OPAL RUNYON, et al.,

Grievants,

v.

DOCKET NO. 98-DPS-322

DEPARTMENT OF PUBLIC SAFETY
and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants Opal Runyon, Janet Spurlock, and Tiffani Vaughn are all employed by the Department of Public Safety ("DPS") as Driver License Examiners in the Logan area. They filed separate grievances on March 18, 1998, alleging they had not been given a salary increase with an increase in job duties and responsibilities. They requested back pay and interest to December 2, 1997, the date they assumed the additional duties.

The level one supervisor, Sergeant Chuck Long, determined in a decision dated March 18, 1998, that he did not have the authority to grant the relief requested. On or about March 24, 1998, Grievants requested that their respective grievances be stayed until the Division of Personnel ("DOP") reevaluated and issued a decision on reclassification to a higher pay grade. On May 28, 1998, DOP increased the pay grade for Driver License Examiners from pay grade 5 to pay grade 6, effective July 16, 1998, and revised the classification specification to reflect the added duties and responsibilities. Grievants allege that the pay grade increase was improper and requested assignment to pay grade 7. First Lieutenant W. D. Totten, in a Level II decision dated June 16, 1998, denied the grievance. Grievants appealed to level three, where the grievances were consolidated, and a level three hearing was held on August 5, 1998. The grievance was denied by Major Terrance Snodgass by decision dated August 20, 1998. Grievants appealed to level four on August 25, 1998,

and also moved for default judgment. (See footnote 1) A level four hearing on the merits was held on October 27, 1998, and this case became mature for decision at that time. Grievants appeared pro se, DPS was represented by Dolores Martin, Esq., and DOP was represented by Lowell D. Basford, Assistant Director of Classification and Compensation.

SUMMARY OF EVIDENCE

Level Three DOP Exhibits

Ex. 1 -

May 1, 1998 letter from Major R. D. Blankenship to Mr. Roger Morgan, Chairman, State Personnel Board.

Ex. 2 -

May 28, 1998 letter from Edison L. Casto, Director, WV Division of Personnel, to Colonel Gary L. Edgell, Superintendent, West Virginia State Police.

Ex. 3 -

Classification Specification for Customer Service Representative, Lead, effective October 23, 1996.

Level Four Grievant's Exhibits

Ex. 1 -

March 24, 1998 letter from Tiffani G. Vaughn to First Lieutenant W. D. Totten, Traffic Records.

Testimony

Grievant Tiffani Vaughn testified on behalf of the Grievants. DPS presented the testimony of Lowell D. Basford.

FINDINGS OF FACT

The material facts are not in dispute. Grievants are classified as Driver License Examiners, and

prior to July 16, 1998, were in pay grade 5. On December 2, 1997, substantially different and new duties were added to the Driver License Examiner jobs. The Logan area, in which Grievants work, was the first area to adopt and assume these new responsibilities. Some of the new duties included taking money from customers, and transporting money to and from the bank, running the cash register, taking photographs, fingerprinting, and increased computer responsibilities. They are also required to move heavy camera equipment when they travel three days a week. Grievants perform duties that Driver License Examiners in other areas do not. They travel extensively, but do not get compensated for travel time. Because of their accounting duties, they sometimes do not leave their offices until 8:00 p.m. at night, and then have to travel from Welch to Logan.

The Driver License Examiner classification does not have a Lead Worker subsection. Grievants all work together, but consider Grievant Runyon their “lead” because she has been with DPS the longest. The Customer Service Representative classification series within DPS does have a Lead Worker subsection. The Customer Service Representatives do everything the Grievants do, with the only difference being that the Customer Service Representatives do titles, while the Driver License Examiners give driving tests. The Customer Service Representatives are in pay grade 6, and the Lead Worker in the Customer Service Representative classification series is in pay grade 7.

