THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

SHARON SOUZA, et al.,

Grievants,

v. Docket No. 2008-0813-CONS

DIVISION OF REHABILITATION

SERVICES,

Respondent.

D E C I S I O N

Grievants (See footnote 1) were employed by the Division of Rehabilitation Services ("DRS") at the Rehabilitation Center in various classifications. On July 16, 2007, Grievants filed this grievance over their reduction in force. The Statement of Grievance reads:

> **We feel we are entitled to the same compensation as was granted to the Workers' Compensation employees because we have become dislocated workers through no fault of our own. Our services and jobs have been privatized in the community through the Division of Rehabilitation Services.**

The Relief Sought states:

> **We want to be compensated in the same manner as Workers' Compensation employees: either freeze accrued sick leave at the balance that existed as of the 30th day of June 2007 and use this sick leave at time of retirement to purchase insurance through the Public Employees Insurance Agency or have accrued sick leave irrevocably surrendered in exchange for one hour pay for each hour of accrued sick leave. Also we want the same years of service plan [as Workers' Compensation employees]. If an employee has more that 10 years of service then that employee would receive 5 years of extended years of service _ if an employee has less than 10 years of service then that employee would receive 2.5 years of extended years of service.**

This grievance was filed to Level one on July 16, 2007, and a conference was held on July 30, 2007. The Level one decision was issued on August 9, 2007, and stated the agency did not

find the grievance to state a grievable event, and DRS was without authority to grant the relief sought. Grievants appealed to Level two on August 13, 2007. On December 27, 2007, the parties participated in mediation, but it was unsuccessful. Grievants appealed to Level three, and a Level three hearing was conducted in the Grievance Board's Charleston office on February 6, 2008, Grievants represented themselves, and DRS was represented by Warren Morford, Training and Employee Relations Coordinator. This matter became mature for decision on March 5, 2008, after the submission of the parties' proposals.

Synopsis

Grievants assert DRS is required to treat them in the same way Workers' Compensation employees were treated when the duties of that agency were privatized. Grievants believe they have been faithful employees and have been treated unfairly and discriminated against. They also believe DRS found positions for other employees that were reduced in force either within DRS or other state agencies, but not for them. Their relief sought, is not for employment, but for various actions to be taken with their sick leave and years of service. As to the years of service issue Grievants were unable to clearly explain what was relief they were actually seeking. Grievants did not allege a violation of any statute, policy, rule, or regulation.

Respondent asserts no grievable event occurred. DRS maintains it does not have the authority to grant the relief sought, as it requires actions by the Legislature, the Divisionof Personnel, and/or PEIA. Additionally, Respondent avers Grievants do not have the right to grieve, as they have been laid off. (See footnote 2)

As explained above, the relief requested by Grievants cannot be granted by the Grievance Board. Grievance DISMISSED.

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

Findings of Fact

1. Prior to the reduction in force, Grievants were employed by DRS at the Rehabilitation Center, a residential treatment facility for disabled individuals.

2. On June 30, 2007, the Rehabilitation Center was closed due to failure to find sufficient

funding. Many employees were laid-off, including Grievants. Some employees retired, some found positions in other sections of DRS, some found positions with other state agencies, and some, like most of the Grievants, are still unemployed.

3. Although not explained clearly, the parties agreed that when Workers' Compensation was reorganized and part of it privatized, the Legislature provided various benefits and options to the employees.

4. Pursuant to an option available only to employees hired prior to July 1, 1988, employees could use their accrued sick leave to purchase health insurance uponretirement. As long-term state employees, Grievants had planned to use their sick leave to purchase health insurance.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. *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 footnote 3) *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). The issues raised by the parties will be addressed one at a time.

Respondent asserts the issues raised by Grievants are not grievable events. W. Va. Code § 29-6A-2(g) defines employer as the "state department, board, commission or agency utilizing the services of the employee covered under this article," and at (e), defines employee as "any person hired for permanent employment, either full or part-time, by anydepartment, agency, commission or board of the state created by an act of the Legislature. . . ."

W. Va. Code § 29-6A-2(i) defines grievance as

> any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; 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 effective job performance or the health and safety of the employees.**
>
> **Any pension matter or other issue relating to public employees insurance in accordance with article sixteen [§ § 5-16-1 et seq.], chapter five of this code, retirement, or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article.**

(Emphasis added).

The relief Grievants seek cannot be granted. Their employer, DRS, cannot require the Public Employees Insurance Agency ("PEIA") to "freeze" Grievants' accrued sick leave to pay for health insurance upon retirement. Neither can it require PEIA to pay Grievants for their unused sick leave in lieu of purchasing this health insurance. The authority for these matters rests with PEIA. Additionally, many issues involving sick leave, are under the purview of the Division of Personnel. As stated above, the Grievance Board is without authority to resolve issues relating to PEIA and the Division of Personnel when they do not involve their own employees.

