THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

CHRISTOPHER PRESTON,

Grievant,

v. **Docket No. 05-DOH-199**

WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION/
DIVISION OF HIGHWAYS AND
WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant, Christopher Preston, filed a grievance against his employer on November 15, 2004, alleging:

The Grievant claims that the West Virginia Department of Transportation, the Division of Highways, the Division of Personnel, the Human Resources Division, and any and all persons or person in charge of, responsible for, or involved in the salary compensation adjustment decisions or recommendations for Reallocation raises has shown discrimination toward the Grievant.

The Grievant also claims that the above-mentioned parties have also used the Reallocation system as a tool to show favoritism to certain WV DOT, DOH organizations and individual employees, by giving a higher compensation increase for Reallocation.

The Grievant also claims and will demonstrate that the aforementioned parties are in violation of

the Equal Pay Act of 1963. (See footnote 1)

Relief Sought:

The Grievant's salary will be increased from $3936/month (42,232/year) to $5664/month (67,968/year). Back pay and interest and overtime back pay. (See footnote 2) This grievance was denied at the lower levels. A two day hearing was held at the Grievance Board's Charleston office. The first day of hearing was held on July 29, 2005, and was presided over by Administrative Law Judge Paul Marteney. The grievance was then transferred to the undersigned for administrative reasons, and the second day of hearing was held on June 1, 2006. At both days of hearing, Grievant was represented by Andrew Katz, Esq., Respondent was represented by Barbara Baxter, Esq., and Lowell D. Basford appeared on behalf of West Virginia Division of Personnel. This grievance became mature on August 17, 2006, upon the parties' submission of findings of fact and conclusions of law.

Issues and Arguments

Grievant asserts he has been discriminated against because his salary is less than other highway engineers. Grievant also argues engineers who are located in Building 5 of the Capital Complex receive favorable treatment.

Respondents argue Grievant's salary is the result of a number of factors such as tenure, merit increases, and individual career decisions. Division of Highways ("DOH") asserts no favoritism has been proven.

Therefore, based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. At the time of filing this grievance, Grievant had been employed by the State for eight years. During those eight years, he changed work organizations three times.

2. Currently, Grievant is employed by DOH as a Highway Engineer III ("HE III") in the Materials Division.

3. The relevant engineer classifications within DOH are Highway Engineer Trainee (HETR), Engineer in Training I (EIT I), EIT II, Highway Engineer (HE I), HE II, HE III, and HE IV.

4. Grievant was originally hired by DOH in 1996. He was classified as a Highway Engineer Trainee ("HETR").

5. In 1997, Grievant was reallocated to Engineer in Training ("EIT I") and received a 5% reallocation raise.

6. In 2000, Grievant transferred to the West Virginia Department of Environmental Protection ("DEP").

7. One month after Grievant transferred to DEP, DOH gave their employees a 5% salary increase. Grievant did not receive this increase.

8. He returned to DOH in February, 2002, as an EIT I, making the same salary as he was when he left DOH in 2000.

9. To receive a merit raise, DOH requires employees have a DOH performance evaluation on file from the previous year.

10. Grievant received one merit raise. Other DOH employees who did not have a break in service received four merit increases.

11. In April, 2004, Grievant passed the professional licensure examination. He was then reallocated to Highway Engineer III ("HE III") and received a 20% salary increase.

12. The West Virginia Division of Personnel Administrative Rule requires that State employees who are covered by this rule, receive a minimum salary increase of 5% per pay grade up to a total of 15% upon reallocation and possibly more with written justification. 13. A DOH employee's supervisor recommends a percentage of salary increase upon reallocation.

14. In Grievant's case, Richard Genthner, the Material Division Director, recommended a 20% increase in salary upon Grievant's reallocation.

15. HE III is a pay grade 19 with a monthly salary between $3,650-6,753. Level III, Respondent's Exhibit 1.

16. On November 11, 2005, Grievant's monthly salary was $4,011.

17. The employee of DOH who followed the career path most similar to Grievant's is George Hanna. On November 11, 2005, Mr. Hanna's monthly salary was $4,301. Mr. Hanna was hired approximately one year before Grievant.

