THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

WILLIAM J. HARRIS,

Grievant,

v. Docket No. 2008-1594-DOT

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

William J. Harris ("Grievant") filed this grievance on June 19, 2007, alleging entitlement to a pay increase. The grievance was denied at levels one and two. Sometime in late 2007, this grievance was transferred to the "new" grievance procedure (See footnote 1) by agreement of the parties; thereafter, on January 22, 2008, the parties agreed to waive levels one and two of the new procedure, proceeding directly to a level three hearing. That hearing was convened in the Grievance Board's office in Westover, West Virginia, on October 22, 2008. Grievant was represented by Danny Burns, and Respondent was represented by Robert Miller, Esquire. The parties declined to submit post-hearingproposals, so this matter became mature for consideration at the conclusion of the level three hearing.

Synopsis

Grievant alleges entitlement to an increase in pay, pursuant to the internal equity provision of the Division of Personnel's Pay Plan Implementation Policy. However, such increases are discretionary on the part of the employer, and all discretionary pay increases are currently

prohibited by the Governor's office. In addition, Grievant failed to prove his salary is the result of discrimination. The grievance is denied.

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") in District Five since December 9, 2002.

2. Grievant's initial position with DOH was Transportation Worker 2 -- Equipment Operator ("TW2"), in Pay Grade H11 (an hourly position) with a pay range of $8.15 to $14.44 per hour. Grievant's starting salary was $9.62 per hour, or $1667.47 per month.

3. On March 1, 2005, Grievant applied for and received a Storekeeper 3 position, which is in Pay Grade 7, with a salary range of $1318 to $2439 per month. Because this was considered to be a lateral class change, Grievant's salary remained the same after he began working in the new position. (See footnote 2)

4. Grievant is the lowest paid Storekeeper 3 in District Five. 5. All but one of the other employees in Grievant's classification in District Five have been employed longer than Grievant, some by more than 20 years. One Storekeeper 3 began employment with DOH on May 5, 2003, and that person's salary was $2132 per month as of May of 2006; however, the record contains no further information regarding that individual. Grievant's salary on the same date was $1743 per month. (See footnote 3)

6. In August of 2006, Grievant's supervisor, Highway Administrator John B. Lusk, requested that Grievant be given an "equal pay increase," because Grievant had been offered a job with a private employer for a higher salary. (See footnote 4) **This request was denied by DOH officials, due to the Governor's moratorium on discretionary salary increases which has been in place since April of 2005.** (See footnote 5)

7. Grievant's current duties require him to keep track of inventory of equipment and supplies, order machine parts, process and correct mechanics' work orders, and manage a P-card account (the state employees' credit card system). He also fills in for an Office Assistant when she is absent.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of

proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant contends that it is discriminatory for him to be the lowest paid Storekeeper 3 in District Five. He is requesting that he be given an "equity" pay increase, not a merit raise. Grievant believes that the level of responsibility of his current position, specifically responsibility for the credit card account, should entitle him to a higher salary.

What Grievant is requesting is essentially a salary increase pursuant to the Division of Personnel's ("DOP") Pay Plan Implementation Policy. That Policy contains a provision entitled "Internal Equity," which reads as follows:

> **In situations in which one or more employees are paid at least 20% less than other employees in an agency-defined organizational unit and the same job class who have comparable training and experience, duties and responsibilities, performance level, and years of State/classified service, the appointing authority may recommend an in-range salary adjustment of up to 10% of current salary to each employee in the organizational unit whose salary is at least 20% less than other employees in the unit. Internal equity increases shall be limited to once every five years for the same job class in the same organizational unit.**

Pursuant to this portion of DOP's Policy, the only employee to whom Grievant could potentially compare himself would be the one individual who has less tenure with DOHthan Grievant, but was hired at a higher salary. As to the other Storekeeper 3s in District Five, all have more years of service with the State of West Virginia, some having many years more than Grievant, so the internal equity provision would not apply.