Next, Grievants want DRS to grant them "extended years of service." While Grievants were unable to explain what this phrase meant, it appears that this relief would require a change in the Division of Personnel's Rules, as well as action on the part of the Legislature. In *Neal v. Division of Rehabilitation Services*, Docket No. 03-RS-001 (November 1, 2006), DRS employees filed a grievance over the failure of the Legislature and the Division of Personnel to grant the same pay increase to rehabilitation counselors as had been granted to teachers at DRS. The Grievance Board held, "the relief Grievants seek is not available through the Grievance Procedure. The Grievance Board does not have the authority to order the Division of Personnel to deviate from its statutory mandate, nor to compel the legislature to enact legislation . . . for the benefit of Grievants." This same rationale applies to this grievance. DRS is without authority to grant this request.

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. *Brining v. Div. of Corr.,* Docket No. 05-CORR-284 (Dec. 7, 2005); W. Va. Code § 29-6A-2(i). *See Smith v. Dep't of Health and Human Res.*, Docket No. 05-HHR-218 (Aug. 5, 2005); *See Bossie v. Div. of Rehab. Serv.*, Docket No. 03-RS-141 (Sept. 23, 2003). While it is understandable that Grievants are upset that DRS did not ask the Legislature for the same provisions given to Workers' Compensation employees, there is no requirement for DRS to do so. No violation occurred by this decision not to act.

The Procedural Rules of the Grievance Board state, "[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." 156C.S.R. 1 § 6.11. The relief sought by Grievants is "wholly unavailable" as it outside the authority of either the Grievance Board or DRS to grant.

Additionally, Grievants allege they have been discriminated against. Discrimination is defined in W. Va. Code § 29-6A-2(d) 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." Grievants note the Legislature made special provisions for Workers' Compensation employees when that agency was privatized and believe that they should be given these same special provisions and considerations. Grievants also maintain DRS found positions for some employees, but not for them.

The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish discrimination asserted under the grievance statutes, an employee must prove:

> (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. Higher Educ. Policy Comm., Slip Opinion Nos. 32163 and 33296 (W. Va., Oct. 12, 2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005). In *Frymier,* the Court acknowledged what this Board's

cases have consistently held, i.e. that the elements of discrimination and favoritism are essentially identical. *Frymier v. Glenville State College,* Docket No. 03-HE- 217R (Nov. 16, 2004); *Kincaid v. Div. of Corr.,* Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.,* Docket No. 90-50-281 (Jan. 28, 1990). It is clear Grievants are not similarly situated to the employees at Workers' Compensation. They are not employees of that agency and do not have similar duties. *Brining, supra*. Additionally, while Grievants demonstrated some DRS employees continued employment with DRS after the Rehabilitation Center closed, the documents submitted by Grievants show only 23 employees out of 99 remained with the agency. Further, several Grievants admitted they were not qualified for these positions. With this limited evidence no discrimination has been proven.

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, Grievants have the burden of proving their grievance by a preponderance of the evidence. *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. Grievants did not establish any violation of a statute, policy, rule, or regulation.

3. "[T]he relief Grievants seek is not available through the Grievance Procedure. The Grievance Board does not have the authority to order the Division of Personnel to deviate from its statutory mandate, nor to compel the legislature to enact legislation . . . for the benefit of Grievants." *Neal v. Div. of Rehab. Serv.*, Docket No. 03-RS-001 (Nov. 1, 2006.

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 is not grievable. *Brining v. Div. of Corr.*, Docket No. 05-CORR-284 (Dec. 7, 2005); W. Va. Code § 29-6A-2(i). *See Smith v. Dep't of Health and Human Res.*, Docket No. 05-HHR-218 (Aug. 5, 2005); *Bossie v. Div. of Rehab. Serv.*,

Docket No. 03-RS-141 (Sept. 23, 2003).

5. The Grievance Board is without authority to resolve the issues raised by this grievance as they are issues involving the Consolidated Public Employees Retirement Board, PEIA, the Division of Personnel, and the Legislature. W. Va. Code § 29-6A-2(i).

6. Discrimination is defined in W. Va. Code § 29-6A-2(d) 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."

7. The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish discrimination asserted under the grievance statutes, an employee must prove:

> **(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. Higher Educ. Policy Comm.*, Slip Opinion Nos. 32163 and 33296 (W. Va., Oct. 12, 2007); *Frymier v. Glenville State College,* Docket No. 03-HE-217R (Nov. 16, 2004). *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005); *Kincaid v. Div. of Corr.,* Docket No. 98-CORR- 144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.,* Docket No. 90-50-281 (Jan. 28, 1990).**

8. Grievants have filed to prove they were discriminated against during this reduction in force.

Accordingly, this grievance is DISMISSED.

This decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. W. Va. Code § 6C-2-5(c). 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.

JANIS I. REYNOLDS

ACTING CHIEF ADMINISTRATIVE LAW JUDGE

Dated: March 31, 2008

Footnote: 1

Grievants in this case are Sharon Souza, Edna Contreras, Linda Donegan, Brian Forbes, Sherry Richards, Pamela Ferrell, Carolyn Martin, Verona Sampson, and Jeff Martin.

Footnote: 2

A grievant has the right to grieve his/her reduction in force. Malcolm v. Monongalia County Bd. of Educ., Docket No. 01-30-593 (Feb. 28, 2002). Respondent incorrectly cites this case as support for the inability of Grievants to file a grievance after they are laid-off. The Malcolm case was dismissed because it was untimely filed, but recognized the right of a grievant to grieve his lay-off.

Footnote: 3

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.