DPS requested that the State Personnel Board change the pay grade of the Driver License Examiners from pay grade 5 to pay grade 6, by letter dated May 1, 1998. By letter dated May 28, 1998, Edison Casto, State Personnel Director, advised Colonel Edgell ofthe State Police that the request was being granted, and would be effective July 16, 1998, with a five percent (5%) pay increase for all incumbents. LIII DOP Exs. 1, 2.

DISCUSSION

Grievants contend that they should have been placed in a pay grade 7, and also, that the increase should have been effective back to December 2, 1997, when they assumed the additional duties and responsibilities that led to the pay grade increase.

DPS and DOP aver that Grievants are properly classified and compensated at pay grade 6, and that the pay increase could not begin until the new class specification was approved by the Division of Personnel.

The pertinent class specifications are identified below.

DRIVER LICENSE EXAMINER

Nature of Work: Under general supervision of the MVI-CDL officer, administers all tests required of applicants for West Virginia driver's licenses and processes all types of driver's license transactions including collections of fees and issuing licenses. Administers road skill tests as required. Performs related work as required.

Examples of Work

Administers all tests related to obtaining West Virginia driver's license: vision test, written test, computerized test and oral test for those with reading impairment.

Conducts skills test for Class D and E licenses (chauffeurs and regular operator license) i.e., parking testing and on-the -road skills test.

Issues all types on driver's licenses and ID cards; reviews documentation to ensure that information is complete and accurate; approves license for issuance.

Calculates and collects fees for all types of driver's license; operates cash register.

Enters driver's information into computerized photo licensing equipment; obtains finger imagines (sic) and signature; photographs applicants for license, permits or ID cards.

Overrides the computer and makes voids.

Balances cash drawer with the log of transactions at the end of each business day;

prepares and makes bank deposit; transports money to and from bank; copies, faxes and mails Division of Motor Vehicles reports daily. Performs inspection of applicant's vehicles for proper operation; rejects vehicles found in unsafe condition.

Reviews for accuracy and legibility applications for learner's permits and transfers from out of state; compares applications to supporting documents.

Checks and scores tests; validates tests; issues licenses with passing scores.

Logs each applicant for written and driving test.

Answers questions and provides general information about driver performance exams, testing procedures and applicable motor vehicle laws.

Completes monthly transportation reports for assigned vehicle.

Travels to assigned designated testing site to administer tests; and issues driver's licenses.

Conducts driver clinic interviews as assigned by the supervisor .

Conducts voter registration.

CUSTOMER SERVICE REPRESENTATIVE

Nature of Work: Under general supervision, performs full-performance level clerical/public contact work involving the processing, recording and issuance of drivers' license, vehicle registration, vehicle titles, and related documents. Work is characterized by regular and recurring tasks requiring knowledge and interpretation of motor vehicle and driver registration and license laws, policies and procedures. Operates moderately complex office equipment on a regular basis. Refers unusual or hostile situations to a supervisor. Performs related work as required.

Examples of Work

Greets motorists in person or by telephone, answers questions regarding state law, policy or procedure; assists motorists in the processing of driver and motor vehicle license and registration; explains necessary forms, fees, taxes, and surcharges involved in the licensing of vehicles, including boats and motorcycles.

Reviews state code, vehicle registration manuals, policy directives, and vehicle appraisal guides to locate information applicable to the licensing situation.

Enters data into the computer to access previous registration data and to update or enter new file information.

Reviews motorists' documentation to ensure that all information is complete and accurate; assesses fees and gives receipts of payment; balances the cash drawer with the log of transactions at the end of each business day.

Relieves other staff for breaks during the day; performs support duties such as re-stocking forms or making copies.

Mails out forms in answer to inquiries; may compose routine explanations to accompany forms.

