ROBERT L. BRINING, et al.,

Grievants,

v. **Docket No. 05-CORR-284**

DIVISION OF CORRECTIONS/
PAROLE SERVICES, and
DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievants, employed by the Division of Corrections ("DOC") in the Martinsburg, West Virginia, office of Parole Services, initiated this proceeding on July 7, 2005. They allege entitlement to a 15% "locality pay increase" as a result of a similar pay increase granted to Division of Highways ("DOH") employees who are also employed in the "Eastern Panhandle" area of West Virginia. The grievances were denied in separate decisions dated July 8, 2005, at level one, and were also denied on July 14, 2005, at level two. By Order dated August 9, 2005, the parties agreed to waive level three proceedings and allow this matter to proceed to level four. Grievants' level four appeal was filed on August 11, 2005, and a hearing was conducted in Westover, West Virginia, on November 4, 2005. Grievants represented themselves, DOC was represented by Charles Houdyschell, Senior Assistant Attorney General, and the Division of Personnel ("DOP") was represented by Assistant Director Lowell Basford. This matter became mature for consideration upon receipt of the parties' fact/law proposals on November 15, 2005.

The following material facts are undisputed by the parties.

Findings of Fact

1. Grievants are employed by DOC in the Parole Services division, and they are assigned to the Martinsburg, West Virginia, office.

2. Martinsburg is located in the "Eastern Panhandle" area of the State of West Virginia.

3. Due to the higher cost of living in the Eastern Panhandle, combined with competition from private employers who provide better salaries and benefits, DOH has experienced difficulty in recruiting and retaining employees in that particular geographic area. Consequently, a 15% pay increase for various DOH employees in the Eastern Panhandle area (See footnote 1) was approved and implemented on July 1, 2005.

4. Grievants, like DOH employees, are in the classified service of the State of West Virginia, and the classifications and salaries for their positions are established by DOP.

5. Grievants are not employed by DOP or DOH.

6. Because of the Eastern Panhandle's location, workers can easily commute to work in three other states, while maintaining their residences in West Virginia.

7. While a pay increase for parole officers has been discussed in recent years, one has not been implemented to date, and DOC has not elected to provide a locality pay increase to its employees located in the Eastern Panhandle.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "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).

Although they concede that they are not employed by DOH and understand that DOC has no control over actions taken by another state agency, Grievants contend that it is discriminatory for the State of West Virginia to fail to provide a locality pay increase to all Eastern Panhandle employees. "'Discrimination' means 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." (See footnote 2) However, as Grievants have admitted, they are not employees of the agency which implemented the locality pay increase. As established by statute, any matter in which authority to act is not vested with the state department, board, commission or agency utilizing the services of the

grievant is not grievable. W. Va. Code §§ 29-6A-2(g) and (i); See Smith v. Dep't of Health and Human Res., Docket No. 05-HHR-218 (Aug. 5, 2005). This Grievance Board has also previously recognized that a state agency's failure to implement practices imposed by aseparate agency does not result in discrimination and does not entitle its employees to similar benefits. See Bossie v. Div. of Rehabilitation Serv., Docket No. 03-RS-141 (Sept. 23, 2003).

Indeed, a Grievance Board decision which directed a state agency to adopt a specific personnel policy was reversed by the West Virginia Supreme Court of Appeals. In Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1977), the Court stated as follows:

> The jurisdiction of the Education and State Employees Grievance Board is limited to the resolution of grievances as defined by W.Va. Code § 29-6A-2(i) (1988) and W.Va. Code § 18-29-2(a) (1992) so that its "authority extends only to resolving grievances made cognizable by its authorizing legislation." Vest v. Bd. of Educ., 193 W.Va. 222, 225, 455 S.E.2d 781, 784 (1995). The grievance board simply does not have the authority to second guess a state employer's employment policy.

Grievants further contend that DOP should have approved a pay differential for all state employees of all agencies located in the same geographic area, because all experience similar problems associated with cost of living. Pursuant to DOP's Administrative Rule, the State Personnel Board:

> 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.

W. VA. CODE ST. R. § 143-1-5.4(f)(4)(2004).

Unfortunately, DOP is not *required* to issue pay differentials, even when requested to do so by an employing agency. Its authority in this regard is purely discretionary. However, in the instant case, no request for a pay differential was made by Grievant'semployer, and its failure to do so is not grievable. Therefore, Grievants have failed to meet their burden of proof.

The following conclusions of law support this Decision.

Conclusions of Law

1. Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89- DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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).

2. Any matter in which authority to act is not vested with the state department, board, commission or agency utilizing the services of the grievant is not grievable. W. Va. Code §§ 29-6A-2(g) and (i); See Smith v. Dep't of Health and Human Res., Docket No. 05- HHR-218 (Aug. 5, 2005).

3. "'Discrimination' means 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." W. Va. Code § 29-6A-2(d).

4. Respondent's failure to implement a pay differential which was adopted by a separate state agency is not a grievable event and did not result in discrimination to Grievants.

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. 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 7, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

According to information provided by the grievants in this matter, the pay increase was given to the positions of Transportation Worker 1, 2, and 3, Transportation Supervisor 1 and 2, and Transportation Crew Chief in Berkeley, Morgan and Jefferson Counties.

Footnote: 2

W. Va. Code § 29-6A-2(d).