18. DOH has numerous physical locations not attached to the Capitol Complex.

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned

Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

Grievant asserts he has been discriminated against with respect to salary compensation adjustments. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> ©) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

The holding of the West Virginia Supreme Court of Appeals in *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994), is instructive in examining the issue raised by Grievant. *Largent* dealt with employees in a somewhat similar situation to Grievant, as one employee within the same pay grade was receiving a much larger salary than other employees within the same pay grade. In *Largent*, the West Virginia Supreme Court of Appeals held "employees who are performing the same tasks with the same responsibilities should be placed within the same job classification," but a state employer is not required to pay these employees at the same rate. *Largent* at Syl. Pts. 2 & 3. Further, *W. Va. Code* § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but that Code Section does not require these employees to be paid exactly the same. *Largent* at Syl. Pts. 3 & 4. The requirement is that all classified employees must be compensated within their pay grade. *See Nafe v. W. Va. Dep't of Health & Human Res*., Docket No. 96- HHR-386 (Mar. 26, 1997); *Brutto v. W. Va.*

Dep't of Health & Human Res., Docket No. 96- HHR-076 (July 24, 2996); *Salmons v. W. Va. Dep't of Transp*., Docket NO. 94-DOH-435 (Feb. 28, 1995); *Tennant v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health and Human Res.*, Docket No. 91-H- 177 (May 29, 1992). *See AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989).

Additionally in *Largent*, the West Virginia Supreme Court of Appeals noted pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Id*. at 246. Consequently, a state employee's salary is the result of many factors. *See White, et al. v. W. Va. State Police and Division of Personnel*, Docket No. 05-DPS-168 (July 28, 2005).

Grievant has made his career choices, whether they be for better or worse. As a result, his salary has not advanced as quickly as others employed by DOH. However, Grievant is being paid within his pay classification, as is required by the law.

In addition to Grievant's career choices, he also was promoted from an EIT II to an HE III. This promotion caused him to skip two levels in the class series. No evidence was presented to indicate Grievant would have received more than 5% per pay grade had he advanced through all the levels of the class series. In addition, since Grievant's promotion caused him to skip two pay levels, had he worked his way through those, he would have only received a 10% pay raise. However, he was provided with a 20% pay increase upon being reallocated to HE III. That 20% is more than he would have received if the increase had been compounded.

Grievant's attorney argues Grievant is similarly situated to employees who are classified as HE I, HE II, and HE III. Grievant also argues he received different treatment due to job responsibilities. Because Grievant's case clearly falls under the law establishedby the West Virginia Supreme Court in *Largent*, these arguments need not be addressed. Grievant also asserts he has been the victim of favoritism. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *W. Va. Code* § 29-6A-2(h). Grievant asserts highway engineers housed in Building 5 of the Capitol Complex are three times more likely to get a higher raise than similarly situated employees who work in other areas. To illustrate this, Grievant prepared graphs complete with percentages. What Grievant appears to forget

is that when it comes to salary advancements there are more factors to consider than just the numbers. (See footnote 3) Experience, longevity, career track all should be taken into account when dealing with salaries. In addition, Jeff Black, Director of Human Resources for DOH, testified that DOH's different districts have differing pools for merit increases based on the employees in that district. Clearly, there is no favoritism to those employees housed in Building 5 when looking at the array of factors to be considered.

The following conclusions of law support this Decision.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486(May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

©) that the difference in treatment was not agreed to in writing by the employee.

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3. In *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994), the West Virginia Supreme Court of Appeals held "employees who are performing the same tasks with the same responsibilities should be placed within the same job

classification," but a state employer is not required to pay these employees at the same rate. Syl. Pts. 2 & 3.

4. *W. Va. Code* § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but that Code Section does not require these employees to be paid exactly the same. *Largent* at Syl. Pts. 3 & 4. The requirement is that all classified employees must be compensated within their pay grade. *See Nafe v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-386 (Mar. 26, 1997); *Brutto v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-076 (July 24, 2996); *Salmons v. W. Va. Dep't of Transp*., Docket NO. 94-DOH-435 (Feb. 28, 1995); *Tennant v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-453 (Apr. 13, 1993);*Acord v. W. Va. Dep't of Health and Human Res.*, Docket No. 91-H-177 (May 29, 1992). *See AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989).

5. Additionally in *Largent*, the West Virginia Supreme Court of Appeals noted pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Id*. at 246. Consequently, a state employee's salary is the result of many factors. *See White, et al. v. W. Va. State Police and Division of Personnel*, Docket No. 05- DPS-168 (July 28, 2005).

6. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h).

7. Grievant has failed to prove that he was discriminated against.

8. Grievant has failed to prove DOH engages in favoritism.

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, 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. 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 withthe civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: October 12, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

No evidence was presented on this issue. Therefore, it will not be discussed and is considered to have been withdrawn.

Footnote: 2

Grievant determined there was an error in his calculations and corrected the error in the relief sought by stating was asking to receive $5,148/month, $61,779/year.

Footnote: 3

Grievant relies heavily on a number of graphs and charts he put together. However, because a number of factors also should be weighed when determining whether statistics are unbiased and because this case clearly rests on legal principles established by the West Virginia Supreme Court, these documents were given little weight.