THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

CHARLENE LITTERAL,

Grievant,

v. **Docket No. 05-HHR-195**

Janis I. Reynolds

Senior Administrative Law Judge

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Charlene Litteral, filed this grievance against her employer, the Department of Health and Human Resources ("HHR"), on May 25, 2005, because she was not given the option of taking a small decrease in salary when she was demoted, thus she was ineligible for a pay increase when she was promoted 18 months later. Her Relief Sought was a retroactive pay increase.

This grievance was waived at Levels I and II and denied at Level III. Grievant appealed to Level IV on June 13, 2005, and a Level IV hearing was held on August 1, 2006, in the Grievance Board's Charleston office. (See footnote 1) Grievant was represented by Dwight Staples, Esq., HHR was represented by Jennifer Akers, Assistant Attorney General, and Division of Personnel was represented by Karen Thornton, Assistant Attorney General. This case became mature for decision on October 16, 2006, after receipt of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserts she has been discriminated against because other employees were allowed to take a minuscule decrease when they were demoted; thus, making them eligible for a pay increase if they were promoted within 24 months.

Respondents argue Division of Personnel Rules were followed when Grievant was demoted, the decision whether to decrease compensation on demotion is discretionary, Grievant was not entitled to a pay decrease, and during the time frame Grievant was demoted, all employees were treated the same.

Respondent Division of Personnel also maintains the type of activity engaged in by the Human Services Section of the Bureau for Child Support Enforcement ("BCSE") was inappropriate gaming of the system, and not in keeping with the spirit and intent of Division of Personnel's Rules.

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

Findings of Fact

1. Grievant has been employed by BCSE since April of 1999.

2. In December 2003, Grievant asked to be voluntarily demoted from a Child Support Specialist 2 to a Child Support Technician 1. She went from a Pay Grade 12 to a Pay Grade 8. By letter dated December 10, 2003, Grievant was notified of her demotion, and that her salary would stay the same. Employer's No. 7 at Level III.

3. In deciding Grievant did not have to take a salary decrease, even though she had been demoted four pay grades, Susan Perry, the Commissioner for BCSE, notedGrievant's salary was within the pay grade of the new classification, and she considered Grievant's seniority and the salary of the other employees in the new unit.

4. During this time period Susan Smith was the Personnel Coordinator for BCSE, and four other employees who were demoted also did not have a decrease in salary.

5. Ms. Smith retired and in May 2005, Reta Hughes was hired as the Personnel Coordinator for BCSE.

6. From then on, whenever an employee was demoted, Ms. Hughes decreased the salary of the demoted employee by $12.00 a year so they would be eligible for a pay increase if they were

promoted within 24 months of their demotion.

7. Although Ms. Hughes indicated she received guidance from HHR's Personnel Director about this action, BCSE was the only division statewide and the only HHR section that engaged in this type of activity. No other section of HHR made this type of diminutive decrease when employees were demoted.

8. None of the employees offered this nominal decrease were demoted four pay grades, and all were requested to take the demotion because of need and difficulty filling the positions.

9. Commissioner Perry was aware of and approved these nominal decreases.

10. Division of Personnel approved these demotions.

11. Grievant applied for and received a promotion to a Pay Grade 11 in May of 2005. Because this promotion was within the 24-month period after her demotion, she did not receive a pay increase. She did receive a 5% pay increase when she was laterpromoted to a Pay Grade 12, her original pay grade in December 2004 before the demotion.

12. James Wells, Manager, Employee Relations Section, became aware of these actions by BCSE and found they were a form of "gaming the system" and did not comport with the spirit and intent of Division of Personnel's Rules. (See footnote 2) He met with various groups and discussed the situation. It was decided to allow the agencies to take these small decreases, but if the employee was promoted within the next 24 months, the increase the employee would receive would be the amount that the employee had lost. For example, if an employee salary was decreased by $12.00 dollars, and they were promoted within the next 24 months, the increase they could receive would be $12.00 dollars.

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 (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).

I. Violation of Division of Personnel Rules

Grievant asserted at Level III that the Division of Personnel's Rules were not properly followed.

