RENE' VINCELL,

Grievant,

v. **Docket No. 03-HHR-268**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

Rene' Vincell ("Grievant") initiated this proceeding on May 29, 2003, challenging a ten percent reduction of her salary after a voluntary demotion. The grievance was denied at level one on June 4, 2003, and at level two on June 16, 2003. A level three hearing was held on August 19, 2003, and the grievance was denied in a decision dated August 26, 2003. Grievant appealed to level four on September 3, 2003, and a hearing was held in Westover, West Virginia, on November 10, 2003. Grievant was represented by her husband, Shelba Vincell, and Respondent was represented by Landon Brown, Assistant Attorney General. The parties elected not to file post-hearing submissions, so this matter became mature for consideration at the conclusion of that hearing.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by the Department of Health and Human Resources ("DHHR") for approximately 29 years. 2. On September 24, 2001, Grievant began working in the position of Information System Assistant ("ISA"), pursuant to a posted job opening. At that time, ISA was in pay grade 8. (See footnote 1)

3. Although she received good evaluations, and her supervisor was pleased with her performance, Grievant was not comfortable in the ISA position, because she felt it required

mechanical computer knowledge that she did not possess.

4. On February 25, 2003, Grievant requested to be placed in an Office Assistant II ("OA II") position, which was going to be vacant due to an upcoming retirement.

5. Grievant completed a position description form, which was reviewed by the Division of Personnel ("DOP"), and it was determined that she could be properly classified as an OA III in the new position, making her eligible for a higher salary than she would have received as an OA II.

6. On March 25, 2003, James Gilmore, Community Services Manager, informed Grievant in writing that, if she accepted the OA III position, she would receive a ten percent salary reduction. At that time, ISA was in pay grade 9, and OA III was in pay grade 7. Grievant's salary would be reduced from $2132 per month to $1918 per month. Grievant's prior salary of $2132 per month fell within pay grade 7.

7. In a memorandum dated March 31, 2003, Grievant requested that Mr. Gilmore reconsider his decision to reduce her salary. Mr. Gilmore spoke with John Hammer, Region III Director, who affirmed that the salary reduction would be necessary. 8. On April 7, 2003, after Mr. Gilmore informed Grievant that she would have to take a ten percent salary reduction and asked her to stay in her present position, Grievant requested, in writing, that he proceed with her change of job title to OA III.

9. In April of 1998, an agreement was reached between the Regional Directors for the Bureau for Children and Families, in which they determined that, when employees voluntarily accept a position in a lower pay grade than their present position, they must also accept a five percent salary reduction per pay grade. However, the policy would not necessarily apply to priority positions, meaning those in which the job duties are of major consequence to the agency, such as child protective service workers, or positions which have suffered recruitment and retention problems.

10. When the ISA job title was placed in pay grade 9, Grievant did not receive a salary increase, because her salary already fell within that pay grade range.

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); Payne v. W. Va. Dep't of Energy, Docket No.

ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6. Grievant has made two arguments. First, she contends that DHHR's “policy” of reducing an employee's salary upon demotion is illegal, and, second, she believes that, even if the reduction was proper, her salary should only have been reduced by five percent. She bases this argument upon the fact that her ISA position was previously in pay grade 8, and she did not receive a salary increase when that job classification was placedin pay grade 9. Accordingly, Grievant contends that her salary should have only been reduced by one pay grade when she took a position which was within pay grade 7.

Respondent counters that its “agreement” regarding salary reduction upon demotion comports with the applicable portion of the DOP Administrative Rule (2003) § 5.6 “Pay on Demotion,” which provides as follows:

> The appointing authority shall reduce the pay of an employee who is demoted and whose current pay rate is above the maximum pay rate for the new classification to at least the maximum pay rate of the new classification or, if the demotion is to a formerly held classification, his or her last pay rate in the formerly held classification, whichever is greater. The employee's salary may remain the same if his or her pay is within the pay range of the new classification, or his or her pay may be reduced to a lower pay rate in the new range.

As explained by Lowell Basford, Assistant Director for DOP, this provision envisions four possible outcomes whenever an employee is demoted: (1) the employee's salary is reduced to the maximum for the new classification; (2) if demoted to a formerly held classification, the employee's salary will be the higher of his current salary or the salary of the former classification; (3) the employee's pay remains the same, if already within the range for the new classification; or (4) the employee's salary is reduced to a lower pay rate within the new pay range. Accordingly, Respondent's practice of reducing the employee's salary five percent per pay grade upon demotion, so long as the salary is within the pay grade for the new job classification, comports with the requirements of DOP's Rule. As Mr. Basford testified, the very last portion of § 5.6 provides the agency with the discretion to lower the employee's salary. Although Grievant's ISA salary fell within both pay grade 9 and pay grade 7, DOP's rule clearly provides the employer with the option of lowering Grievant's salary to a lower rate of pay within pay grade 7. As to Grievant's second contention, she believes that, because she did not receive a salary increase when the ISA job classification was moved into pay grade 9, she should have only been deemed to have “moved down” one pay grade when she accepted the OA III position. However, there has been no contention that Grievant was not being paid within pay grade 9 when

she was working as an ISA. If Grievant's salary at the time the ISA classification was moved into pay grade 9 was already within that pay grade, in accordance with § 5.4 of DOP's rule, Respondent was not allowed to increase her salary. Nevertheless, as discussed above, the key issue when determining pay upon demotion is the pay range for the classification, pursuant to § 5.6. In this case, the ISA classification was in pay grade 9, and the OA III classification was in pay grade 7, so DHHR acted within its authority to reduce Grievant's salary ten percent for two pay grades. As there has been no contention that Grievant's reduced salary was not within pay grade 7, Respondent's actions cannot be found to have been improper or illegal.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. When an employee is demoted to a position in a lower pay grade, the employer may reduce her salary to a rate of pay within the new classification's pay grade. DOP Administrative Rule § 5.6 (2003). 3. Responded acted within its discretion in reducing Grievant's salary by ten percent when she accepted a voluntary demotion.

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

Date: December 11, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

That job title was later placed in pay grade 9.