WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JAMES KELLY,

Grievant,

v. **Docket No. 07-HHR-109**

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/HOPEMONT

HOSPITAL and DIVISION OF PERSONNEL,

Respondents.

DECISION

James Kelly ("Grievant") initiated this grievance on March 6, 2007, alleging that coworkers with the same experience, duties and responsibilities as Grievant are paid at least 20% more than he is, and he requests that he be granted a 20% pay increase. After denials at the lower levels, Grievant appealed to the Grievance Board on March 23, 2007. Due to legislative changes which took effect in 2007, affecting the Grievance Board and the grievance process, a hearing was not scheduled for some time. (See footnote 1) After several continuances granted for good cause shown, a hearing was convened before the undersigned in Westover, West Virginia, on June 11, 2008. Grievant was represented inthis matter by AFSCME (See footnote 2) and R. Matthew Oliver, Esquire, of the firm Vital & Vital, L.C.; Respondent Department of Health & Human Resources was represented by B. Allen Campbell, Senior Assistant Attorney General; and the Division of Personnel was represented by Karen O. Thornton, Assistant Attorney General.

A brief procedural history would appear to be appropriate in this case. At the hearing on June 11, Grievant's counsel attempted to introduce into evidence a voluminous document which purported to represent the names and salaries of numerous state employees who had allegedly received

discretionary pay increases in contravention of the Governor's office's moratorium on such raises, issued on April 29, 2005. However, upon inspection, the undersigned concluded that the document was not what counsel represented it to be, in that it included the undersigned's name _ along with those of other upgraded Grievance Board employees _ with information reflecting a non-discretionary pay increase that had resulted from a temporary position upgrade. After arguing that the law firm of Vital & Vital had only been retained one day prior to the hearing (despite Mr. Oliver's representation of Grievant since at least December of 2007 (See footnote 3)), counsel requested additional time to investigate whether or not any of the pay increases reflected in the document could have been the result of discretionary or merit pay raises. Grievant was granted an additional thirty days after the hearing to conduct such investigation. After conductingdiscovery and providing additional information, (See footnote 4) the parties submitted fact/law proposals on September 8, 2008.

Synopsis

Grievant alleges that he receives a lower salary than most other employees in his classification at Hopemont Hospital, and some make over 20% more than he does. Grievant's salary is partially the result of a break in his employment that occurred because of a layoff, and his return to Hopemont in a different classification at a much lower salary. Other employees in his classification have had continuous, uninterrupted employment, accounting for their higher salaries.

Grievant argues that he should receive a salary increase pursuant to the “internal equity” provision of the Division of Personnel's Pay Plan Implementation Policy. However, such raises are requested at the employer's discretion, and they are not required. Grievant also contends that the Governor's Office moratorium on discretionary pay increases has been applied unfairly, but no party to the instant grievance has been involved in the conduct alleged. This grievance is denied.

Findings of Fact

1. Grievant is currently employed at Hopemont Hospital as a Recreation Specialist, a classification assigned to Pay Grade 9, with a monthly salary range of $1510 to $2795.

2. Grievant began employment with the Department of Health and Human Resources (“DHHR”) in 1981 as a Maintenance Worker, and he was promoted to Carpenter approximately one

year later. He was laid off on May 7, 1997, and temporarily left the state.

3. Grievant was rehired at Hopemont Hospital on July 1, 1998, as a Food Service Worker. Because he had left state employment, Grievant began at a new employee's salary and was paid $893 per month. When he was laid off from his Carpenter position, he was earning $1422 per month. The Carpenter classification is in Pay Grade 9, but Food Service Worker is only a Pay Grade 3.

4. Grievant received several pay increases while classified as a Food Service Worker until he was reallocated to a Health Service Trainee position on April 1, 2000, receiving a salary of $1256 per month.

5. Grievant applied for and was placed in his current position of Recreation Specialist on June 16, 2001, at a salary of $1563 per month. He has received one merit increase since that time, along with four across-the-board increases, and his current salary is $1917 per month.

6. There are eight Recreation Specialists at Hopemont Hospital who are paid more than Grievant, and there is one who makes less. Three of these individuals have been employed continuously by DHHR since the 1970s, and another three have beencontinuously employed since the 1980s. All of them have had uninterrupted employment with no breaks in service or layoffs.