CUSTOMER SERVICE REPRESENTATIVE, LEAD

Nature of Work: Under general supervision and in a lead capacity, performs and leads public contact work involving the receipt, auditing, processing, recording and issuance of drivers' license[s], vehicle registration, vehicle titles and related documents. Performs daily audits and prepares daily labor reports as directed. Responsible for office in the absence of the manager or supervisor. Performs voids and corrects errors in computer cash register system. Assists in assigning, reviewing and approving the work of other employees; may approve leave requests, trains employees in new work methods and orientation; handles unusual and complex driver or motor vehicle licensing and title problems. Assists public by telephone and in person in processing driver or motor vehicle license and title processing. Explains and provides assistance in requirements, fees, documents, forms, taxes and surcharges involved in registering and licensing vehicles. Reviews and processes documents, issues drivers' licenses, vehicle plates. Performs related duties as required.

Examples of Work

Assists in planning, assigning and reviewing the work of others and trains employees in work methods.

Audits Customer Service Representatives at check-out time and verifies transactions at the end of the day.

Has authority to make corrections/voids to other Customer Service Representatives' transactions in the computer cash register system.

In the absence of a Supervisor will have authority as established by management: i.e., delegate job assignments, arrange work schedules, prepare daily labor reports, approve leave requests, counsel employees on current and/or new policies and procedures, and prepare correspondence and reports, etc.

Greets motorists in person or by telephone, answers questions regarding state law, policy or procedure; assists motorists in the processing of driver and motor vehicle license and registration; explains necessary forms, fees, taxes, and surcharges involved in the licensing of vehicles, including boats and motorcycles.

Reviews state code, vehicle registration manuals, policy directives, and vehicle appraisal guides to locate information applicable to the licensing situation.

Enters data into the computer to access previous registration data and to update or enter new file information.

Reviews motorists' documentation to ensure that all information is complete and accurate; assesses fees and gives receipts of payment; balances the cash drawer with the log of transactions at the end of each business day.

Relieves other staff for breaks during the day; performs support duties such as re-stocking forms or making copies.

Mails out forms in answer to inquiries; may compose routine explanations to accompany forms.

The first issue to address is whether DOP's placement of Grievants in pay grade 6 was arbitrary and capricious and contrary to DOP's regulations, because the complexity of their work is equal to or greater than another more highly rated classification. (See footnote 2)

The West Virginia State Personnel Board, a part of DOP, was created in 1989 to replace the former Civil Service Commission. W. Va. Code §29-6-6 (1989). The duties and responsibilities of the former Director of the Civil Service System were also transferred to the Director of Personnel. W. Va. Code §29-6-9 (1989). Pursuant to W. Va. Code §29- 6-10(1), the State Personnel Board has been delegated the discretionary authority to promulgate, amend, or appeal legislative rules governing the preparation, maintenance and review of a position classification plan for all positions within the classified service . . . based upon a similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be

equitably applied to all positions in the same class.

The Personnel Board has the same authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code §29-6-10(2). The Personnel Board has wide discretion in performing its duties although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. Moore v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR-126 (Aug. 26, 1994). See, Callaghanv. W. Va. Civil Service Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hospital v. State Health Planning, 328 S.E.2d 164 (W. Va. 1985).

This standard of entitlement to substantial weight applies when a grievant attempts to review DOP's interpretation of its own regulations and class specifications to determine if DOP's decision was arbitrary and capricious or an abuse of discretion. Farber v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 95-HHR-052 (July 10, 1995). “There is no question DOP has the authority to establish pay grades within a pay plan.” Stephenson v. W. Va. Bureau of Employment Programs/Div. of Personnel, Docket No. 92-DOP-447 (Aug. 12, 1993).

Further, a grievant may prevail by demonstrating his or her pay grade was selected in an arbitrary and capricious manner. See Kyle v. W. Va. State Bd. of Rehab., Docket No. VR-88-006 (Mar. 28, 1989). Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of DOP. See generally, Harrison v. Ginsberg, 286 S.E.2d 276, 283 (W. Va. 1982). An employee who alleges impropriety and challenges the pay grade to which his or her position was assigned, bears the burden of proving the claim by a preponderance of the evidence.

