

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
**FILED**

**RANDY HAMMOND *et al.*,**

2010 DEC 23 AM 11:49

**Petitioners,**

CATHY S. GIBSON, CLERK  
KANAWHA CO. CIRCUIT COURT

v.

**Civil Action No. 08-AA-19  
Judge Paul Zakaib, Jr.**

**DEPARTMENT OF TRANSPORTATION,  
DIVISION OF HIGHWAYS, and  
DIVISION OF PERSONNEL,**

**Respondents.**

**ORDER AFFIRMING DECISION OF THE  
WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

Presently pending before the Court is the Petitioners' administrative appeal from a decision of the West Virginia Public Employees Grievance Board ("Board") denying the far majority of these grievances as untimely and, with regard to those grievances timely filed, upholding the decision of Respondent Division of Highways ("DOH") to grant a pay differential and special hiring rate to certain classifications working for the DOH in a three-county area in the Eastern Panhandle. After reviewing the record and the parties' submissions, hearing oral argument, being otherwise fully advised, and after careful deliberation, the Court is of the opinion that the Board's Decision should be, and the same is, **AFFIRMED** and the case dismissed, with prejudice, for the following reasons:

**COMBINED FINDINGS OF FACT AND PROCEDURAL HISTORY**

1. The Petitioners in this matter are employed by the DOH as Transportation Workers 1, 2, and 3, and Transportation Crew Chiefs.
2. The Petitioners are employed in DOH District One, which includes the counties of Boone, Kanawha, Clay, Mason and Putnam.
3. The employer Respondent in this matter is the DOH, a State governmental agency.
4. The West Virginia Division of Personnel ("DOP") is also a Respondent in this matter.

5. Beginning in 2002, DOH county and district managers began complaining that there was a shortage of applicants for positions in Morgan, Jefferson and Berkeley Counties, which worsened over the next two years.
6. During 2004, it became apparent that, when a vacancy occurred in the Eastern Panhandle counties, the DOP register frequently contained very few applicants. In addition, when the applicants on the register were contacted to schedule interviews, most were not interested or did not appear for the interview.
7. The DOH positions for which there were insufficient applicants were in the TW 1, 2, and 3 classifications.
8. Due to concerns that a significant recruitment and retention issue in the TW job series jobs was occurring in the Eastern Panhandle, on May 16, 2005, the DOH) submitted a proposal (hereinafter the "Pay Differential and Retention and Incentive Proposal" or the "Proposal") to the DOP pursuant to which the approval of a pay differential was requested for certain defined groups of Highways employees.
  - a. The Proposal was designed to address recruitment and retention concerns in Berkeley, Jefferson, and Morgan Counties, West Virginia.
  - b. Berkeley, Jefferson, and Morgan Counties are located in DOH District Five, which also includes Grant, Hampshire, Hardy, and Mineral Counties. Morgan, Berkeley and Jefferson Counties are known as and commonly referred to as the "Eastern Panhandle" portion of West Virginia. This area borders the states of Virginia and Maryland and is less than two hours' driving distance from Washington, D.C.
  - c. As submitted, the Proposal was designed to address recruitment and retention concerns for the following classifications: Transportation Worker I, II, and III;

Transportation Crew Chief; Transportation Crew Supervisor I and II; and Highway Administrator II.

- d. The Proposal requested a 15% salary adjustment for employees in the above classifications and a 25% pay differential for incoming employees. The special salary differential was requested to address attraction and retention problems and to offset the salary compression resulting from the proposed hiring rates.
9. Berkeley, Jefferson, and Morgan Counties were addressed because supervisors were alarmed at the minimal internal applicant pool and the difficulties they were having finding people on registers. Although recruitment and retention in these counties had been a subject of concern for at least six years, prior DOH Human Resource Division salary comparisons had not substantiated a significant disparity between DOH and private sector wages.
  10. When these issues were revisited in 2005, the DOH collected the most recent wage data from the West Virginia Bureau of Employment Programs, compiled on February 2, 2005, Workforce Investment Area 7, which includes Berkeley, Jefferson, and Morgan Counties. The data used related to "Truck Drivers, Heavy and Tractor-Trailer" and "Excavating and Loading Machine and Dragline Operators." *Comparative Occupational Wages 2004 (4<sup>th</sup> Quarter), Workforce Investment Area 7, Transportation and Material Moving Occupations*, West Virginia Bureau of Employment Programs.
    - a. This data showed, by comparison, that the average DOH entry wage for Transportation Worker IIs and IIIs was \$ 8.48 per hour; the corresponding figure for the private sector was \$ 10.42.
    - b. This data also showed that the average wage actually being paid by the DOH to Transportation Worker IIs and IIIs, as depicted in *Division of Highways Active*

