THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JONINA CLAY, ET AL.,
Grievant,

v. **Docket No. 2012-0293-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
MILDRED MITCHELL-BATEMAN HOSPITAL,
Respondent.

DECISION

Grievants, Jonina Clay, Kimberly Porter, Kimberly Russell, and Teresa Thompson, are employed by Respondent, Department of Health and Human Resources at Mildred Mitchell-Bateman Hospital. On September 14, 2011, Grievants filed individual grievances against Respondent for hiring a new employee into the Admissions Department in the position of Office Assistant II at a higher rate of pay than Grievants, the incumbent Office Assistant IIs. For relief, Grievants seek an increase in pay, along with a year of back pay, plus interest. The grievances were consolidated by the Grievance Board into the instant consolidated docket number.

Following the November 1, 2011 level one conference, a level one decision was rendered on November 16, 2011, denying the grievance. Grievants appealed to level two on November 22, 2011. Grievants perfected the appeal to level three of the grievance process on April 9, 2012. A level three hearing was held on March 12, 2013, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievants were represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union, Respondent was represented by counsel, B. Allen Campbell, Supervising Senior Assistant Attorney General. This matter became mature for

decision on April 8, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent hired a new employee at a higher salary than Grievants, incumbent employees in the same classification. The new employee's salary was determined properly under the administrative rule. 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. Grievants cited no law, rule, or policy that would require Respondent to hire a new employee at the same or less pay than incumbent employees or that would require Respondent to increase the pay of incumbent employees if hiring a new employee at a higher rate. Grievant's failed to prove Respondent's actions were arbitrary and capricious. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievants are employed as Admissions Clerks at Mildred Mitchell-Bateman Hospital ("Bateman"), a psychiatric facility operated by the Department of Health and Human Resources.

2. Grievants are each classified as an Office Assistant II ("OAII"), which is assigned to Pay Grade 5 with an annual salary range of $18,552 to $34,332.

3. Grievant Thompson was hired on June 1, 1999, and her current annual salary is $20,592. She has a one-year certificate in secretarial skills as well as a one-

year certificate in computer technology, and nine and one half years of relevant prior work experience.

4. Grievant Porter was hired on April 21, 2008, and her current annual salary is $20,172. She has a certificate in both EKG and phlebotomy, and six years of relevant prior work experience.

5. Grievant Russell was hired on June 16, 2009, and her current annual salary is $19,056. She has an associate's degree in professional office administration with a medical specialty, and six years of relevant prior work experience.

6. Grievant Clay was hired on July 1, 2010, and her current annual salary is $19,056. She has an associate's degree in applied science with an emphasis in psychology, and one year and four months of relevant prior work experience.

7. On August 25, 2011, Stephanie Elswick was hired at Bateman as an Admissions Clerk and was also classified as an OAII. Ms. Elswick was hired at an annual salary of $21,336. She had a bachelor's degree in business administration/marketing, and four years and four months of relevant prior work experience.[1] It was this hire that precipitated the instant grievance.

8. None of the grievants grieved the determination of their salary when they were hired.

9. All of the grievants and Ms. Elswick are paid within the salary range for the pay grade.

Discussion

[1] Although at the level three hearing Ms. Worden could no longer remember the particulars of Ms. Elswick's degree and prior work history, the level one decision, following a conference close in time to the hiring decision, reflects the particulars and is cited herein.

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Determination of starting salary is governed by the administrative rules of the Division of Personnel ("DOP"):

> The entry salary for any employee shall be at the minimum salary for the class including any applicable Board approved pay differential. However, an individual possessing pertinent training or experience above the minimum required for the class, as determined by the Director, may be appointed at a pay rate above the minimum, up to the market rate of the salary range, unless otherwise prescribed by the Board. For each pay increment above the minimum, the individual must have in excess of the minimum requirements at least six (6) months of pertinent experience or equivalent pertinent training. The Director may authorize appointment at a rate above the market rate where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class.