This is a difficult undertaking. Trimboli v. W. Va. Dept. of Health and Human Resources/ Div. of Personnel, Docket No. 93-HHR-322 (July 7, 1997). See W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Bennett v. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR- 206 (June 15, 1995); Thibault v. Div. of Rehabilitation Serv./Div. of Personnel, Docket No. 94-RS-061 (May 31, 1995); Frame v. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR-140 (Nov. 29, 1994). See O'Connell v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 95-HHR-251 (Oct. 13, 1995). Unless a grievant presents sufficient evidence to demonstrate DOP's determination of pay grade is clearly wrong, inappropriate, or the result of an abuse of discretion, an administrative law judge must give deference to DOP and uphold the pay grade assignment. Farber, supra; O'Connell, supra.

On close examination Grievants' argument is not actually one of equal pay for equal work, but an argument for a higher pay grade based on comparative worth. Grievants are not comparing themselves to other employees within their classification who perform substantially similar work through exerting the same effort and by utilizing the same skill level within a substantially similar working environment. See Moore, supra.

Most comparative worth litigation concerning an employer's establishment of pay scales has been handled by federal courts in cases brought by employees within the context of discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.§2000e-2a. See IUE v. Westinghouse Electric Corp., 631 F.2d 1094 (3rd Cir. 1980), cert. denied, 452 U.S. 967 (1981); Gunther v. County of Washington, 602 F.2d 882 (9th Cir, 1979), reh'g denied with supplemental opinion, 623 F.2d 1303 (9th Cir, 1980), aff'd 452 U.S. 161 (1981); Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300 (E.D. Mich. 1980); Taylor v. Charley Brothers Co., 25 F.E.P. 602 (W.D. Pa. 1981).

Most federal courts have expressly rejected claims brought under a pure comparative worth theory absent a showing of intentional discrimination. (See footnote 3) See Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983); Power v. Berry County, 539 F. Supp. 721 (W.D. Mich. 1982). In 1987, the Ninth Circuit overruled a district court's decision in American Federation of State, County and Municipal Employees (AFSCME) v. Washington, 578 F. Supp. 846 (W.D. Wash. 1983), which had ruled that the State of Washington had discriminated against female employees through

adoption of its job classification system. The district court determined that comparability of jobs was determined by the State's own evaluation studies. The Circuit Court reversed the District Court and stated as follows:

Disparate impact analysis is confined to cases which challenge a specific, clearly delineated employment practice applied at a single point in the job selection process . . . . A compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by Dothard and Griggs;such a compensation system, the result of a complex array of market forces, does not constitute a single practice that suffices to support a claim under disparate impact theory.

770 F.2d 1401 (9th Cir. 1985), reh'g denied, 813 F.2d 1034 (9th Cir. 1987). Most federal courts have been reluctant, if not expressly unwilling, to strike down an employer's pay system on the basis of a pure comparable worth theory, absent a companion showing of intentional discrimination.

The majority of federal courts are unwilling to substitute their judgment for that of the various employers in the comparative worth Title VII cases dealing with the issue of numerous positions' value to their employers. In Moore, supra, the Administrative Law Judge stated, this Grievance Board is likewise reluctant to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, and substitute its judgment for that of the administrative agency in charge of classification and compensation.

Grievants presented some evidence to show their classification had the same complexity as another classification. However, a detailed review of Grievants' class specification and pay grade, vis-a-vis the CSRL's pay grade, does not demonstrate that DOP was clearly wrong or acted in an arbitrary and capricious manner in placing Grievants in pay grade 6.

Grievants compare their duties with those of the CSRL's and note that many of the "Examples of Work" are the same, especially since both classifications have the right to make voids in the cash register. Grievants also note that they have multiple duties that relate to money, deposits, and other bank transactions. These duties are certainly an important part of Grievants' duties. However, an examination of the "Nature of Work"Section reveals that the key difference between the two class specifications is the lead or quasi-supervisory duties of the CSRL. Grievants agreed they have no lead or supervisory duties, and agreed that they do not supervise other employees in any way.