*Hourly and Salary Employees Berkeley Jefferson Morgan & 0571 (Interstate)*, (computer run dated April 27, 2005),” was \$ 12.51 per hour; the corresponding private sector wage was \$ 15.85 per hour.

11. In addition to considering the wage data, the DOH reviewed Classified Advertisement excerpts from *Martinsburg Journal* (dated January 27, 2005). The *Martinsburg Journal* is the newspaper of general circulation in the three-county area at issue.

- a. The advertisements relating to commercial driver’s license holders showed starting rates of pay of \$ 14.00 per hour, \$ 750.00 per week (the equivalent of \$ 17.30 per hour), and \$ 900.00 per week (the equivalent of \$ 20.00 per hour).
- b. The advertisement for a diesel mechanic, which, upon review, would have performed essentially the same duties as Transportation Worker Mechanics in the three-county area, showed a starting rate of pay of \$ 18.00 per hour.
- c. The advertisement for a craftsman in the area of building construction, which, upon review, would have performed essentially the same duties as a Transportation Worker Craftworker in the three-county area, showed a starting rate of pay of \$ 15.00 to \$ 20.00 per hour, depending upon experience.

12. Additionally, recent job posting and applicable civil service certification/register information were requested and examined for the three-county area at issue. When positions become vacant, DOH posts the vacancy and requests a “register” from DOP. The register is actually entitled “Personnel Certification,” and includes the top ten percent of the qualified applicants who have successfully tested and had their names placed on the state's register for a particular job classification. *For nine vacancy postings, a total of only 12 applicants reported for their respective interviews.* A breakdown follows:

- a. Bulletin 558 and Certification Number 32043 (one Transportation Worker II vacancy); seven applicants invited to interview, of which only two reported
  - b. Bulletin 554 and Certification Number 31480 (two Transportation Worker II vacancies); nine applicants invited to interview, of which only four reported
  - c. Bulletin 548 and Certification Number 30038 (three Transportation Worker II vacancies); 14 applicants invited to interview, of which only four reported
  - d. Bulletin 557 and Certification Number 31859 (two Transportation Worker II vacancies); 10 applicants invited to interview, only one reported
13. The State Personnel Board (hereinafter the "Personnel Board"), by Proposal Review Summary signed by Tari McClintock Crouse for Willard M. (Max) Farley, Acting Director of the DOP, advised the DOH that the proposed hiring rate and plan of implementation had been approved, with one modification: The proposed hiring rate and plan of implementation for the Highway Administrator II classification was disapproved.<sup>1</sup> Additionally, the Proposal Review Summary indicated the following:
14. In approving the requested pay increases, DOP's Review Summary of DOH's proposal noted "[w]e have seen similar recruitment problems for other agencies in these counties due to the generally better economic climate and the proximity to higher paying jobs in the nearby states of Maryland and Virginia." Level IV, Resp. DOH Exhibit 7.
- a. "The proposal documents significant differences in pay rates for similar jobs in the local labor market as well as difficulty in recruiting qualified applicants for vacancies."

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<sup>1</sup> The DOP noted that the DOH had greater flexibility in setting salaries for positions in that classification.

