HUSSEIN SHARIFPOUR,

Grievant,

v. **DOCKET NO. 98-DOH-162**

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

Respondents.

DECISION

Grievant, Hussein Sharifpour, alleges that he is not being properly compensated by the Division of Highways ("DOH"). This grievance was initiated at level one on January 15, 1998. A joint level one and level two response, denying the grievance, was issued on February 9, 1998. Grievant appealed to level three on February 13, 1998. After no response was received, Grievant appealed to level four on May 14, 1998, pursuant to the provisions of W. Va Code §29-6A-3(a). A show cause order was issued by the undersigned on May 18, 1998, requiring Respondent to show good reason why this matter should not proceed to a level four hearing. No such reason having been shown, this grievance was scheduled for hearing. After a continuance for good cause shown, a hearing was held in the Grievance Board's office in Morgantown, West Virginia, on September 11, 1998. Grievant represented himself, and DOH was represented by counsel, Timbera Wilcox. This matter became mature for consideration on October 19, 1998, upon receipt of the parties' written post-hearing proposals.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Since 1986, Grievant has been employed by DOH as an Engineer in Training II (EIT II).
2. The EIT II job classification is assigned to Pay Grade 15.

3. Grievant supervises several employees who are classified as Senior Engineering Technicians ("SET") in Pay Grade 16.

4. SETs must be certified as Senior Engineering Technicians by the National Institute for the Certification of Engineering Technicians ("NICET").

5. Grievant's duties are very similar to those of the SETs he supervises.

6. Grievant possesses a bachelor of science degree in civil engineering.

7. By obtaining either an SET certification from NICET or certification as a Registered Professional Engineer ("PE") from the state, Grievant would be minimally qualified for classification in Pay Grade 16. (See footnote 1)

8. Grievant has not attempted to obtain either of the certifications listed in Finding of Fact 7.

9. Grievant does not contend that he is misclassified.

10. Grievant has received good to excellent performance evaluations throughout his employment with DOH.

Discussion

Grievant contends that his duties are the same as those of other engineers whosejobs are in Pay Grade 16, and that he should not have to obtain a certification to be compensated at a higher rate of pay. Although not clearly articulated, it appears that Grievant is arguing that, regardless of certification, he should be paid the same as others who perform the same type of work.

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-441/445/445 (Mar. 23, 1994). 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). Prior 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); Boyles v. W. Va. Bureau of Employment Programs, Docket No. 98-BEP-027 (July 15, 1998); Nafe v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997); Salmons, supra. There is no evidence in this case which would indicate that Grievant or any of the engineers with whom he has

compared himself are being improperly compensated for their respective job classifications. (See footnote 2) Grievant introduced numerous exhibits at the level four hearing in this case, seemingly in an effort to prove that he is a hardworking, dedicated and competent employee. Respondent does not appear to dispute this. Grievant does not contend that he is improperly classified as an EIT II. He merely argues that he should be compensated at Pay Grade 16, because the engineers he supervises are. However, Grievant does not dispute that he does not have the NICET or PE certifications of those who hold classifications in Pay Grade 16.

The West Virginia Division of Personnel is charged with establishing classification plans for state employees, pursuant to the provisions of Code §29-6-1 et seq. The Division of Personnel is also vested with the authority to determine the minimum qualifications for each job class. Division of Personnel Administrative Rule § 4 (July 1998). A NICET or PE certification is stated in the minimum qualifications for positions in Pay Grade 16, specifically Senior Engineering Technician or Highway Engineer I. Grievant has offered no evidence which would indicate that this requirement is the result of any improper motive or action. In general, an agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985). This standard of entitlement to substantial weight applies when a grievant attempts to review the Division of Personnel's interpretation of its own regulations and classification specifications to determine if Personnel's decision was arbitrary and capricious or an abuse of discretion. Farber v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-052 (July 10, 1995). Nothing in the record indicates that these certifications are unreasonable minimum requirements for the job classifications at issue. Grievant has not proven any discriminatory motive or abuse of discretion in the placement of certain engineering positions in a higher pay grade. Similarly, no impropriety has been demonstrated with regard to the requirement of particular engineering certifications for positions in Pay Grade 16. As testified to by Jeff Black, Human Resources Director for DOH, Grievant could obtain these certifications at any time and be classified in a Pay Grade 16 job. There is no evidence in this case that the salary disparities identified by Grievant violate any statute, policy, rule, regulation, or written agreement under which he works. See Code §29-6A-2(i). (See footnote 3)

Consistent with the foregoing discussion, the following conclusions of law are appropriate.

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-441/445/445 (Mar. 23, 1994).

2. 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);Boyles v. W. Va. Bureau of Employment Programs, Docket No. 98-BEP-027 (July 15, 1998); Nafe v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997); Salmons, supra.

3. Grievant has failed to establish by a preponderance of the evidence that his employer is compensating him contrary to the provisions of 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 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, and 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.

Date:

November 13, 1998 _____

DENISE MANNING SPATAFORE

Administrative Law Judge

Footnote: 1

State certification as a PE qualifies an employee to hold the classification of Highway Engineer I. The evidence of record indicates that Grievant would be qualified to hold either the Highway Engineer I or SET classification, depending on

which certification he obtained. Both are in Pay Grade 16.

Footnote: 2

It should be noted here that Grievant only contends that he should be placed in Pay Grade 16, because he performs work similar to employees who hold jobs assigned to that pay grade. He does not contend that all EIT IIs are entitled to a higher pay grade. Accordingly, this is not a case of an employee arguing "comparative worth", as discussed extensively in Fike v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-156 (Aug. 28, 1998) and Trimboli v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-322 (June 6, 1997).

Footnote: 3

At the level four hearing, Respondent argued that Grievant's claim was untimely; however, since claims of salary improprieties area considered continuing violations under the grievance statute, his claim would not have been barred, but his relief would have been limited. See Martin v. Randolph County Bd. of Educ., 465 S.E.2d 399 (W. Va. 1995). Nevertheless, due to the outcome of this grievance, this issue has no bearing, as with Respondent's arguments regarding Grievant's settlement of a federal lawsuit involving allegations similar to those raised in this grievance.