THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

EDWARD F. WISNER,
Grievant,

v. **Docket No. 2011-1471-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION/
DIVISION OF WATER AND WASTE MANAGEMENT,
Respondent.

DECISION

Grievant, Edward Wisner, filed this grievance on April 14, 2011, alleging that the "starting salary I received for the Environmental Inspector position for the Underground Storage Tank unit was far below what I should have been offered based on my education, training, and experience. This became apparent after comparing salary of an inspector hired after me that was compensated at a much higher starting wage." For relief, Grievant seeks to "have my salary increased to match or surpass the younger person's salary, pay the difference in back salary between the two salaries from the date of their employment and adjust my 401 K and retirement contributions to reflect the differences in pay accordingly."

This grievance was denied at level one following a hearing conducted on August 30, 2011, before Respondent's Hearing Examiner, Jack McClung. A level two mediation session was conducted on April 26, 2012. Grievant perfected his appeal to level three on April 30, 2012. A level three hearing was conducted before the undersigned Administrative Law Judge on July 1, 2013, at the Grievance Board's Westover office location. Grievant

appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, David A. Stackpole, Assistant Attorney General. This matter became mature for consideration following the receipt of the last of the parties' proposed findings of fact and conclusions of law on August 12, 2013.

Synopsis

Grievant, who was paid within his pay grade, asserts he should have received more compensation due to another employee hired a year later, for the same position, being paid at a higher salary. Grievant did not meet his burden of proof. Grievant was compensated within his pay grade, and Respondent did not violate the equal pay for equal work principles. The grievance is denied.

The following findings of fact are based upon the record of this grievance.

Findings of Fact

1. Grievant was an Environmental Inspector in the Division of Water and Waste Management for the Department of Environmental Protection ("DEP") since November 2007. Grievant left the employment of the DEP after filing this grievance.

2. The posting to which Grievant initially applied listed the salary for the position as a pay grade 14, with a minimum annual salary of $25,452.00 and a maximum annual salary of $47,088.00.

3. The record established that, in making the salary range decision, Respondent considered Grievant's relevant education. Grievant had a bachelor's degree in Geology, but did not have any work toward a master's degree in any relevant field.

4. The record established that, in making the salary range decision, Respondent considered the work experience of Grievant. Grievant did not have any computer certification, and had no experience in sampling at the time of his hire.

5. Grievant was offered the position at an annual salary of $30,108.00. He accepted the offer.

6. Since filing the grievance, Grievant's salary increased to $35,004.00 due to a hiring rate for oil and gas inspectors created by the Legislature, that required an across the board salary adjustment for all inspectors.

7. Grievant filed the instant case based on his comparison of salaries on the Auditor's website. This site does not separate out information regarding overtime and other benefit issues.

8. Grievant asserts a pay equity issue because another inspector was hired at a salary higher than Grievant had been hired. This employee's educational experience included work toward a master's degree in a relevant field. In addition, this employee's work experience included computer certification, and experience in sampling.

9. A pay equity evaluation process took place after the filing of this grievance. It was determined that the Grievant's salary was not 20% or more below the highest paid inspector within the tenure grouping.

10. Michael Zeto, Chief Inspector of Environmental Enforcement for DEP, indicated that the agency had experienced recruitment problems regarding inspectors for several years. The employee to whom Grievant compared his salary was given a higher starting salary based on her more related experience and education.

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 Public Employees Grievance Bd. 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 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).

Pursuant to W. VA. CODE § 29-6-10(1), the State Personnel Board has been delegated the discretionary authority to promulgate, amend, or appeal legislative rules governing the:

> preparation, maintenance and review of a position classification plan for all positions within the classified service . . . based upon a similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class.

Additionally, the State Personnel Board has the same authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. VA. CODE § 29-6-10(2).[1] The State Personnel Board has

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[1]Section 5.1 of DOP's Rules notes the purpose and intent of the classification plan is to "[t]o attract qualified employees and retain them in the classified service" and the State Personnel Board "shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various agencies and on comparability to pay rates established in other public and private agencies and businesses."

wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by State Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Moore v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). *See Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980).

Additionally, "DOP is primarily concerned with administering a classification and compensation plan that equitably compensates similarly situated employees while maintaining appropriate recruitment and retention, thereby assuring that each state agency has sufficient qualified personnel to perform its assigned governmental function." *Travis v. Dep't of Health and Human Res.*, Docket No. 96-HHR-518 (Jan. 12, 1998). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning*, 328 S.E.2d 164 (W. Va. 1985). As stated by the West Virginia Supreme Court of Appeals, an employee who alleges impropriety regarding a reclassification action or challenges the pay grade to which his or her position is assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Bennett v. Dep't of Health and Human Res.*, Docket No. 93-HHR-518 (June 23, 1995); *Johnston v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-206 (June 15, 1995); *Thibault v. W. Va. Div. of Rehab. Serv.*, Docket No. 94-RS-061 (May 31, 1995); *Frame v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-140 (Nov. 29, 1994).

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 controlling in examining the issues raised by Grievant. *Largent* noted 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. *Largent* at Syl. Pts. 2, 3 & 4. The requirement is 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 AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989). 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.

There is a process under the Division of Personnel's policies available to address pay equity issues. That process involves comparing the salaries within a classification, and within a tenure group, to determine if there is a difference of 20% or more between salaries. If there is a difference of 20% or greater, then there is a pay equity issue. If the difference is less than 20%, then there is no pay equity issue. As noted above, it was

determined that the Grievant's salary was not 20% or more below the highest paid inspector within the tenure grouping.

It is clear there has been no violation of the equal pay for equal work principle of W. VA. CODE § 29-6-10 with this set of facts. The limited amount of evidence offered to the undersigned establishes that Grievant was compensated within his pay grade. Grievant is being paid within the salary range assigned to his classification and, in fact, receives a salary at more than the base level. In addition, Grievant received greater compensation than some of his fellow inspectors. The fact that a fellow inspector was given a higher starting salary than Grievant's does not create a pay equity issue. While some disparity of compensation within the pay grade of the Environmental Inspector class does exist in this case, the evidence does not support a finding of a violation of any law, rule, policy or statute.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. *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. W. VA. CODE § 29-6-10 authorizes the State Personnel Board to promulgate rules for the implementation and administration of the classified State employees' job classification and pay plans for which plans the Personnel Board is responsible. *Frame v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-140 (Nov. 29, 1994).

3. The Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. VA. CODE § 29-6-10(2).

4. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *W. Va. Dep't of Health v. Blankenship*, 431 S.E.2d 681 (W. Va. 1993); *Princeton Community Hosp. v. State Health Planning*, 328 S.E.2d 164 (W. Va. 1985); *Dillon v. Bd. of Ed. of County of Mingo*, 301 S.E.2d 588 (1983).

5. 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. *Largent v. West Virginia Div. of Health and Div. of Personnel*, Syl. Pts. 2, 3 and 4, 192 W. Va 239, 452 S.E.2d 42 (1994). The requirement is 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 AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989).

6. Grievant did not meet his burden of proof, and failed to demonstrate a violation of the equal pay for equal work principle.

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: September 19, 2013

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Ronald L. Reece
Administrative Law Judge