- b. "The salary survey data shows that the DOH entry rate is 22% below the private sector and the average actual wage paid in DOH is 26% below the private sector for comparable jobs."
  - c. "DOH has documented the unwillingness of applicants to respond to requests for interviews for vacancies. For one vacancy posting, 11 of 14 applicants declined to interview; in another, 10 of 11 declined; and, for a third vacancy in these counties, 5 of 7 applicants failed to interview."
  - d. "DOP staff has verified the data from the proposal and concurs with the proposed special hiring rate as the best response at this time to the recruitment problem."
  - e. "[DOP has] seen similar recruitment problems for other agencies in these counties due to the generally better economic climate and the proximity to higher paying jobs in the nearby states of Maryland and Virginia."
15. The approved increases became effective on July 1, 2005.
16. Approximately 84 current employees fitting the Proposal criteria received the increases.
17. The pay increases for the Eastern Panhandle employees took effect on July 1, 2005, and the ten-day statutory time limit for filing would have expired on July 18, 2005.
18. Petitioners, among many others, filed a grievance challenging the DOH's actions relating to the pay differential and special hiring rate.
19. Numerous grievants and, in fact, the vast majority from District One, did not file on or before July 18, 2005.
20. No evidence was presented by the late-filing Petitioners that would excuse or explain the filing of grievances beyond ten days after the effective date of the increases on July 1, 2005.

21. All of the Petitioners are paid pursuant to the Classification and Paygrade Schedule for their respective classifications.
22. Although many vacancies occurred in District One during the relevant time period, management in those counties did not complain to DOH officials that positions could not be filled or that there was any shortage of applicants for posted vacancies.
23. Certification lists for posted TW positions in District One in 2004 show that a typical register would contain at least 30 names, and in many cases the total certification would contain more than 100 names.
24. When vacancies occurred in District One in 2004 and early 2005, even after a register was requested, on many occasions interviews were not conducted and applicants were not contacted.
25. The substantial evidence of record establishes that there was a significant recruitment and retention problem in the three counties identified, in that, as vacancies occurred, the number of applicants available to fill them was extremely limited.
26. The conditions existing in the three-county region, specifically the availability of private sector employment at higher wages, along with the general economic climate, severely affected workers' interest in applying for state positions.
27. The DOH demonstrated that the situation was becoming critical and, absent some action, DOH was likely facing the possibility of having to hire private contractors to accomplish its work.
28. Virtually every DOP certification sought for vacancies in District One contained multiple pages of available applicants, and in most cases dozens and dozens more were available.
29. Despite the testimony of Dennis King, a retired Maintenance Engineer for District One, that there was "high turnover" within the TW classifications in 2004 and 2005, the

evidence in this case did not prove that insufficient applicants were available or that positions went unfilled due to a lack of interested applicants, as occurred in the Eastern Panhandle counties.

30. The grievance was denied by the Board by Decision dated February 14, 2008. *Hammond et al. v. Dep't of Transp./Div. of Hys. And Div. of Personnel*, 2008 WL 701627 (W. Va. Educ. St. Empl. Griev. Bd., Docket No. 05-DOH-336(B), Feb. 14, 2008).
31. The grievants represented by the American Federation of State, County of Municipal Employees Council 77 ("AFSCME") filed a Petition for Appeal on or about February 29, 2008.
32. The Petitioners request that the Court "overturn the ALJ's decision denying their grievance."
33. The Petitioners filed a Brief on the merits on or about December 16, 2008.
34. Respondent DOH filed its Brief on or about January 15, 2009.
35. The Petitioners filed a Reply Brief on or about January 30, 2009.
36. On September 18, 2009, Respondent DOH, through its counsel, Krista L. Duncan, Respondent DOP, through its counsel, Stacy Delong, and Petitioners, by and through their counsel, Andrew J. Katz, came before the Court regarding the above-referenced grievance appeal.

#### **CONCLUSIONS OF LAW**

37. *W. Va. Code* § 29-6A-7 provides the following grounds for appeal of a decision of the Board: (a) Is contrary to law or a lawfully adopted rule or written policy of the employer; (b) Exceeds the hearing examiner's statutory authority; (c) Is the result of fraud or deceit; (d) Is clearly wrong in view of the reliable, probative and substantial evidence on the

whole record; and (e) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

38. The burden of proof is on a respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If a respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

39. *W. Va. Code* § 29-6A-4 provides that “before a grievance is filed and within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.”

