HOPE SMITH,

Grievant,

v. **DOCKET NO. 05-HHR-218**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

BUREAU FOR CHILDREN AND FAMILIES and

DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant Hope Smith filed this grievance against her employer, the Department of Health and Human Resources (DHHR), on April 18, 2005, stating,

> According to Field Operations Management Team (FOMT) Minutes from the March 16, 2005, meeting, Social Service Coordinators would have a change in pay grade and an [sic] 10% pay increase. Email from DHHR Secretary Walker dated March 22, 2005, and sent to all DHHR employees states that Social Service Coordinators would go from a pay grade 16 to pay grade 18. I did not receive the promised pay increase.

Her stated relief sought is “Salary adjustment of at least 10% as stated in the attached FOMT minutes dated March 16, 2005.”

The Division of Personnel (DOP) was joined as a party at level four. Although there was no hearing at level three, the parties agreed to submit this matter based on the record below, with stipulated facts. (See footnote 1) Grievant represented herself, and Respondent DHHR was represented by Landon Brown, Senior Assistant Attorney General. Respondent DOP wasrepresented by Lowell D. Basford, Assistant Director for Classification and Compensation. The matter became mature for decision on July 29, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Since Ms. Smith did not file proposed findings or any other type of brief, her entire argument must be surmised from her statement of grievance, which asserts that a discussion among Field Operations Team management, together with a proposal made by DHHR Secretary Walker,

somehow amounted to an enforceable promise that she would get a 10% pay increase. Respondent DHHR apparently contends that it followed applicable DOP policy and procedure, and DOP's position is evidently that the Personnel Board never authorized a raise, so none could be given.

Included in the record submitted to level four are the following exhibits, which do not contradict the stipulated facts: (See footnote 3)

Exhibit E1

Minutes of the State Personnel Board meeting held March 17, 2005.

Exhibit E2

Grievant's Personnel Service Record.

Exhibit E3

DOP Schedule of Salary Grades, Effective 7/1/02.

Exhibit G1
Minutes of the Field Operations Management Team meeting held March 16, 2005.

Exhibit R1
Memorandum dated March 9, 2005, from Martha Yeager Walker to Willard M. Farley re Child Protective Services.

Exhibit R2
Letter dated March 21, 2005, from Mr. Farley to Ms. Walker.

Exhibit R3

Email dated March 22, 2005, from Ms. Walker to all DHHR employees.

The following material facts are recited as stipulated to by the parties:

Findings of Fact

1. Grievant is a Social Service Coordinator for DHHR.

2. On March 9, 2005, DHHR Secretary Martha Yeager Walker sent a memorandum to Mr. Willard M. Farley, Acting Director for the DOP. This memorandum requested Mr. Farley approve and recommend to the State Personnel Board several proposals to address manpower needs in child protective services. One item included in this memorandum was a proposal to "Reassign the classification of social service coordinator from pay grade 16 to pay grade 18 with affected employees to receive a minimum salary increase of 20%."

3. On March 16, 2005, the Field Operations Management team met to discuss several matters, one of which was the creation of a CPS Crisis Plan. One of th key points discussed regarding this Crisis Plan included a proposal that "Coordinators pay grade will change and they will receive a 10% increase."

4. On March 17, 2005, the State Personnel Board met and considered a number of different proposals. At this meeting the Board approved several changes within DHHR, including, "(3) reassign Social Services Coordinator from pay grade 16 ($29,160- 53,952) to pay grade 18 ($33,396 - 61,788)" and "(4) . . . the salaries of incumbents classified as Social Services Coordinator that are below the minimum of pay grade 18 areraised to the minimum and those that are within the range of pay grade 18 remain the same."

5. On March 21, 2005, Mr. Farley sent a letter to Secretary Walker, informing her of the Board's decisions. In relevant part, this letter stated, "At its meeting . . . the State Personnel Board approved your proposal, as modified by staff, for the following actions . . . (3) reassign Social Services Coordinator from pay grade 16 ($29,160-53,952) to pay grade 18 ($33,396 - 61,788)."

6. On March 22, 2005, Secretary Walker sent a department-wide email to all DHHR employees, informing them of the Board's actions with respect to the changes made within the Child Protective Services Program. Included in this email was the Board's decision to reassign Social Service Coordinator from pay grade 16 to pay grade 18.

7. Prior to these events, Grievant was assigned to pay grade 16. Her salary was $2,815 per month. (See footnote 4) This salary is above the minimum for pay grade 18.