Grievant is correct in his assertion that the newest employee in his classification makes over 20% more than he, and it is understandable that he is upset by this situation. Nevertheless, as discussed in *Ebert Allen v. Department of Transportation*, Docket No. 06-DOH-224 (Jan. 31, 2007), the granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or

obligatory on the part of Respondent. Moreover, discretionary increases are clearly prohibited by the Governor's moratorium, which remains in effect. As recently noted in *Morgan v. Department of Health Human Resources*, Docket No. 07-HHR-131 (June 5, 2008):

> **Even if the salaries in Grievant's unit were inconsistent with the Internal Equity provision, this policy does not confer upon Grievant an entitlement to a salary increase should she prove her situation fits within the policy. It is within the agency's discretion to recommend a salary increase of up to 10% for employees who fit within the situation described in the policy. . . . "The grievance board simply does not have the authority to second guess a state employer's employment policy." *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997). An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't of Health and Human Res.*, Docket No. 07-HHR-141 (May 14, 2008).**

As to Grievant's allegation that he has been discriminated against, "discrimination" is defined by statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. Va. Code § 6C-2-2(d). In order to establisheither a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> **(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,**
>
> **(c) that the difference in treatment was not agreed to in writing by the employee.**

***Frymier v. Higher Education Policy Comm*., 655 S.E.2d 52 (2007);** (See footnote 6) ***See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).**

As discussed above, all but one of the other employees in Grievant's classification in his district have years more of tenure and experience than Grievant, so he would not be similarly situated to them. Similarly, although one Storekeeper 3 has less state tenure and makes a higher salary, the record contains no information regarding that individual's situation, and as

explained by Human Resources Director Jeff Black, starting salaries may be affected by factors such as experience and training. 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." *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va 239 at 246, 452 S.E.2d 42 (1994). Also as noted in that case, W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. *Id.* at Syl. Pts. 2, 3 & 4. The requirement is only 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, 1996); *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 Res.*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health & Human Res.*, Docket No. 91-H-177 (May 29, 1992). *See also AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989).

Under the circumstances presented here, Grievant has not established that his salary is the result of unlawful discrimination or that Respondent has violated any law, rule or policy. He has failed to prove by a preponderance of the evidence that Respondent has any legal obligation to increase his pay.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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. State employers may grant salary increases of up to 10% to employees who are paid at least 20% less than similarly situated employees, pursuant to DOP's Pay Plan

Implementation Policy; however, the granting of such increases is purely within the discretion of the employing agency. *See Morgan v. Department of Health Human Resources*, Docket No. 07-HHR-131 (June 5, 2008).

3. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> **(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,**
>
> **(c) that the difference in treatment was not agreed to in writing by the employee.**

***Frymier v. Higher Education Policy Comm*., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).**

4. 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." *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va 239 at 246, 452 S.E.2d 42 (1994). 5. Grievant has failed to prove by a preponderance of the evidence that he is entitled to a pay increase pursuant to the DOP policy, and he has not proven discrimination or a violation of any law, rule, or policy.

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: December 15, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. However, parties were given the option to transfer pending cases to the new process, agreeing to be governed by the statutory changes which went into effect in July of 2007; accordingly, the instant grievance is governed by the provisions of W. Va. Code §§ 6C-2-1, et seq.

Footnote: 2

The Division of Personnel's Administrative Rule, 143 CSR 1, § 3.52 defines a "lateral class change" as movement from a position in one class into a position in another class within the same pay grade. Pursuant to § 5.7 of that rule, an employee's salary remains unchanged when he receives a lateral class change.

Footnote: 3

It should be noted that at least two legislative pay increases have been given to all state employees since this time, but for purposes of this grievance, the salary information from 2006 will be used.

Footnote: 4

For reasons not explained in the record, Grievant never accepted the other position.

Footnote: 5

In a memorandum to all West Virginia Cabinet Secretaries dated April 29, 2005, the Governor's Chief of Staff, Larry Puccio, advised that "merit or salary advancements" should not be granted until further notice, but nondiscretionary increases should continue, which would include pay increases associated with promotion, pay differentials, reclassification, reallocation, increment increases, and temporary upgrades.

Footnote: 6

Although these cases addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions were virtually identical to those contained in the current statute.