7. All the Recreation Specialists are paid within the salary range for Pay Grade 9, and the highest paid person makes $2588 per month; this individual, Paul Himelrick, has been employed by Respondent since 1979.

8. Two Recreation Specialists make 20% more than Grievant, including Mr. Himelrick at $2588 per month and Shellie Rodeheaver at $2395 per month. Ms. Rodeheaver has been employed since 1989.

9. In a memorandum to all West Virginia Cabinet Secretaries dated April 29, 2005, the Governor's Chief of Staff, Larry Puccio, advised that “merit or salary advancements” should not be granted until further notice, but nondiscretionary increases should continue, which would include pay increases associated with promotion, pay differentials, reclassification, reallocation, increment increases, and temporary upgrades.

10. The Division of Personnel's (“DOP”) Pay Plan Implementation Policy provides for pay differentials to address “Internal Equity” issues, as follows:

> In situations in which one or more employees are paid at least 20% less than other employees in an agency-defined organizational unit and the same job class who have comparable training and experience, duties and responsibilities, performance level, and years of State/classified service, the appointing authority *may* recommend an in-

> range salary adjustment of up to 10% of current salary to each employee in the organizational unit whose salary is at least 20% less than other employees in the unit. Internal equity increases shall be limited to once every five years for the same job class in the same organizational unit.

(Emphasis added.) 11. On June 1, 2005, the State Fire Marshal requested that the Governor's Office approve a 5% pay increase for two employees who were to complete their probationary period of employment, which was approved and made retroactive to June 1, 2005.

12. Pursuant to the request of Department of Revenue Cabinet Secretary John Musgrave, the Governor's Office approved a 4.07% salary increase for an Alcohol and Beverage Control Enforcement Agent who was taking on additional duties, effective April 14, 2006.

13. Effective August 1, 2006, two employees of the Tax Division received salary increases as approved by the Governor's Office, with no further documentation or explanation.

14. Effective April 1, 2007, an employee of the Insurance Commission was approved by the Governor's Office for a salary increase due to the reorganization of the Workers' Compensation Commission and absorption of some of its employees by the Insurance Commission.

15. The Bureau of Senior Services requested and received approval from the Governor's Office for a 5% salary increase for a nurse who assumed new duties, allowing the agency to avoid having to hire an additional employee, effective July 16, 2007.

16. Grievant is a valued employee of Hopemont Hospital, with excellent performance evaluations. If not for the Governor's prohibition on discretionary pay increases, his superiors would recommend that his pay be increased.

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for theundersigned Administrative Law Judge to decide that his claim is more likely valid than not. *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 his burden. *Id.*

Grievant contends that, pursuant to the provisions of the Pay Plan Implementation Policy, Respondents should correct the inequities in the salaries of Recreation Specialists at Hopemont

Hospital. As testified to by Ralph Raybeck, CEO at Hopemont, if not for the prohibition on discretionary increases, Grievant would certainly be in line for a merit raise. Grievant is a valued employee that the facility would like to keep, but they feel that their hands are tied by the Governor's Office. However, Mr. Raybeck also acknowledged that the salary disparity between Grievant and others in his classification was largely due to their continuous service in the system over the course of many years, and the fact that Grievant “started over” as a new employee after his layoff, unfortunately in a very low pay grade.

“The West Virginia Equal Pay Act, W. Va. Code 21-5B-1 [1965], does not apply to the State or any municipal corporation so long as a valid civil service system based on merit is in effect.” Syl. Pt. 2, *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va 239, 452 S.E.2d 42 (1994). "'[E]mployees who are performing the same tasks with the same responsibilities should be placed within the same job classification,' but a state employer is not required to pay these employees at the same rate. *Largent* at Syl. Pts. 2 & 3. The requirement is that all classified employees must be compensated within their pay grade. *See Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar.26, 1997); *Brutto v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-076 (July 24, 1996); *Salmons v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-435 (Feb. 28, 1995); *Tennant v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health & Human Res.*, Docket No. 91-H-177 (May 29, 1992). *See AFSCME v. Civil Serv. Comm'n,* 181 W. Va. 8, 380 S.E.2d 43 (1989).” *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006).

