REBECCA S. COWGILL,

Grievant,

v. DOCKET NO. 97-DOH-350

WEST VIRGINIA DIVISION OF HIGHWAYS,
and WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

DECISION

Rebecca S. Cowgill, Grievant, filed this grievance against Respondent, the West Virginia Division of Highways (DOH) on January 31, 1996. The West Virginia Division of Personnel (Personnel) was made a party at Level IV. She grieves the fact that new employees, in the same classification as herself, are hired at a higher salary range even though she has over seven years of experience. As relief, Grievant requests “restitution be made to bring [her] salary in line with other secretaries as to years of service and experience.”

Grievant was denied relief at the lower levels of the grievance procedure. The parties agreed to submit this grievance to Level IV on the record produced at the lower level of the grievance procedure. On November 4, 1997, this case became mature with receipt of DOP's proposed findings of fact and conclusions of law. DOH did not file proposed findings of fact and conclusions of law.

DISCUSSION

In order to prevail in a grievance of this nature, Grievantmust prove the allegations in her complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

This an example of an instance where a grievant failed to put on an adequate case, and elicit sufficient evidence to prove by a preponderance of the evidence the allegations asserted in her grievance statement. At Level III, Grievant's representative called only two witnesses, Mr. Jeff Black (DOH's Human Resource Director) and Mr. Lowell Basford (DOP's Assistant Director for

Classification and Compensation), and presented four exhibits (Gr. Ex. #1 - a Statewide Weekly Vacancy Report, Gr. Ex. #2 - DOP's Pay Plan Implementation policy, Gr. Ex. #3 - Application for Examination for Judith J. Kennen, and Gr. Ex. #4 - Application for Examination for Melissa Ann Christian).

Grievant merely answered some questions for Mr. Robert Smith (See footnote 1) at the end of the Level III hearing, and the record does not indicate whether she was under oath. However, even assuming that Grievant testified truthfully in the five responses she provided during the Level III hearing, she failed to prove the allegations of her grievance by a preponderance of the evidence. The colloquy appearing in the Level III transcript after Mr. Basford's testimony was completed is reproduced below:

> Byrd: We're back on the record. The Evaluator, Ron Smith, has a question for the Grievant.
>
> Smith: Mr. Lloyd, in [Grievant's] grievance statement she makes reference to two other Secretary II's. In the course of the evidence that you've presented to us here today, we have Grievant Exhibit #3 and Grievant #4, are either one of these exhibits the people that we're referring to in the grievance statement itself?
>
> Grievant: Yes, I'll answer that. The exhibit listed as #3 does pertain, that is an application that does pertain to one of the other secretaries referred to in the grievance. The other application is basically just to show this was a Secretary I, hired in as a Secretary I also submitting an application to be hired in as a Secretary II already working in this District strictly just to show the educational background on hers. So I do just have the one application that does pertain to the actual one listed in the grievance.
>
> Smith: So Grievant Exhibit #3 is the one that is referenced in your original grievance?
>
> Grievant: Yes.
>
> Smith: Which salary equates with this Judith Kennen, the $17.00 more per month than you or the $127.00?

Grievant: Yes, it's $17.00.

Smith: So that makes Ms. Kennen's salary $1,480.00?

Grievant: Yes, that's correct.

Smith: Thank you.

Byrd: The other Secretary II that is mentioned in your grievance statement, is this Secretary II in the same District that you work in?

Grievant: No, she is out of District Five.

Byrd: Thank you. Can we go off the record? Mr.Catsonis, (See footnote 2) are your ready to present the Agency's case?

Catsonis: I hope that I have gotten all the evidence that I will need for my case from the witnesses and documents that have already been presented.

Byrd: Thank you. Is the Grievant ready for their closing statement?

Lloyd: We just need a few minutes to put it together.

Byrd: Let's go off the record. We're back on the record [,] and we are ready for the Grievant's closing statement. [Whereupon, closing statements were heard].

Level III, Tr. at 30-31.

