THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

DAMON IAROSSI,

Grievant,

v. **Docket No. 07-HHR-047**

Janis I. Reynolds

Senior Administrative Law Judge

DEPARTMENT OF HEALTH

AND HUMAN RESOURCES,

Respondent.

D E C I S I O N

Grievant, Damon Iarossi, an Accountant/Auditor 3, filed two grievances against his employer, the Department of Health and Human Resources ("HHR"), on January 24, 2007. His first Statement of Grievance reads:

> In September 2004 I began work on a special project on behalf of the Office of Accountability and Management Reporting and was notified that I would be recommended for a salary increase. After numerous events prolonged the submission and acceptance of the recommendation I was notified that due to a governor[']s directive that the salary increase was denied. I feel that the submission was initiated in ample time to have been processed prior to the directive and should have been approved.

Grievant's Relief Sought in the first grievance is, "I seek for my salary to

be adjusted to the requested amount and back pay to the date of the submission of the pilot strategic compensation policy."

Grievant's second Statement of Grievance reads, "I believe that DHHR is practicing discriminatory hiring practices by denying current employees the ability to receive discretionary salary increases." The relief sought in the second grievance was, "I seek for DHHR to cease its current practice of denying discretionary raises for promotions." These grievances were denied at Levels I and II, and consolidated and dismissed at Level III as the Grievance Evaluator found he was without authority to overrule the Governor's Order. Grievant appealed to Level IV on February 7, 2007. These grievances were consolidated, and a Level IV hearing was held on April 10, 2007, in the Grievance Board's Charleston office. Grievant represented himself, and HHR was represented by B. Allen Campbell, Senior Assistant Attorney General. This case became mature for decision on the hearing date, as the parties elected not to file proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserts the failure to grant him a discretionary pay increase was an act of discrimination. He also avers he should receive the increase because the agency was slow to process the increase, and if HHR had processed the request more quickly, he would have received the increase before the Governor's memo was issued.

Respondent argues the pay increase Grievant was seeking was discretionary, and all discretionary increases are currently prohibited by the Governor. Respondent also asserts there has been no discrimination, and there is no requirement to process a request under the Pilot Strategic

Compensation Policy within a certain time frame.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by HHR as an Accountant/Auditor 3 in the Office of Accountability and Management Reporting/Division of Compliance and Monitoring. 2. In 2004, the Division of Personnel developed and put into place the Pilot Strategic Compensation Policy, in part, to establish variable and flexible compensation practices that would reward exemplary employees, encourage employee growth and development, and reduce the misuse of reallocations and promotions.

3. With the approval of the State Personnel Board, the Pilot Strategic Compensation Policy was incorporated into the Pay Plan Implementation Policy. This addition became effective on July 1, 2005. The purpose of this plan was "[t]o establish a uniform policy for the implementation of the pay regulations and the salary schedule for the classified staff." Compensation requests must be approved by the agency before they can be sent to the Division of Personnel for review and/or approval.

4. The Pay Plan Implementation Policy allows for a variety of salary adjustments.

5. On September 28, 2004, Grievant's Director, Leonard Kelley, completed the necessary forms for Grievant and another employee, Craig Richards. The request was for a "Project/Team Incentive" salary increase for taking on an additional duty assignment that would last 18 months. Mr. Kelley recommended the maximum increase of 10% for each employee. Grt. No. 1 at Level IV.

6. By e-mail dated March 29, 2005, from Brian Cassis (See footnote 1) , Mr. Kelley was informed Grievant's salary increase could not be processed under the "Project/Team Incentive" portion of the Pilot Strategic Compensation Policy because it was too late in the projectstage to obtain Division of Personnel's approval. The new plan was to submit a proposal for an in-range adjustment for "Additional duties/responsibilities."

7. During April of 2005, several memos were exchanged between Mr. Cassis, Mr. Kelley, and others to fine tune the paperwork for submission.

8. On April 29, 2005, Governor Manchin's Chief of Staff, Larry Puccio, issued a memorandum ("Governor's memo") informing all Cabinet Secretaries they were not to grant any discretionary merit or salary increases, but non-discretionary increases were to be granted pursuant to the Division of Personnel's Rules.

9. On May 5, 2005, Michael McCabe, Director, Office of Personnel Services, sent a memo to all Administrative Staff explaining the Governor's memo. He noted discretionary increases must be approved by the Governor's Office, and he had been informed that approval for such increases "would occur only under the most extenuating circumstances. . . ." Grt. No. 1 at Level IV.

10. On May 19, 2005, the Request for Approval for Grievant's salary adjustment for "Additional duties/responsibilities" was submitted for approval to the appropriate administrative staff within HHR. This request was approved by HHR on May 25, 2005, and the Director of the Division of Personnel on June 17, 2005.