The State Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2). (See footnote 5) The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by [the] State 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./Div. of Personnel*, 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 (W. Va. 1980).

There is no dispute here that Grievant is compensated within the pay grade for his classification. It

is not discriminatory for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dept. of Health and Human Res.*, Docket No.02-HHR-366 (Sept. 18, 2003). Also, as recently noted in *Morgan v. Department of Health and Human Resources*, Docket No. 07-HHR-131 (June 5, 2008), even if an employee's situation fits within the circumstances discussed in the internal equity provision, it is within the agency's discretion whether or not to recommend such increases. (See footnote 6) An agency's decision not to recommend a discretionary pay increase is usually not considered to be grievable. *Lucas v. Dep't of Health and Human Res.*, Docket No. 07-HHR-141 (May 14, 2008). There is no legal obligation on Respondents' part to raise Grievant's salary, especially in light of the state-wide prohibition on discretionary pay increases.

As this Grievance Board has previously noted, "[u]nfortunate as it may be, the provisions of the Governor's office edict are clear, and discretionary salary increases are prohibited." *Saas v. Dep't of Transp.*, Docket No. 07-DOH-005 (July 25, 2007). Undoubtedly, one would be hard pressed to find a state employee who does not believe that the general prohibition on discretionary pay increases is unfair and/or unnecessary. Indeed, the evidence introduced in this case indicates that exceptions have been granted which have not always been explained. Nevertheless, none of the employees who received those increases were employed by DHHR, nor did DOP provide any independent approval of such increases unless ordered to do so by the Governor's Office. Theexecutive office is not a party to this grievance, and any actions taken by those individuals are not within the Grievance Board's jurisdiction in this case, nor would they obligate Respondents to grant a similar pay increase to Grievant. (See footnote 7)

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary case, Grievant must prove all of his claims by a preponderance of the evidence. *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).

2. "W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but that Code Section does not require these employees to be paid exactly the same. Syl. Pts. 3 and 4, *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 452 S. E.2d 42 (1994); *Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26,

1997)." *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006).

3. An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't of Health and Human Res.*, Docket No. 07-HHR- 141 (May 14, 2008). 4. Grievant is paid within the salary range applicable to his classification.

5. Respondents were not legally required to grant Grievant a discretionary pay increase.

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. *See* W. Va. Code § 29-6A-7 *(repealed*, *See footnote 1, supra*). Neither the West Virginia Public 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: November 14, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

American Federation of State, County and Municipal employees, AFL-CIO.

Footnote: 3

Mr. Oliver apparently had been employed by AFSCME as a representative, and left that position to become an employee of the Vital & Vital law firm, taking this case with him.

Footnote: 4

On June 27, 2008, the undersigned issued an Order as the result of Respondents' objections to unduly burdensome and overly broad post-hearing discovery requests from Grievant's counsel. This included requests for documentation regarding salary increases granted to hundreds of state employees, regardless of reason, along with such questions as "Explain the function of the Division of Personnel," among other requests which the undersigned determined went beyond the scope of the limited purpose of leaving the record open after the hearing.

Footnote: 5

Section 5.1 of [Personnel's] Rules notes the purpose and intent of the classification plan is to "[t]o attract qualified employees and retain them in the classified service" and the State Personnel Board "shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various agencies and on comparability to pay rates established in other public and private agencies and businesses."

Footnote: 6

As further noted in Morgan, supra, even this discretion has been removed from HHR and other state agencies, as set forth in a Memorandum from Michael F. McCabe, Director, Office of Personnel Services, to DHHR Administrative Staff, dated May 5, 2005, which states in paragraph one:

> *Larry Puccio, Chief of Staff, Office of the Governor, has directed that discretionary salary increases must be approved by the Governor's Office. He further indicated that approval for such increases would occur only under the most extenuating circumstances such as settlement of litigation.*

Footnote: 7

In his post-hearing argument, Grievant's counsel argues that, because the Governor's moratorium "has been applied unevenly, arbitrarily, and capriciously," Grievant's substantive due process rights have been violated. Counsel has not explained what he means by this allegation or provided any legal analysis of exactly how Grievant's constitutional rights were violated. In that the undersigned has already concluded that no party to this grievance was responsible for granting exceptions to the merit raise moratorium, this argument will not be addressed further.