40. “[C]ontinuing 'damage' flowing from a past decision of the employer” is separate and distinct from a “continuing practice” as set forth in the grievance statute. In that case, this Grievance Board held that the employer's decision to place a particular job classification in a particular pay grade, while continuing to affect grievants' salaries, was “a salary determination that was made in the past, a discrete event with lasting effects,” which did not constitute a continuing practice. “[W]hen a grievant challenges a salary determination which was made in the past, . . . this 'can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage

cannot be converted into a continuing practice giving rise to a timely grievance pursuant to Code §29-6A-4(a). See, *Spahr v. Preston Co. Bd. of Educ.*, [182 W. Va. 726,] 391 S.E.2d 739 (1990).<sup>1</sup> *Nutter v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-630 (Mar. 23, 1995).” *Young v. Div. of Corr. and Div. of Personnel*, Docket No. 01-CORR-059 (July 10, 2001).

41. The one-time salary increase which was granted to the Eastern Panhandle employees was a single grievable event, not a continuing practice within the meaning of *W. Va. Code* § 29-6A-4.
42. All grievances filed after July 18, 2005, are untimely.
43. When a grievance does not involve a disciplinary matter, the grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (W. Va. Nov. 29, 1990). See *W. Va. Code* § 29-6A-6. "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).
44. The Petitioners have not claimed, nor could they reasonably claim under the facts and circumstances presented, that the Board's decision was contrary to law or a lawfully adopted rule or written policy of the employer, that it exceeded the hearing examiner's statutory authority, or that it was the result of fraud or deceit.
45. The Decision of the Board was clearly reasoned; was supported by the reliable, probative and substantial evidence on the whole record; and was not arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

46. DOP Rule 143 C.S.R. 1 § 5.4(f)4 "Pay Differentials", gives the Personnel Board the explicit authority to take the actions at issue in this matter: "[t]he [Personnel] Board, by formal action, may approve the establishment of pay differentials to address circumstances such as class-wide recruitment and retention problems, regionally specific geographic pay disparities, shift differentials for specified work periods, and temporary upgrade programs. In all cases, pay differentials shall address circumstances which apply to reasonably defined groups of employees (i.e. by job class, by participation in a specific program, by regional work location, etc.), not individual employees."
47. The DOP has broad discretion to perform its administrative functions so long as it does not exercise this discretion in an arbitrary or capricious manner. *Crowder v. W. Va. Dep't of Tax & Revenue*, Docket No. 94-T&R-545 (Feb. 28, 1995). See *Smith v. W. Va. Div. of Corr.*, Docket No. 94-CORR-624 (Feb. 27, 1995).
48. The rules promulgated by DOP pursuant to its delegated authority 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. See *Callaghan v. W. Va. Civil Serv. Comm'n*, 166 W. Va. 117, 273 S.E.2d 72 (1980).
49. A government agency's determination regarding matters within its expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985). See *Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp, Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981); appeal dismissed, 454 U.S. 1131 (1982).
50. Pay differentials have been used many times in the past to address specific recruitment and retention issues and have been upheld by the Grievance Board. See *Travis v. Dep't of Health and Human Res.*, Docket No. 96-HHR-518 (January 12, 1998); *Pishner v. Dep't*

of *Health and Human Res.*, Docket No. 97-HHR-478 (May 21, 1998); *Rosanna v. Dep't of Health and Human Res.*, Docket No. 05-HHR-460 (Sept. 28, 2007). So long as the increase has a rational basis and is limited to "a reasonably defined group of employees," it is properly upheld. *Travis, supra*.