11. When the WV 11 requesting the increase went through the system, it was rejected by the Governor's Office. Grievant was informed on August 8, 2005, that his WV 11 was being held until HHR received further guidance and

notice. His WV 11 was sent through several times and was rejected each time. Grt. No. 1 at Level IV.

12. On January 2, 2007, Grievant wrote his then supervisor, Craig Richards, asking about the status of his salary increase. 13. Mr. Richards requested information about Grievant's inquiry, and on January 11, 2007, Jeanne Roberts in HHR's Division of Personnel Services, responded noting transactions were entered to give Grievant a 10% increase, but "[p]er the May 5, 2005[,] memo, this Office was unable to secure approval and the transactions were disapproved." Grt. No. 1 at Level IV.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 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 and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the grievant has not met his or her burden. Id.

Grievant has raised several issues, and they will be discussed separately.

I. Delay in applying for the increase under the Pilot Strategic Compensation Policy

Grievant asserts if the process had been started sooner, there would have

been ample time for the increase to be granted. It is noted Grievant's supervisor started the process in September 2004, when Grievant started the project. He continued to try to obtain Grievant an increase when the first avenue was not available, and worked at fine tuning the language of the request to assure Grievant would have the best chance atobtaining the increase. During this time, the Governor's memo was issued, and even though the application was still completed and approved, it did not meet the Governor's memo's guidelines. The undersigned Administrative Law Judge does not find any delay in this set of facts, and Grievant did not cite to any rule, regulation, statute, or policy that required the application to be completed within in a set time frame. Accordingly, no violation has been established.

II. Discrimination

Grievant has also asserted he has been discriminated against. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as, "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." Administrative notice is taken that the West Virginia Supreme Court of Appeals revised the legal test for discrimination/favoritism claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing:

(See footnote 2)

(a) that he or she has been treated differently from one or more similarly- situated employee(s);

(b) that the different treatment is not related to the actual job

responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant has not met his burden of proof. While it appears HHR and the Division of Personnel processed some salary increases under the Pilot Strategic Compensation Policy, there was no indication these increases did not follow the guidelines in place at the time they occurred. After the Governor's memo was issued there was some confusion whether increases under the Pilot Strategic Compensation Policy were to be included. Later, agencies were informed no discretionary increases were to be given even if the Pilot Strategic Compensation Policy guidelines were met. See Allen v. Div. of Highways, Docket No. 06-DOH-224 (Jan. 31, 2007). Grievant presented no evidence that other similarly situated employees received a discretionary increase when he did not.

Additionally, Grievant's assertion that HHR is "practicing discriminatory hiring practices by denying current employees the ability to receive discretionary salary increases" is without merit. HHR, as a state agency, is required to follow the legal orders of the Governor, and the following of these orders does not constitute discrimination. (See footnote 3)

Additionally, the cases cited by Grievant are not on point. In Haller v. Reg. Jail Auth, Docket No. 06-RJA-027 (Apr. 14, 2006) the employee received an Employee of the Year award and was to receive a 5% merit increase, as had all other previous winners. Theadministrative law judge found to deny this increase would result in unlawful discrimination. Towner v. Div. of Highways, Docket No. 06-DOH-095D (July 19, 2006), was a default remedy case, which

had different burden of proof, and carried the presumption that the grievant had won the grievance on the merits. The administrative law judge held that to deny a merit increase with this set of facts would result in discrimination, as other similarly situated employees had received the increase.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 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 and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the grievant has not met his or her burden. Id.

2. The plain language of the Pilot Strategic Compensation Policy states the salary adjustments of this plan are discretionary in nature. As such, they are clearly prohibited by the Governor's memo. 3. Grievant did not demonstrate HHR violated any statute, policy, rule, or regulation in relation to the processing and treatment of Grievant's request for an increase.

4. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as, "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."

5. In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004), the West Virginia Supreme Court of Appeals revised the legal test for discrimination claims raised under the grievance procedure statutes. A grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly- situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

6. Grievant did not meet his burden of proof and established he was treated differently than any other similarly situated employees.

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 StateEmployees 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.

Janis I. Reynolds

Senior Administrative Law Judge

Dated: May 25, 2007

Footnote: 1

This individual was not identified by the parties.

Footnote: 2

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Footnote: 3

The undersigned Administrative Law Judge is unclear how Grievant's argument at Level IV about hiring practices and promotions are related to discretionary increases under the Pilot Strategic Compensation Policy. What is clear is that those groups of employees are not similarly situated to Grievant.