PAMELA COOK,

Grievant,

v. **Docket No. 00-HHR-352**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES

and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Pamela Cook, employed by the Department of Health and Human Resources (DHHR or Respondent) as an Information Systems Specialist I, filed a level one grievance on July 13, 2000, in which she alleged a violation of W. Va. Code § 5-5-2. Specifically, Grievant asserted that she had been improperly deprived of increment pay. For relief, Grievant requested all increment pay to which she has been entitled since her employment at DHHR, with interest.

The hearing evaluators at levels one and two lacked authority to grant the requested relief, and the grievance was denied following an evidentiary hearing at level three. Appeal was made to level four on November 8, 2000. A level four hearing was conducted in the Grievance Board's Beckley office on April 24, 2001, and post hearing filings were submitted by all three parties on or before June 1, 2001. (See footnote 1) The grievance was subsequently transferred to the undersigned on June 4, 2001, for administrative reasons.

The following findings of fact are derived from the record developed at levels three and four.

Findings of Fact

1. Grievant has been employed by DHHR in Management Information Services (MIS) since April 27, 1998, classified as an Information Systems Specialist I.

2. Prior to her employment with DHHR, Grievant was employed by Regional Educational Service Agencies (RESA) I and IV from March 1, 1991 to April 30, 1997.

3. Although DHHR's Office of Personnel Services initially determined that Grievant's employment with RESA would be considered toward increment pay, Grievant did not receive increment checks in 1998 or 1999.

4. Grievant received an increment check in the amount of $400, reflecting eight years of

service, in July 2000.

5. On July 13, 2000, Grievant initiated grievance proceedings to collect her annual increment checks for 1998 and 1999.

6. In November 2000, DHHR notified Grievant that her work with RESA had been improperly considered for purposes of annual increment eligibility.

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 §4.21 (2000); 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). See W. Va. Code §18-29-6.

Grievant argues that the six years she worked with RESA should be considered for purposes of increment pay because her job title with RESA of Computer Operator is listedin DOP's class specifications, she made contributions to the State Retirement System, and was covered by the Public Employees Insurance Agency. Further, Grievant notes that her accrued annual and sick leave were transferred when she began employment with DHHR. Grievant's final contention in support of her claim is that the RESAs were created by the legislature which provides funding for the programs and services which they offer.

Respondents argue that, notwithstanding Grievant's examples, RESA employees are not state employees, and she is not entitled to credit for her years of service at that agency for purposes of increment pay. The RESAs were established, Respondents assert, by the State Board of Education to provide services to the county school systems. A designated county board of education in the district serves as the fiscal agent for the RESAs and conducts annual audits, while the Auditor's Office is responsible for auditing state agencies. Finally, Respondents conclude that RESA employees are not state employees because they receive a paycheck from a county board of education, and participate in the Teachers' Retirement Plan, not the Public Employees' Retirement System.

W. Va. Code §§ 5-5-1, et seq, addresses salary increases for state employees. Code § 5-5-2

provides in pertinent part:

Effective for the fiscal year beginning the first day of July, one thousand nine hundred ninety-six, every eligible employee with three or more years of service shall receive an annual salary increase equal to fifty dollars times the employees' years of service, not to exceed twenty years of service.

W. Va. Code § 5-5-1 defines "Eligible employee" as

any regular full-time employee of the state or any spending unit thereof who is eligible for membership in any state retirement system of the state of West Virginia or other retirement planauthorized by the state. Provided, That the mandatory salary increase required by this article shall not apply to any faculty employee at public institutions of higher learning or any employee of the state whose compensation is fixed by statute or by statutory schedule (except that the clerks, deputy clerks and magistrate assistants of magistrate courts shall be eligible for the incremental salary increases provided in this article and with such increases to be allowable in addition to the maximum salaries and compensation for such employee offices under the magistrate court system statutes of article one [§§ 50-1-1 et seq.], chapter fifty of the code), nor shall this article be construed to mandate an increase in the salary of any elected or appointed officer of the states; . . .

The controlling issue in this matter is whether RESA employees are state employees. If they are not, Grievant would not be entitled to credit for her years of service with RESA for increment pay purposes. Evidence that RESA employees are education, rather than state employees is found in W. Va. Code § 18-2-26 which states:

Notwithstanding any other provision of this code to the contrary, employees of regional educational service agencies shall be reimbursed for travel, meals and lodging at the same rate as state employees under the travel management office of the department of administration.

RESA employees are also specifically included in the grievance procedure for education employees set forth in W. Va. Code §§ 18-29-1, et seq. Additionally, as a RESA employee, Grievant was not subject to the Division of Personnel regulations, she contributed to the Teacher's Retirement Plan, rather than the State Employees' Retirement System, and her paycheck was not from the State of West Virginia. (See footnote 2) Finally, Respondent has established that the leave time Grievant earned with RESA was improperly transferredto her state account. Therefore, RESA employees are not state employees, and time worked with RESA may not be included in the calculation of an

employee's increment pay.

Finally, Grievant submitted evidence that RESA employment was credited to another DHHR employee for purposes of calculating his increment pay. Including RESA experience in the calculation of any employee's tenure would be improper, and previous errors may not be used to require an agency to perpetuate the violation. Singleton v. Dep't of Health and Human Res., Docket No. 95-HHR-490 (May 24, 1996).

Conclusions of Law

1. 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 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. W. Va. Code §5-5-2 provides that every eligible state employee with three or more years of service shall receive an annual salary increase equal to fifty dollars times the employees' years of service, not to exceed twenty years of service.

3. RESA employees are not state employees.

4. Grievant is not entitled to credit for the years she was employed with RESA in the calculation of her annual increment pay.

Accordingly, the 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. However, the appealing party is required by W. Va. Code §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: June 29, 2001 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Grievant was represented by Trish Kerbawy, an employee in the Office of the Inspector General. DHHR and the Division of Personnel (DOP) were represented by counsel, Anthony Eates and Robert Williams, respectively.

Footnote: 2

Deborah Calhoun, Office Manager for RESA I testified at level four that Grievant had participated in the Teachers' Retirement plan, contrary to Grievant's representation.