The Division of Personnel's Rules governing this issue are as follows at:

143 C.S.R. 1 § 5.6 Pay on Demotion

> (a) The appointing authority has the discretion to reduce or not reduce the pay rate of any employee who is demoted if the employee's pay rate is within the pay range of the job class to which the employee is demoted.
>
> (b) The appointing authority shall reduce the pay rate of an employee who is demoted if the employee's current pay rate is above the maximum pay rate for the job class to which the employee is demoted. The reduction may be to any pay rate within the pay range of the job class to which the employee is demoted as long as the pay rate does not exceed the maximum pay rate of the pay range. If the demotion is to a formerly held job class and the employee's current pay rate is above the maximum pay rate for the job class, the reduction may be to any pay rate within the pay range of the job class to which the employee is demoted or to his or her last pay rate in the formerly held job class, even if the last pay rate is above the maximum pay rate for the job class.
>
> 143 C.S.R. 1 § 5.5 Pay on Promotion
>
> When an employee is promoted, the employee's pay shall be adjusted as follows:
>
> (a) Minimum Increase - An employee whose salary is at the minimum rate for the pay grade of the current class shall receive an increase to the minimum rate of the pay grade for the job class to which the employee is being promoted. An employee whose salary is within the range of the pay grade for the current class shall receive an increase of one pay increment, as established by the State Personnel Board, per pay grade advanced to a maximum of 3 pay grades, or an increase to the minimum rate of the pay grade for the job class to which the employee is being promoted, whichever is greater. In no case shall an employee receive an increase which causesthe employee's pay to exceed the maximum for the pay grade to which he or she is being promoted.
>
> (b) Exception[s]
>
> . . .
>
> 2. If an employee has been demoted or reallocated to a class at a lower pay grade

> with no reduction in pay and is promoted or reallocated within the next twenty-four months within the same agency, no consideration shall be given to the pay grade(s) reduced in the demotion or reallocation when calculating pay on promotion as provided in subdivisions 5.5(a) and (b) of this rule.

A review of the rules clearly indicates HHR violated no rules when Grievant was demoted. HHR had the option of decreasing Grievant's salary, and this action was recommended by Ms. Smith because Grievant was voluntarily demoted four pay grades from a Pay Grade 12 to Pay Grade 8. Commissioner Perry decided not to accept this recommendation, and Grievant's salary remained at the Pay Grade 12 level. There was absolutely no requirement to offer Grievant a nominal decrease, and indeed, this type of game playing does not follow the intent or spirit of the Division of Personnel's Rules.

When Grievant was later promoted within the 24-month period, the rules were followed, and she was not allowed a three pay grade increase (15%) when she went from Pay Grade 8 to Pay Grade 11. Allowing Grievant this 15% pay increase would be similar to placing her in Pay Grade 15 with the assumption of less duties and responsibilities than she had when she was in Pay Grade 12.

II. Discrimination

Grievant asserts she has been discriminated against because other employees were offered the nominal increase, and she was not. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as, "any differences in thetreatment 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 recently 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 3)

> (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).

There are two reasons why there has been no discrimination in this case. First, Grievant was not similarly situated to the employees to whom she compares herself. None of the other employees were demoted four pay grades without a decrease, and the position she was demoted into, while it needed to be filled, this need was not as great as the employees offered the nominal decrease. Additionally, the actions by HHR in this set of events were incorrect and not in keeping with the Division of Personnel's Rules. This error cannot be perpetuated by allowing Grievant to "game the system." To grant Grievant this nominal increase would, in essence, be an ultra vires act, and this Grievance Board has discussed the issue of ultra vires acts at some length. "Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts." Guthrie v. Dep't of Health and Human Serv., Docket No. 95- HHR-297 (Jan. 31, 1996). See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991); Franz v. Dep't of Health and Human Res., Docket No. 99- HHR-228 (Nov. 30, 1998). Here, HHR allowed gaming of the system to circumvent the Division of Personnel Rules, and this act "cannot be used to force an agency to repeat such violative acts." Guthrie, supra. See Crosston v. Div. of Highways, Docket No. 96-DOH-503 (Oct. 31, 1997).

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 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 (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).

2. All applicable Division of Personnel Rules were followed with Grievant's demotion and

subsequent promotion.

3. HHR's action in allowing employees to accept nominal decreases in order to circumvent 143 C.S.R. 1 § 5.6 were incorrect and not in keeping with the intent and spirit of these Rules.

4. W. Va. Code § 29-6A-2(d) defines discrimination 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 has failed to establish she was similarly situated employees to other employees. 7. "Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts." Guthrie v. Dep't of Health and Human Serv., Docket No. 95- HHR-297 (Jan. 31, 1996). See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991); Franz v. Dep't of Health and Human Res., Docket No. 99- HHR-228 (Nov. 30, 1998).

8. The nominal decreases given to other employees upon demotion were ultra vires acts and "cannot be used to force an agency to repeat such violative acts." Guthrie, supra.

Accordingly, this grievance is **DENIED**.

Any party 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.

Janis I. Reynolds

Senior Administrative Law Judge

Date: January 31, 2007

Footnote: 1

This grievance was placed in abeyance at Grievant's attorney request and without objection on the part of Respondents.

Footnote: 2

Mr. Wells noted the Rules governing demotion were put in place when a "creative personnel officer" demoted himself one day and then promoted himself the next day with a salary increase.

Footnote: 3

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).