Grievants responded to this argument by questioning why the Driver License Examiner

classification does not have a lead worker subsection, and argued that, because they perform more functions than other Driver License Examiners (travel, lift heavy equipment), they should receive a "lead" designation. However, as noted above, DOP is granted substantial discretion in its classification of employees, and there was no evidence to suggest that it was arbitrary and capricious not to have a lead worker subsection in the Driver License Examiner classification series. (See footnote 4)

As far as a comparison between the duties of CSR and Driver License Examiners' job duties, DOP's decision to place both in the same pay grade was not shown to be arbitrary and capricious. While Grievants deal in more detail in one specific area, the CSR's appear to have less detail in an area, but are required to understand and explain the law and regulations to customers in multiple areas. Both groups collect money, balance cash drawers, and log transactions. Clearly, Grievants have more duties relating to money such as deposits and voids, but these duties do not demonstrate that Grievants are in the incorrect pay grade. Accordingly, Grievants have failed to meet their burden of proof and demonstrate they should be paid at pay grade 7. The increase in Grievants'duties warranted an increase to a pay grade 6, but did not warrant an increase to a pay grade 7.

The next issue to discuss is whether Grievants should have received the pay increase from the date they began their duties, November 2, 1997, not from the effective date of the new approved class specification. This issue has been decided by this Grievance Board in the previous decision of Hager, et al. v. Dept. of Public Safety, Docket No. 98-DPS-306/307/308 (Sept. 30, 1998), and will not be disturbed here. In that case, the Administrative Law Judge found that the grievants had knowingly and voluntarily agreed to undertake the additional duties and responsibilities in November 1997, and were cognizant that a new classification was being written, and they would be upgraded, but were not promised retroactive pay increases. See also, Harvey v. Bureau of Emp. Programs, Docket No. 96-BEP-484 (Mar. 6, 1998).

This Grievance Board has previously determined that an employee who voluntarily "fills in" for an employee in a higher classification without a guarantee of additional pay may not later successfully claim that he should have received the pay of the higher classification. Freeman v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H- 237 (Dec. 26, 1990). Accord, Deel v. Bureau of Employment Programs, Docket No. 96- BEP-361 (Mar. 11, 1997); Spencer v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-523 (Oct. 28, 1994); Thornton v. W. Va. Workers'

Compensation Fund, Docket No. 90-WCF-077 (Dec. 26, 1990). See also Gregg v. Bd. of Trustees, Docket No. 94-MBOT-863 (Dec. 18, 1996). Grievants' situation in the instant matter is similar to the circumstances in Freeman, supra, and the above-cited cases which followed Freeman. Grievants voluntarily began performing the new duties with the full knowledge that, they were engaging in more complex activities. Grievants had a reasonable expectation that they would eventually be reclassified to a new classification title at a higher pay grade, although there was no guarantee what that pay grade would be. There was likewise no guarantee how long the reclassification process would take, although it obviously took longer than Grievants anticipated. Grievants ultimately received what they had a reasonable expectation of receiving; they were reclassified from pay grade 5 to pay grade 6. See Harvey, supra.

It is unfortunate that the process of establishing a new classification for the work Grievants were performing was not completed in a shorter time frame. Nonetheless, there is no evidence that any of the parties prolonged the reclassification process simply to take advantage of Grievants, or to avoid having to pay a higher salary to those employees. Grievants have not established that either DPS or DOP violated any statute, policy, rule, regulation, or written agreement within the meaning of W. Va. Code § 29-6A-2(i) through their conduct in this matter. Likewise, Grievants have failed to demonstrate that the conduct of DPS and DOP was arbitrary and capricious in the circumstances presented. See generally, Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990).

CONCLUSIONS OF LAW

1. Grievants have the burden of proof in this case to establish, by a preponderance of the evidence, that the assignment of the Driver License Examiners class title to pay grade 6 was clearly wrong, arbitrary, capricious, contrary to regulation, orotherwise illegal and improper. W. Va. Code §29-6A-6; Bennett v. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR-206 (June 15, 1995).

2. An employee who alleges impropriety and challenges the pay grade to which his or her position was assigned bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. Blankenship, supra; Bennett, supra; Johnston, supra; Thibault v. Div.

