RICHARD A. KENNEDY,

Grievant,

v. Docket No. 03-DOH-174

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Richard A. Kennedy ("Grievant"), employed by the Division of Highways ("DOH" or "Respondent") as a Senior Engineering Technician ("SET"), filed a level one grievance on April 3, 2003, in which he alleged, "[m]y salary is not comparable to other S.E.T. Technicians in District Six Design Sections." For relief, Grievant requested, "comparable salary." Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied at levels two and three, and appeal to level four was made on June 24, 2003. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on August 26, 2003. Grievant appeared *pro se*, and DOH was represented by Barbara Baxter, Esq. The parties waived the opportunity to file proposed findings of fact and conclusions of law, and the grievance became mature for decision at the close of the hearing.

The following facts are undisputed.

Findings of Fact

1. Grievant has been employed by DOH since January 13, 1986, and has held the classification of Senior Transportation Engineering Technologist (TRETSR) in theDesign Section at all times pertinent to this grievance. Grievant's monthly salary at the time this grievance was filed was $3,204.00.

2. Morgan Bier has been employed by DOH since June 25, 1985, and was classified as a NICET (National Institute for Certification in Engineering Technologies) Enrollee III, until June 30, 2002, when he was reallocated as a TRETSR. As a result of the reallocation, Mr. Bier was given a three pay grade salary increase which elevated his monthly salary from $3,060.00 to

$3,586.00.

3. NICET III is compensated at pay grade 13, while TRETSR is compensated at pay grade 17.

4. Following Mr. Bier's reallocation, John Sunderlin, also classified as a TRETSR, filed a grievance in which he alleged a salary disparity among level four technicians in the Design Section. The grievance was settled at level three, and Mr. Sunderlin was given a five percent pay increase.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).Where the evidence equally supports both sides, the employee has not met his burden of proof. Id.

Grievant concedes that Mr. Bier's salary was adjusted in compliance with the Division of Personnel Pay Plan Implementation Policy, but argues there is now a substantial difference between their salaries which is unfair and unjust. (See footnote 1) **DOH asserts that it simply applied the DOP Policy, and has not violated any statutes, rules, or regulations.**

Grievant's argument is in the nature of “equal pay for equal work,” in that he and Mr. Bier hold the same classification and similar seniority, but their salaries are substantially different. The concept of "equal pay for equal work" is generally embraced by W. Va. Code § 29-6-10. Brutto v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-076 (July 24, 1996). See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E. 2d 43 (1989). However, previous decisions interpreting that provision have established that employees performing similar work need not receive identical pay, so long as they are paidin 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); Iseli v. Div. of Corr., Docket No. 99-CORR-260 (Dec. 29, 1999); Nafe v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997); Brutto, supra; Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dep't of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992).

As conceded by Grievant, Mr. Bier was entitled to a pay raise upon promotion in accordance with the West Virginia Division of Personnel's Administrative Rule, and Pay Plan Policy. This increase in salary does not violate the equal pay for equal work doctrine in this state as interpreted by the West Virginia Supreme Court of Appeals in Largent, supra, even though Mr. Bier now earns considerably more than Grievant. Both Grievant and Mr. Bier are compensated within the pay grade 17 pay range.

As for Grievant's assertion that DOH improperly failed to settle his grievance although another grievance identical to his was settled, two things should be noted. First, "'[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.' Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968)." Syl. Pt. 1, McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994). Second, and this is the key tenet in this case, "[a]n agency . . . is free to settle one case and not another even if the facts of the two are parallel."Smith v. W. Va. Dep't of Health and Human Resources, Docket No. 90-H-470 (Sept. 30, 1991). See Farley v. Mason County Bd. of Educ., Docket No. 94-26-243 (Dec. 14, 1994).

Further, this Grievance Board has "long recognized the principle that grievance settlements can only be challenged in later grievances when it is proven by a preponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy." Myers v. Harrison County Bd. of Educ., Docket No. 01-13-013 (Nov. 21, 20010. See Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). The decision to settle a grievance is within the discretion of the agency, and this determination is based on each

grievance's facts and circumstances. Collins v. Dep't of Transp./Div. of Highways, Docket No. 03-DOH-053 (July 17, 2003); Smith, supra. Grievant has not demonstrated the settlement of Mr. Sunderlin's grievance contravened any of the applicable laws or any public policy.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. DOH increased Mr. Bier's salary consistent with the provisions of DOP's Rule 5.5(a) which provides that upon promotion an employee's salary is to be increased one increment per pay grade advanced to a maximum of 3 pay grades, or to the minimum rate of the pay grade for the job classification to which the employee is being promoted, whichever is greater.

3. 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); Nafe v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997).

4. "'The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.' Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968)." Syl. Pt. 1, McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994).

5. "An agency . . . is free to settle one case and not another, even if the facts of the two are parallel." Smith v. W. Va. Dep't of Health and Human Resources, Docket No. 90-H-470 (Sept. 30, 1991). See Farley v. Mason County Bd. of Educ., Docket No. 94-26-243 (Dec. 14, 1994).

6. Grievant failed to prove that a settlement in a related matter was unfairly made or in contravention of some law or public policy.

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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: SEPTEMBER 5, 2003

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.DOP's Pay Plan Implementation Policy is based upon its Administrative Rule, Section 5.5(a), which provides that when an employee is promoted, the employee's pay shall be adjusted as follows:

Minimum Increase - An employee whose salary is at the minimum rate for the pay grade of the current classification shall receive an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted. An employee whose salary is within the range of the pay grade for the current classification shall receive an increase of one increment, as established by the State Personnel Board, per pay grade advanced to a maximum of 3 pay grades, or an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted, whichever is greater. In no case shall an employee receive an increase which causes the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted.