CHARLES WILLARD,

Grievant,

v. **DOCKET NO. 97-HHR-259**

WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION

Grievant, Charles Willard, initiated this grievance pursuant to the provisions of W. Va. Code § 29-6A-1, et seq., alleging that he is entitled to back pay for additional job duties he performed between November 1, 1995, and April 30, 1996. The grievance was filed at level one on May 24, 1996, where relief was denied by Grievant's immediate supervisor on May 30, 1996. After a timely appeal to level two, relief was again denied by Scott Boileau, Acting Commissioner, on December 9, 1996. A level three hearing was conducted on April 25, 1997, which was followed by a May 19, 1997, written decision denying the grievance. Grievant appealed to level four on May 27, 1997, where the parties agreed to submit the matter upon the existing record. Proposed written submissions were received by July 21, 1997, at which time this matter became mature for decision.

The following findings of fact are appropriately made after a review of the record developed at level three.

Findings of Fact

1. Grievant is employed by Respondent as a Community Service Manager (CSM). Prior to August of 1995, he was assigned to Mineral County. 2. On August 16, 1995, the CSM for Hampshire County resigned from her employment. Upon her resignation, Grievant was asked by his supervisor, John Hammer, to assume responsibility for both Mineral and Hampshire Counties on an interim basis, which Grievant agreed to do.

3. Grievant was assured by Mr. Hammer and Sue Sergi, former Commissioner for the Department of Health and Human Resources (DHHR), that, if the two districts were combined permanently, he would be compensated for the additional duties he assumed.

4. In mid-September of 1995, it was decided that Hampshire and Mineral Counties would be combined into one district, with Grievant serving as the district's CSM.

5. At the time that DHHR decided to combine the two districts, it had an internal policy which divided the Community Service Districts into three categories, based upon caseload. The salary range for the CSMs was also divided into categories accordingly, as follows: small, $27,758- $33,568; medium, $33,569-$39,368; and large, $39,369-$45,168.

6. Prior to May 1, 1996, the CSM job classification was at a Pay Grade 16 on the Division of Personnel's (DOP) salary schedule, with a salary range of $27,758 to $45,168. The classification's salary categories established by DHHR had not been approved by DOP and did not exist in DOP's administrative rules or regulations.

7. The combination of Hampshire and Mineral Counties placed the new district into the medium category under DHHR's salary categories for the job classification.

8. Prior to the combination of the two service districts, and until May 1, 1996, Grievant's salary was in the range for small districts, approximately $28,000 per year. 9. On May 1, 1996, DHHR received approval from the State Personnel Board for the three salary ranges for CSMs, formally establishing separate pay ranges according to size of district in the Division of Personnel's salary schedule.

10. Grievant began receiving an increased salary in the “medium” range for CSMs on May 1, 1996. He believes he was entitled to a salary in the medium range beginning on September 1, 1995, when the two districts were first combined.

11. Grievant informed Mr. Hammer that he would not perform additional duties without additional compensation. However, between September 1, 1995, and April 30, 1996, Grievant performed the additional duties required of the combined service district without an increase in pay.

Discussion

In order to prevail in this grievance, Grievant must prove by a preponderance of the evidence that

Respondent violated, misapplied or misinterpreted a statute, policy, rule, regulation or written agreement. See Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); W. Va. Code § 29-6A-2(i). Interestingly, Grievant has stated quite clearly that he is not contending that DHHR violated any law, regulation or policy. T. at 12; Exhibit G. (See footnote 1) He does not contend that he was misclassified in any respect. Nonetheless, he initiated this grievance due to the "unnecessary delay" which DHHR took in obtaining his salary advancement, which he believes should have been accomplished on September 1, 1995, when he first undertook the official duties of CSM for the combined district of Hampshire and Mineral Counties. He contends that a change in the DOP's administrative rules should have been proposed long before itactually was, so that he would not have performed double his previous duties for no additional compensation for a period of several months.