The concept of "equal pay for equal work" is embraced by W. Va. Code §29-6-10. See AFSCME v. Civil Service Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that 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. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); 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).

As was the case in Largent, and the prior decisions of this Grievance Board cited above, Grievant has not shown that there wasany discriminatory motive when DOH set the salaries of Grievant's fellow employees at a level which exceeds Grievant's current salary, that the salary of any secretary is not within the range for the secretary classification, 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).

The following findings of fact were derived from the record.

FINDINGS OF FACT

1. Ms. Judith J. Kennen is a secretary employed by Respondent, and makes $17.00 more per month than Grievant. Level III, Tr. at 30-31.

2. Ms. Kennen has worked for DOH as a switchboard operator/receptionist from May 9, 1994 to October 7, 1994, for Gregory's Truck and Auto Repair as a secretary from 1992 to 1994, for “Soil Plant - Tech.” as a secretary from 1982 to 1985, and for the West Virginia Division of Vocational Rehabilitation as a clerk/typist from August 1978 to July 1979. She has fourteen hours of college credit. Gr. Ex. #3.

3. Ms. Melissa Ann Christian is a secretary employed by Respondent in District Five. Level III, Tr. at 30-31.

4. Ms. Christian has worked for DOH as a Secretary I fromMay 1995 to September 10, 1996, (See footnote 3) for the General Lewis Inn as a front desk clerk from September 1994 to April 1995, for

Super 8 Motel, Inc., as a front desk clerk from June 1992 to September 1993, and for the Greenbrier County Board of Education as a secretary from September 1988 to June 1991. She received a B.S. degree from Concord College in May 1994. Gr. Ex. #4.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. In nondisciplinary matters the grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Under W. Va. Code §29-6-10(2), the State Personnel Board shall have the authority to promulgate, amend, or repeal rules, in accordance with W. Va. Code §29A-1-1 et seq., and to implement:

> [A] pay plan for all employees in the classified service, after consultation with appointing authorities and the state fiscal officers, and after a public hearing held by the board. Such pay plan shall become effective only after it has been approved by the governor after submission to him by the board. Amendments to the pay plan may be made in the same manner. Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which he is employed. The principle of equal pay for equal work in the several agencies of the state government shall be followed in the pay plan as established hereby.

3. Under West Virginia Division of Personnel Administrative Rule 5.04(a), the State Personnel Board "assign[s] each class of positions to an appropriate pay grade consistent with the duties outlined in the class specification. No salary shall be approved by the Director of Personnel unless it conforms to one of the pay

rates in the pay grade assigned to the employee's class of position."

4. West Virginia Division of Personnel Administrative Rule 5.04(b) regarding entry level salaries under the pay plan provides:

> 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. The Director may authorize appointment at

> a rate above the mid-point where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class. (Emphasis added.)

The use of the word “may” indicates that the employer has no duty to hire an applicant above the minimum starting salary.

5. The principle of “equal pay for equal work,” as proscribed in W. Va. Code §29-6-1, and the West Virginia Division of Personnel Administrative Rules, does not require that all employees performing the same tasks be paid identical salaries. Acord v. W. Va. Dept. of Health and Human Resources, Docket No. 91-H-177 (May 29, 1992).

6. 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. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); 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).

7. “No rules or regulations require a state employer to inform an applicant that [s]he can attempt to negotiate a higher salary.” Austin v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-216 (Sept. 30, 1996).

8. Grievant failed to prove, by a preponderance of the evidence, that a violation, misapplication or misinterpretation of any statute, policy, rule, regulation, or written agreement, or that she was entitled to any relief.

Accordingly, the grievance is **DENIED**.

Any party 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 LawJudges 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.

Dated: February 25, 1998. _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

Mr. Ronald Smith, and Ms. Susan Byrd (mentioned below) were two of the members of the three member panel that heard this grievance at Level III, and submitted a recommendation to the Commissioner of Highways.

Footnote: 2

Mr. Leo Catsonis represented DOH at Level III.

Footnote: 3

Ms. Christian's application for examination states from "5-95 to present." She dated it September 10, 1995.