BEVERLY LUCAS, et al.,

Grievants,

v. **Docket No. 05-HHR-383**

DEPARTMENT OF HEALTH & HUMAN
RESOURCES/BUREAU FOR CHILDREN
AND FAMILIES, and DIVISION OF PERSONNEL,

Respondents.

DECISION

On October 12, 2005, this grievance was appealed to level four by Grievants, who are employed by the Bureau for Children and Families ("BCF") in Berkeley, Jefferson, and Morgan Counties. Subsequently, the parties were allowed to submit written arguments regarding whether or not a claim had been stated upon which relief could be granted. These submissions were received by December 5, 2005. (See footnote 1)

In support of the conclusion that this matter must be dismissed for failure to state a claim upon which relief can be granted, the following pertinent facts are undisputed:

Findings of Fact

1. Grievants are employed by the Department of Health & Human Resources ("DHHR") in the BCF district office which comprises Berkeley, Jefferson and MorganCounties. These counties are located in the so-called "Eastern Panhandle" area of West Virginia.

2. On July 1, 2005, the West Virginia Division of Highways ("DOH") granted a 15% pay increase to employees in a specified group of job classifications who were working in the Eastern Panhandle area. This "locality" increase was granted by DOH because of the higher cost of living in the Eastern Panhandle (due to its proximity to the metropolitan areas surrounding Washington, D.C., and Baltimore, Maryland), and competition from private employers who provide better salaries and

benefits. This had caused DOH to suffer recruitment and retention issues in certain worker classifications located in the area.

3. Grievants are not employed by DOH.

4. DHHR has not chosen to grant a similar locality pay raise to its employees in the Eastern Panhandle.

5. Grievants' amended grievance statement at level four states:

> DHHR has discriminated and continues to discriminate against its employees in Berkeley, Jefferson and Morgan counties by failing to advocate/request pay differential "locality pay" for workers in the Eastern Panhandle of West Virginia despite knowledge that the differential is merited and has been approved for the same location by DOP for DOH employees.

Discussion

Pursuant to the Procedural Rules of the West Virginia Education & State Employees Grievance Board, 156 C.S.R. 1 § 4.12 (2004), "A grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." Unfortunately, this Grievance Board has just recently ruled upon the exact same issue presented here,concluding that a locality pay increase granted to employees of a separate agency is not a grievable issue. See Brining v. Div. of Corrections, Docket No. 05-CORR-284 (Dec. 7, 2005). The following language from that decision is dispositive here:

> 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. 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 a separate 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).

Moreover, as further noted in Brining, supra, when the Grievance Board actually did order a state

agency to adopt a specific personnel policy, that decision was reversed by the Supreme Court of Appeals, which held that “[t]he grievance board simply does not have the authority to second guess a state employer's employment policy.” Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997).

Accordingly, Grievants have failed to state a claim upon which relief can be granted, and this matter must be dismissed from the Grievance Board's docket.

Conclusions of Law

1. “A grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailableto the grievant is requested.” Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.12 (2004).

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. “The grievance board simply does not have the authority to second guess a state employer's employment policy.” Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997).

5. 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. Brining v. Div. of Corrections, Docket No. 05-CORR-284 (Dec. 7, 2005).

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 suchappeal 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: January 9, 2006

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants were represented at level four by Grievant Beverly Lucas, and Respondent Health and Human Resources was represented by counsel, B. Allen Campbell.