Respondent readily admits that it took several months to figure out how to compensate Grievant for his additional responsibilities. When Grievant initially began working in his new capacity for the combined district, Mr. Hammer and Ms. Sergi took measures to raise his salary to that of a medium size district. It was then that they discovered that DOP's regulations did not allow for this change in salary. As explained by Mike McCabe, Director of Personnel Services, Grievant's salary could not be raised, because he was being compensated within the pay grade for his classification, which was $27,758 to $45,168. In September of 1995, the State Personnel Board did not allow for salary advancements on a merit basis exceeding ten percent within any twelve-month period. T. at 11; See DOP's Administrative Rule, Section 5 (1995). The only other mechanisms available in DOP's regulations for salary increases involve situations regarding promotions or other changes in classification, which did not apply to Grievant. Both parties agree that Grievant was performing entirely within his appropriate job classification at all times, so misclassification was not an issue.

Upon discovering that it could not raise Grievant's salary to the necessary level under current regulations, DHHR pursued other options. Proposals which were investigated included having Grievant resign and be rehired at a higher salary, demoting and then promoting him, or granting him the ten percent salary increase allowed by regulation. Each proposal was later rejected due to various concerns that the desired result--raising Grievant's salary to the medium range--would not be achieved. After these options were exhausted, Calvin Robbins, of DHHR's Bureau of Operations, proposed to the DOP in a memorandum dated March 25, 1996, that three pay grades be

createdwithin the CSM classification so that employees would be compensated according to caseload. Exhibit C. After discussion and approval, DOP implemented the new salary schedule, effective May 1, 1996, at which time Grievant began receiving the minimum salary for a medium size district, $33,569.

Mr. Hammer testified that the idea of proposing that DOP change its regulations was discussed as early as September of 1995, but it was not pursued at that time. DHHR has not stated why it waited so long to make this formal proposal; it has merely recognized that “hindsight is 20/20,” and perhaps the option should have been pursued earlier. However, it asserts that it was making good faith efforts from September of 1995 and after to ensure that Grievant would receive adequate compensation for his additional job duties.

Grievant has not proven, or for that matter alleged, a violation of any law, policy, rule, regulation or written agreement, as required by Code § 29-6A-2(i). Moreover, it has been held by this Grievance Board that an increase in job duties alone, so long as the duties are within those contemplated by the classification, is not grounds for a reallocation. Kuntz v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-301 (Mar. 26, 1997). Again, Grievant has not alleged he was improperly classified, and reallocation requires placing a position in a different classification due to a change in job duties or to correct a misclassification. DOP's Administrative Rule, Section 3.77. Neither situation is in issue in this case. Finally, it is undisputed that, prior to May 1, 1996, Grievant was compensated within the pay scale for his assigned classification, which, in the absence of any discriminatory motive or specific violation, is not improper. See Nafe v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997). He has established no entitlement to back pay. Grievant also alleges that Respondent did not comply with the timelines set forth in the grievance procedure statute, Code § 29-6A-4. Respondent does not appear to dispute that there were significant delays between the level one and two decisions, and then between the level two decision and the level three hearing date. However, the only relief to which Grievant is entitled for Respondent's failure to process his grievance in a timely fashion is an appeal to the next level of the grievance process. Code § 29-6A-3(a). Since Grievant did not pursue appeal to the next level at each point of the process, allowing a decision to be rendered, this is now a moot issue. See Harmon v. Fayette County Bd. of Educ., Docket No. 96-10-500 (August 25, 1997). (See footnote 2) Respondent's violation of the required timelines entitles Grievant to no relief under these circumstances.

In addition to the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In a non-disciplinary matter, the grievant must prove all the allegations of his complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994).

2. Grievant was compensated within the pay scale for his appropriate job classification prior to May 1, 1996, which is not improper or illegal in any way. Nafe v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997).

3. Grievant was not misclassified as a Community Service Manager. 4. Grievant has failed to prove by a preponderance of the evidence that his employer violated any statute, policy, rule, regulation or written agreement applicable to his employment situation.

5. Although Respondent did not comply with the timelines set forth in W. Va. Code § 29-6A-4, Grievant did not appeal his grievance to the next level when the violations occurred, so he is entitled to no relief. See Code § 29-6A-3(a); Harmon v. Fayette County Bd. of Educ., Docket No. 96-10-500 (August 25, 1997).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision 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. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Date: August 28, 1997 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

References to testimony taken at level three will be designated as "T. at ___." Also, all exhibits referred to in this Decision were introduced at the level three hearing.

Footnote: 2

Although Harmon dealt with the grievance procedure for education employees, which differs slightly in that employees are allowed to win by default, the principle still applies that, if the employee does not pursue his rights at the level at which the employer is neglectful, the issue becomes moot after the employee allows a decision to be rendered.