W. VA. CODE ST. R. § 143-1-5.4(b) (2012). In this case, the minimum salary Ms. Elswick could be offered was $18,552. However, under DOP's administrative rule, Respondent was permitted to increase Ms. Elswick's salary by five percent for each six months of excess pertinent training or experience she possessed up to the market rate. The posting for the position required a high school diploma and two years of experience

in routine office work. Despite Grievants' argument to the contrary, there is no question a bachelor's degree is pertinent training for office work. Regardless of the field of study, completion of a bachelor's degree provides organizational, time-management, communication, and writing skills. Therefore, Ms. Elswick had four years of training in excess of the requirement and two years and four months of excess experience. As Ms. Elswick was offered $21,336, Respondent actually offered her less than the Rule could have allowed. Ms. Elswick's salary clearly complies with the administrative rule.

Grievants seek for Respondent to increase their salaries since the salary Ms. Elswick was offered was more than that of all the incumbent, tenured OAIIs. Grievants cited no law, rule, or policy that would require Respondent to hire a new employee at the same or less pay than incumbent employees or that would require Respondent to increase the pay of incumbent employees if hiring a new employee at a higher rate. Grievants argue Respondent's actions were somehow arbitrary and capricious, including in the original determination of each Grievants' starting salary.

Previous decisions of the West Virginia Supreme Court of Appeals and this Board 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); *Salmons v. W. Va. Dept. of Transp.,* Docket No. 94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dept. of Transp*., Docket No. 94-DOH-435 (Feb. 28, 1995); *Tennant v. W. Va. Dept. of Health & Human Resources*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dept. of Health & Human Resources*, Docket No. 91-H-177 (May 29, 1992). It is not discriminatory for employees in the same classification to

be paid different salaries. *Thewes & Thompson v. Dept. of Health and Human Resources/Pinecrest Hospital*, Docket No. 02-HHR-366 (Sept. 18, 2003). As noted by the West Virginia Supreme Court of Appeals in *Largent,* 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." *Jenkins v. Dept. of Environmental Protection/Office of Mining and Reclamation*, Docket No. 03-DEP-154 (Sept. 12, 2003) (citing *Largent* at 246).

All of the grievants and Ms. Elswick are paid in accordance with the pay scale for OAII. Without question, Ms. Elswick had greater education than any of the grievants, which would justify a greater starting salary. In addition, Ms. Worden testified that market conditions were also a factor in determining Ms. Elswick's salary. These are both appropriate factors under *Largent*. It is clear this case falls squarely within the established law on this issue. Respondent is not required to pay all OAIIs the same, it must simply pay within the pay scale and in accordance with the administrative rule. Further, any argument that Respondent erred in determining the starting salaries of Grievants is out of time. None of the grievants grieved the determination of their salaries when they were hired, and so cannot attack that determination now, years after the fact.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE

ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Determination of starting salary is governed by the administrative rules of the Division of Personnel ("DOP"):

> The entry salary for any employee shall be at the minimum salary for the class including any applicable Board approved pay differential. However, an individual possessing pertinent training or experience above the minimum required for the class, as determined by the Director, may be appointed at a pay rate above the minimum, up to the market rate of the salary range, unless otherwise prescribed by the Board. For each pay increment above the minimum, the individual must have in excess of the minimum requirements at least six (6) months of pertinent experience or equivalent pertinent training. The Director may authorize appointment at a rate above the market rate where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class.

W. VA. CODE ST. R. § 143-1-5.4(b) (2012).

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); *Salmons v. W. Va. Dept. of Transp.,* Docket No. 94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dept. of Transp*., Docket No. 94-DOH-435 (Feb. 28, 1995); *Tennant v. W. Va. Dept. of Health & Human Resources*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v.*

W. Va. Dept. of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992). It is not discriminatory for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dept. of Health and Human Resources/Pinecrest Hospital*, Docket No. 02-HHR-366 (Sept. 18, 2003). As noted by the West Virginia Supreme Court of Appeals in *Largent,* 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." *Jenkins v. Dept. of Environmental Protection/Office of Mining and Reclamation*, Docket No. 03-DEP-154 (Sept. 12, 2003) (citing *Largent* at 246).

4. Grievants did not prove by a preponderance of the evidence that Respondent acted arbitrarily and capriciously in hiring a new employee at a higher salary than incumbent employees or that Respondent is required to increase the salary of incumbent employees if a new employee is offered a higher salary.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: August 21, 2013

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Billie Thacker Catlett
Administrative Law Judge