8. Following these events, Grievant was reassigned to pay grade 18. As the Board did not authorize any pay adjustment for Grievant's classification, other than a reassigning of pay grades, no change was made to Grievant's salary following this reassignment.

Discussion

Grievant must prove all of her grievable claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that it is more likely than not that there has been a violation, misapplicationor misinterpretation of the statutes, policies, rules, regulations or written agreements under which she works. (See footnote 5) In this case, Grievant's evidence is insufficient to establish that she was ever entitled to the pay increase she seeks. She has cited no law, rule, or policy that she claims has been violated. Even if one could conclude that a discussion about a proposal amounted to a promise, she cannot show that whoever made that promise had the authority to do so, or that it was in any other way binding.

The DOP maintains a classification plan and assigns pay scales to the classifications. "There is no question [DOP] has the authority to establish pay grades within a pay plan." (See footnote 6) The Personnel Board has authority and responsibility to establish and revise a pay plan for all positions within the classified service. (See footnote 7) The Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. The rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. (See footnote 8)

Grievant made no argument and provided no evidence that the Personnel Board's revision of DHHR's proposal was improper. DHHR's proposal as presented to the State Personnel Board was essentially a “wish list,” and the Board did not grant all DHHR's wishes. What it did do was increase Ms. Smith's potential salary, but because Ms. Smithwas already earning a salary within the new pay range, the proposal as modified and approved did not allow for a salary increase. Because the Personnel Board did not approve a pay raise, DHHR was without authority to grant one. Grievant does not dispute this, and that fact takes the situation out of the purview of the grievance process. 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. (See footnote 9)

The following conclusions of law support this discussion:

Conclusions of Law

1. Grievant must prove all of her grievable claims by a preponderance of the evidence, which

means she must provide enough evidence for the undersigned Administrative Law Judge to decide that it is more likely than not that there has been a violation, misapplication or misinterpretation of the statutes, policies, rules, regulations or written agreements under which the grievant works; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with the grievant's effective job performance or the health and safety. 156 C.S.R. 1 § 4.21; W. Va. Code § 29-6A-2(i). *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.* 2. "'There is no question [DOP] has the authority to establish pay grades within a pay plan.' *Stephenson v. W. Va. Bureau of Employment Programs/Div. of Personnel*, Docket No. 92-DOP-447 (Aug. 12, 1993)." *Tyler, et al. v. Dep't of Admin./Public Employees Ins. Agency and Div. of Personnel*, Docket No. 00-DOA-291 (Aug. 8, 2001). The Personnel Board has authority and responsibility to establish and revise a pay plan for all positions within the classified service. W. Va. Code § 29-6-10(2). The Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner.

3. The rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Moore v. W. Va. Dep't of Health and Human Res.*, Docket No. 94- HHR-126 (Aug. 26, 1994). *See*, *Callaghan v. W. Va. Civil Serv. Comm'n*, 166 W. Va. 117, 273 S.E.2d 72 (1980).

4. Any matter in which authority to act is not vested with the state department, board, commission or agency utilizing the services of the grievant shall not be the subject of any grievance. W. Va. Code §§ 29-6A-2(g) and (i).

5. Grievant has not met her burden of proving she should have received a pay increase when her pay grade was increased. She also has not stated a grievable claim that her employer had the authority to grant her the increase she seeks.

For the foregoing reasons, this grievance is hereby **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 grievanceoccurred, and such appeal must be filed within thirty 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.

August 5, 2005

_____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

At a telephone conference held July 22, 2005, the parties agreed to adopt the facts as set out in the level three decision verbatim.

Footnote: 2

None of the parties submitted proposed findings.

Footnote: 3

Although the record was held open so that DOP could submit a transcript of the State Personnel Board meeting discussed in the findings of fact, this additional evidence was never received. Accordingly, no new findings of fact have been made to supplement the stipulated facts.

Footnote: 4

$33,780 per year.

Footnote: 5

W. Va. Code § 29-6A-2; 156 C.S.R. 1 § 4.21.

Footnote: 6

Tyler, et al. v. Dep't of Admin./Pub. Employees Ins. Agency and Div. of Personnel, Docket No. 00-DOA-291 (Aug. 8, 2001).

Footnote: 7

W. Va. Code § 29-6-10(2).

Footnote: 8

Moore v. W. Va. Dep't of Health and Human Res., Docket No. 94-HHR-126 (Aug. 26, 1994).

Footnote: 9

W. Va. Code §§ 29-6A-2(g) and (i).