51. The ALJ properly found that the special hiring rate and pay increase for the Eastern Panhandle employees was not arbitrary and capricious and had a rational basis.
52. The salary adjustments that were awarded in the three-county area were promulgated within the statutory and regulatory authority of the Division of Personnel.
53. "[I]t does not violate the principle of pay equity for the state to pay employees within the same classification differing amounts." *Largent v. W. Va. Div. of Health*, 192 W.Va. 239, 452 S.E.2d 42 (1994).
54. *W. Va. Code* § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a discrimination 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 Educ. Policy Comm'n*, Nos. 32163 and 33296 (W. Va., Oct. 12, 2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).
55. The Supreme Court of West Virginia has recently described the nature of the discrimination inquiry as follows: "[T]he policy underlying uniformity and discrimination claims under the education statutes is to prevent discrimination against

similarly situated education employees regardless of the basis for discrimination. The crux of such claims is that the complainant was treated differently than *similarly situated* employees[.] *Board of Educ. of the County of Tyler v. White*, 216 W.Va. 242, 246, 605 S.E.2d 814, 818 (2004). Accordingly, a critical component of any discrimination claim is the determination that the person or persons alleging improper discrimination are *similarly situated* to those allegedly receiving preferential treatment.” *Pritt v. W. Va. Div. of Corrections*, 218 W. Va. 739, 630 S.E.2d 49 (2006).

56. The Petitioners are not similarly situated to those employees who received the adjustments because they live in different geographic areas and because no complaints existed in District One to justify DOH considering a pay differential in those areas.

57. The Petitioners are not similarly situated to those employees who received the adjustments because complaints, if any, regarding the inability to attract employees in District One did not rise to the level of those received by DOH management from District Five.

58. Because no complaints were received from DOH management in District One regarding these issues, the DOH had no reason to evaluate attraction or retention issues in that part of the state.

59. Given the lack of complaints from District One to DOH management regarding attraction and retention, the adequate number of applicants on the registers in other parts of the state, and the large number of DOH employees statewide, the DOP and DOH had no duty to canvass or analyze districts other than District 5 before requesting the pay differential for the three-county area.<sup>2</sup>

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<sup>2</sup> The Court notes that, given the lack of complaints in District One to upper-level DOH management regarding attraction and retention issues, it was unnecessary for the Grievance

60. The reliable, probative, and substantial evidence on the whole record demonstrates that the DOH's decision to review only the attraction and retention issues in District 5 was warranted.

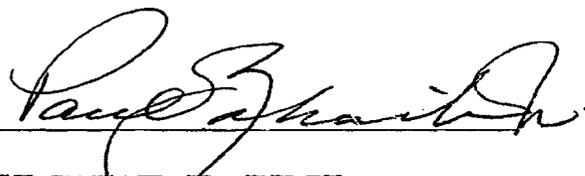
61. The reliable, probative, and substantial evidence on the whole record supports the Board's conclusion that the DOH did not discriminate against the petitioners when it granted the pay differential at hand.

Therefore, this Court, after mature consideration and after a review of the Court file, the briefs of counsel, and the study of relevant legal authority, does hereby **AFFIRM** the Decision of the West Virginia Public Employees Grievance Board and **ORDERS** that this administrative appeal be dismissed, *with prejudice*.

The objections and exceptions of the Petitioners to all adverse rulings herein are duly noted and preserved.

The Circuit Clerk is directed to provide certified copies of this Order to all counsel of record.

ENTERED this the 22<sup>d</sup> day of Dec, 2009.

  
PAUL ZAKAIB, JR., JUDGE

December 27<sup>th</sup> 2009  
Cathy D. Watson, Jr.

Date: 12-27-10  
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JK  
Deputy Circuit Clerk

Board to have considered evidence of job postings, job advertisements, or work force data at the Level Four hearing of this matter.

Prepared by:

*Krista L. Duncan*

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 28<sup>th</sup> January, 2011, the following order was made and entered:

Randy Hammond, et al., Petitioners Below, Petitioners

vs.) No. 11-005

West Virginia Department of Transportation, Division of Highways,  
Division of Personnel, Respondents Below, Respondents

On a former day, to-wit, January 24, 2011, came the petitioners, Randy Hammond, et al., by Andrew J. Katz, The Katz Working Families Law Firm, LC, their attorney, and presented to the Court their motion in writing for an extension of time within which to file their notice of appeal in the above-captioned matter, for the reasons set forth therein.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said motion. It is therefore ordered that the time within which to file the notice of appeal in the above-captioned matter be, and it hereby is, extended until February 14, 2011.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court

