's position was reclassified by DOP in a statewide reclassification project to Employment Programs Claims Deputy, Pay Grade 11. See G Ex A at L III. Effective December 1, 1991, Grievant's annual salary was increased to $19,764,the minimum salary within Pay Grade 11, which ranges from $19,764 to $32,184 annually. (See footnote 2) DOP Ex 1 at L IV; G Ex A at L III.

4. Since reclassification, Grievant has received two across-the-board pay raises awarded to state employees. On July 1, 1994, Grievant's salary was increased by $1,008 annually, and, on July 1, 1996, his salary was increased by $300 annually. In addition, Grievant received a five per cent (5 %) salary advancement (merit raise) on August 1, 1996, and a two and one-half per cent (2.5 %) merit raise on December 1, 1997. DOP Ex 1 at L IV.

5. On July 16, 1997, Grievant's position was reallocated to a Deputy Claims Manager in Pay Grade 11 without any change in pay. See DOP Ex 1 at L IV.

6. Grievant's current annual salary as a Deputy Claims Manager is $22,692. See DOP Ex 1 at L IV.

7. Grievant has consistently received very good to exceptional performance evaluations in his current position with BEP. See G Ex A at L III.

8. Subsequent to Grievant's reclassification as an Employment Programs Claims Deputy/Deputy Claims Manager, personnel have become Deputy Claims Managers through hiring or promotion, and some of these employees receive annual salaries in excess of Grievant's. L III HT at 24-25.

DISCUSSION

In a grievance of this nature, Grievant has the burden of proving the allegations in his complaint by a preponderance of the evidence. Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994).

Grievant complains that he is not being appropriately compensated for his work in that other employees hired more recently with less experience with BEP are receiving a higher salary. Grievant correctly asserts that the Administrative Rules of the West Virginia Division of Personnel sanction this situation. Under § 5.04(b), a new employee may be appointed at a salary up to the mid-point range, based upon the employee's pertinent training and experience, in the discretion of the Director of the Division of Personnel. 143 C.S.R. 1 § 5.04(b). Similarly, an employee who is promoted to a higher classification may receive a pay increase of five per cent (5 %) of his annual salary for each pay grade he advances, up to a maximum of fifteen per cent (15 %), unless the minimum pay rate of pay for the classification to which he is promoted is greater. In such case, the employee is entitled to the greater amount. See 143 C.S.R.1 § 5.05(a) (1995). Although it is not clearly established in the record, it appears that those employees who are in the same Deputy Claims Manager classification as Grievant, but who are receiving more pay at the present time, attained their higher salaries through application of the foregoing provisions.

Grievant's claim that the Division of Personnel's Administrative Rules are invalid involves a matter which falls outside the jurisdiction of the West Virginia Education and State Employees Grievance Board. This Board is an administrative body which functions within the executive branch of state government. Therefore, the Grievance Board has noauthority to declare legislation, or regulations which have been promulgated through the legislative rule-making process, invalid or unconstitutional. Wilson v. W. Va. Dept. of Tax & Revenue, Docket No. 93-T&R-061 (Nov. 30, 1993). See Akers v. W. Va. Dept. of Transp., Docket No. 89-DOH-605 (May 22, 1990).

Grievant's underlying complaint is that he is not being properly compensated, given the duties of his position, and his education, tenure, and experience. In accordance with W. Va. Code § 29-6-10, state employees are generally expected to receive “equal pay for equal work.” See AFSCME v. Civil Service Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). The West Virginia Supreme Court of Appeals

clarified this concept in Largent v. West Virginia Division of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994). In that decision, the Court noted that the Division of Personnel's Administrative Rules were issued pursuant to W. Va. Code § 29-6-10. After reviewing both the statute and the legislative rules, the Court stated: "[W]e conclude that it does not violate the principle of pay equity for the state to pay employees within the same classification differing amounts." Id. The Court further noted: "All of the relevant language in the definition section of the Administrative Rules and Regulations of the West Virginia Civil Service System reflects the Legislative intent to allow the state to maintain a certain degree of flexibility in setting employee compensation within a classification." Id. Accordingly, employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. See Largent, supra; Salmons, supra; Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dept. of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992). In this matter, the Assistant Director for Classification and Compensation of the West Virginia Division of Personnel, Lowell Basford, testified at Level IV that Grievant, and the other employees against whom Grievant compares his salary, are being properly compensated in accordance with the Division of Personnel's Administrative Rule governing compensation within the classified service. See 143 C.S.R. 1 § 5 (1995).

As was the case in Largent and the prior decisions of this Grievance Board cited above, Grievant has not shown that there was any discriminatory motive, or abuse of discretion, when BEP set the salaries of Grievant's fellow employees at a level which exceeds Grievant's current salary, or that the salary disparities which Grievant has identified violate any statute, policy, rule, regulation, or written agreement under which Grievant works. See W. Va. Code § 29-6A-2(i).

Grievant also contends that certain managers in BEP have adopted an unwritten policy that discourages or prevents current employees from applying for vacancies and obtaining transfers to other positions. As was noted at the Level IV hearing, W. Va. Code § 29-6A-3(j) prohibits consideration of a new grievance that is not part of the original complaint. W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993); Coddington v. W. Va. Dept. of Health & Human Resources, Docket Nos. 93-265/266/267 (May 19, 1994). Therefore, the undersigned is without authority to rule on the propriety of any such policy or practice. However, even

if such a policy was applied to prevent Grievant from transferring to another position, it would have no impact on his salary, because Personnel's administrative rules do not require an employer to increase the salary of an employee who is selected to fill a lateral position. 143 C.S.R. 1 § 5.07 (1995). Consistent with the foregoing discussion, the following Conclusions of Law are appropriately made in this matter.

CONCLUSIONS OF LAW

1. A grievant alleging pay discrimination must prove the allegations in his complaint by a preponderance of the evidence. Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994).

2. The West Virginia Education and State Employees Grievance Board does not have jurisdiction to declare an administrative rule promulgated through the legislative rule-making process invalid or unconstitutional. Wilson v. W. Va. Dept. of Tax & Revenue, Docket No. 93-T&R-061 (Nov. 30, 1993). See Akers v. W. Va. Dept. of Transp., Docket No. 89-DOH-605 (May 22, 1990).

3. In accordance with W. Va. Code § 29-6A-3(j), an administrative law judge at Level IV does not have authority to rule upon a claim that was not properly presented for consideration at the lower levels of the grievance procedure. W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993); Coddington v. W. Va. Dept. of Health & Human Resources, Docket Nos. 93-265/266/267 (May 19, 1994).

4. Employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classifi cation. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Nafe v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997); Salmons, supra; Acord v. W. Va. Dept. of Health & Human Resources, Docket No. 91-H- 177 (May 29, 1992). 5. Grievant has failed to establish by a preponderance of the evidence that his employer is compensating him contrary to the provisions of W. Va. Code § 29-6-10, or any other statute, policy, rule, regulation, or written agreement applicable to his employment situation.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: July 15, 1998

Footnote: 1

Grievant appeared pro se, while BEP was represented by Assistant Attorney General Mary McLaughlin, and DOP was represented by Assistant Director Lowell D. Basford.

Footnote: 2

There is no correlation between the Pay Grade numbers employed in the prior classification system and the current classification system. Thus, Pay Grade 11 represents a more highly-paid classification than Grievant held under the old scheme.