LOIS MORTON,

Grievant,

v. **Docket No. 99-HHR-013**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,

and

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION,
DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

On December 9, 1998, Lois Morton (Grievant) filed a grievance against Respondent Department of Health and Human Resources, Bureau of Finance, Office of Financial Services (HHR), alleging that she should have received a 10% pay increase when her position was reallocated to the Office Assistant III classification. The grievance was denied at Levels I and II, and Grievant appealed to Level III on December 16, 1999. On December 17, 1999, the West Virginia Division of Personnel (DOP) was joined as a party. A Level III evidentiary hearing was conducted by Grievance Evaluator M. Paul Marteneyon December 28, 1998. (See footnote 1) A written decision denying the grievance at Level III was issued by G. Dewey Rice, Jr., HHR's Assistant Secretary, on January 4, 1999. Grievant appealed to Level IV on January 8, 1999, and a Level IV hearing was scheduled. Prior to that hearing, the parties agreed to submit this matter for decision on the record developed through Level III. The parties were given until March 19, 1999, to submit written arguments in support of their respective positions. This matter became mature for decision on that date. (See footnote 2)

There is no significant dispute regarding the facts necessary for adjudicating this matter. Therefore, based upon a preponderance of the credible evidence contained in the record established through Level III, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by HHR in its Office of Financial Services, which is part of the Bureau of Finance. Grievant is currently classified as an Office Assistant III.

2. On February 1, 1995, Grievant was transferred to an Accounting Assistant I position within the Payroll Section of HHR's Office of Financial Services. G Ex 2; HT at 3.

3. On February 1, 1996, Grievant's Accounting Assistant I position was reallocated to the classification of Payroll Assistant in Pay Grade 6. G Ex 3; HT at 3. Asa result of this reallocation, Grievant's salary increased from $15,228 to $17,520 annually, a gain of approximately 15%. G Ex 3.

4. On November 1, 1997, Grievant was demoted, without prejudice, to an Office Assistant II, in Pay Grade 4. G Ex 4. This demotion resulted from a change in Grievant's job duties when she ceased handling payroll matters for six state hospitals, and began serving as the benefits liaison between the Public Employees Insurance Agency (PEIA) and HHR's employees. HT at 4-5.

5. Grievant's pay was not reduced as a result of the demotion described in Finding of Fact Number 4, above. G Ex 4. Grievant did not file a grievance challenging this action.

6. On December 1, 1998, Grievant's position was reallocated from Office Assistant II to Office Assistant III. G Ex 5. HHR and DOP took this action based upon the Level IV decision of this Grievance Board in Smith v. West Virginia Department of Health and Human Services, Docket No. 94-HHR-1077 (Nov. 9, 1998).

7. Joanna Smith, the grievant in the decision cited in Finding of Fact Number 6, above, received a 10 % pay raise when her position was reallocated from Office Assistant II in Pay Grade 4 to her proper classification, Office Assistant III in Pay Grade 6.

8. The Payroll Section in HHR's Office of Financial Services is divided into two branches. Simply stated, the Health group deals with employees who were previously under that part of HHR which was in the Department of Health, and the Human Services group deals with employees who were previously under the Department of HumanServices. Ms. Smith works with the Human Services group and Grievant works with the Health group, where they are similarly responsible for PEIA

benefits matters. HT at 6.

9. When Grievant's position was reallocated to Office Assistant III as described in Finding of Fact Number 6, above, her pay was not changed.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6.

Grievant established that she was involuntarily demoted from Payroll Assistant to Office Assistant II, and just over a year later, she was reallocated from an Office Assistant II to an Office Assistant III, based upon the successful grievance decision obtained by a co-worker, Joanna Smith. Grievant contends she should have received a 10% pay raise just like Ms. Smith, who was reallocated from Office Assistant II in Pay Grade 4 to Office Assistant III in Pay Grade 6, because she and Ms. Smith perform virtually identical duties for different branches within the Payroll Section of HHR's Office of Financial Services. (See footnote 3)

The action Grievant challenges is governed by the following provisions in DOP's Administrative Rule:

> When a position is reallocated to a different class, the salary of the incumbent shall be adjusted in accordance with salary regulations for promotion, demotion and lateral class change.

143 C.S.R. 1 § 5.4(f)(3) (1998).

> If an employee has been demoted or reallocated to a class at a lower pay grade with no reduction in pay and is promoted or reallocated within the next twenty-four months within the same agency, no consideration shall be given to the pay grade(s) reduced in the demotion or reallocation when calculating pay on promotion as provided in subdivisions 5.5(a) and (b) of this rule.

143 C.S.R. 1 § 5.5(c) (1998).

HHR and DOP correctly applied the foregoing provisions in regard to Grievant's reallocation as an Office Assistant III. Inasmuch as Grievant retained her pay in Pay Grade 6 when she was involuntarily demoted from Payroll Assistant to Office Assistant II, Section 5.5(c) of DOP's Administrative Rule

clarifies that her subsequent reallocation may not be treated as if it were a promotion. Although the record strongly suggests that Grievant should have been properly reallocated from Payroll Assistant to Office Assistant III in 1997, had that occurred the bottom line would remain the same: Grievant would have been in Pay Grade 6 all along, and there would still be no legal basis to increase her pay based on the outcome of the Smith grievance.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving her grievance by a preponderance of the evidence. ProceduralRules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Grievant's position was correctly reallocated from Office Assistant II to Office Assistant III on December 1, 1998, without an increase in pay, in accordance with the provisions of Section 5.5(c) of the West Virginia Division of Personnel's Administrative Rule, 143 C.S.R. 1 § 5.5(c) (1998).

3. Respondents, West Virginia Department of Health and Human Resources and West Virginia Division of Personnel, did not violate any applicable statute, policy, rule, regulation or written agreement when Grievant's position as an Office Assistant II was reallocated to an Office Assistant III without any increase in pay.

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. In accordance with W. Va. Code § 29A-5-4, 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: March 31, 1999

Footnote: 1

At that hearing, Grievant appeared pro se, HHR was represented by Danny Franco, and DOP appeared by telephone through its representative, Lowell Basford, Deputy Director for Classification and Compensation.

Footnote: 2

No arguments were received from any of the parties.

Footnote: 3

Grievant did not allege "discrimination" or "favoritism" under W. Va. Code §§ 29-6A- 2(m) or (o), and no such allegations will be inferred. However, this has no bearing on the outcome of this grievance, because Grievant failed to demonstrate that she and Ms. Smith are similarly situated in terms of their work history, the critical factor to be considered in applying DOP's rules for pay upon demotion, promotion and reallocation.