Rehabilitation Services/Div. of Personnel, Docket No. 94- RS-061 (May 31, 1995); Frame, supra; See O'Connell v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 95-HHR-251 (Oct. 13, 1995).

3. A grievant may prevail by demonstrating his or her pay grade was selected in an arbitrary and capricious manner. See Kyle v. W. Va. State Bd. of Rehab., Docket No. VR-88-006 (Mar. 28, 1989).

4. An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996).

5. An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id. 6. While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of DOP. See generally, Harrison v. Ginsberg, 286 S.E.2d 276, 283 (W. Va. 1982).

7. Unless a grievant presents sufficient evidence to demonstrate DOP's determination of pay grade is clearly wrong, inappropriate, or the result of an abuse of discretion, an administrative law judge must give deference to DOP and find that the pay grade assignment was correct. Farber v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 95-HHR-052 (July 10, 1995); O'Connell, supra.

8. In order for Grievants to prevail they must show DPS and/or DOP acted in an arbitrary and capricious manner by placing the Driver License Examiners position in pay grade 6. To meet this burden Grievants must show DPS and DOP had no rational basis for placing Grievants in their current pay grade, or that Respondents acted in bad faith by placing the Driver License Examiners classification in pay grade 6 despite overwhelming evidence indicating the classification should be otherwise placed. Hager v. Dept. of Public Safety, Docket No. 98-DPS-306/307/308 (Sept. 30, 1998).

9. Grievants have failed to prove DPS or DOP acted arbitrarily or capriciously in assigning the Driver License Examiners classification to Pay Grade 6. Additionally, Grievants have failed to prove, by a preponderance of the evidence, that the Driver License Examiners duties are the same or very similar to the duties of the CSRL See, Tomlinson v. W. Va. Dept. of Transp., Docket No. 94-DMV-209 (Oct. 20, 1994); Frame, supra.

10. Employees who voluntarily agree to work outside their current classification, which is ultimately awarded a higher classification, may not later successfully claim theyshould have received the pay of the higher classification for the time they worked in the new classification. Harvey v. Bureau of Employment Programs/Div. of Personnel, Docket No. 96-BEP-484 (Mar. 6, 1998). See Deel v. Bureau of Employment Programs, Docket No. 96-BEP-361 (Mar. 11, 1997); Spencer v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-523 (Oct. 28, 1994); Freeman v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H-237 (Dec. 26, 1990); Thornton v. W. Va. Workers' Compensation Fund, Docket No. 90-WCF-077 (Dec. 26, 1990).

11. Grievants failed to prove that the DPS or DOP violated any rules, policy, regulation, or statute when it reclassified them to the newly-redesigned classification of Driver License Examiners in July 1, 1998, without awarding back pay to November 1997, when they began performing the essential duties of the new classification in the context of a prototype or changed position. See Hager, supra; Deel, supra; Freeman, supra.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 3, 1998

Footnote: 1

A hearing was held on the issue of default on October 10, 1998. The motion for default was denied by Order dated October 19, 1998.

Footnote: 2

For a detailed discussion of DOP's role in classifying and placing employees in pay grades, see Trimboli v. W. Va. Dept. of Health and Human Resources/ Div. of Personnel, Docket No. 93-HHR-322 (July 7, 1997).

Footnote: 3

In Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982), the District Court found that the employees who were nurses had established a prima facie case of discrimination under a theory of comparable worth after comparing their skills, efforts, responsibilities, and working conditions to those of a group of sanitarians. In accepting the plaintiff's showing of discrimination on its face, the court in Briggs stated the employees would have been paid similarly absent the employer's discriminatory treatment. Ultimately however, the Briggs court found in favor of the city as it demonstrated that the existing market conditions justified the differences in the two positions' pay ranges.

Footnote: 4

Grievants did not raise the issue of uncompensated travel time as part of this grievance, but it was suggested by Mr. Basford that they follow up on that issue with their supervisors.