THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

BEVERLY GAIL LUCAS, et al.,

Grievants,

v. **Docket No. 07-HHR-141**

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

Respondents.

DISMISSAL ORDER

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This grievance was filed by Grievants, Beverly Gail Lucas, Darcia Collis, Judy Darlington, Paul Denchy, Shelly J. Nicewarner, Betty L. Johnston, Jennifer Michael, T'zouri Oliver, Melissa Link, and Ann Hubbard, against their employer, the Department of Health and Human Resources/Bureau for Children and Families ("HHR"), on March 19, 2007. All the Grievants serve in a supervisory capacity. The statement of grievance alleges that the Grievants had requested an across the board salary increase for all employees in Berkeley, Jefferson, and Morgan counties, and the ability to hire above the base salary, "due to our inability to hire and retain qualified staff in those three counties due to the cost of housing," and that this request was denied. It continues stating that "West Virginia Administrative Rule allows for the request," and cites "3.65. Pay Differential," "3.84. Salary Adjustment," "5.1. Purpose and Intent," "5.4. Implementation of Plan (b) Entry Salary," and "5.4. Implementation of Plan (f) Salary Adjustments." The statement of grievanceasserts that "[p]recedent

for this has been set by the State Personnel Board approval of proposal #2395. In this proposal, Secretary Walker established a special hiring rate above the minimum pay rates and approval of 3.5% to current employees. While this is for just one classification, the fact is that in these three counties, hiring for any position takes longer because we have so many of our initial candidates turn down our offer and we are left with offering the position to our second or lower choice." As relief sought, Grievants stated:

> According to the "Out of Reach 2006" report by the National Low Income Housing Coalition (NLIHC), the "housing wage" for a modest apartment in these three counties was $12.60/hour. Using the lowest paid staff in the office, the average yearly salary of the Office Assistants II is $19,191.43, not including increment. These salaries are artificially high because several of OA II positions were filled by persons who transferred here and brought their salaries with them. Taking the average OA II salary and dividing it by 2080 hours equals $9.22 per hour. Subtract $9.22 from $12.60 and there is a difference of $3.38/hour. Multiply $3.38 by 2080 and it equals $7030.00. In order to maintain the position pay grade differences, we are requesting the ability to offer new staff $7,000 over the base starting salary and to give the existing staff $7,000.00 across the board."

The grievance was denied at level one of the grievance procedure on March 26, 2007. Grievants appealed to level two on April 2, 2007, where a conference was held on April 11, 2007. The grievance was denied at level two on April 16, 2007, and Grievants appealed to level three. On April 24, 2007, a Dismissal Order was entered at level three, dismissing the grievance because the relief requested could not be granted. Grievants appealed to level four on April 27, 2007. A telephone conference was held by Acting Chief Administrative Law Judge Janis I. Reynolds on November 8, 2007, for the purpose of addressing "whether the statement of grievance constitutes a grievance." Grievants were represented by Grievant Lucas, HHR was represented by B. Allen Campbell, SeniorAssistant Attorney General, and the Division of Personnel was represented by Karen O'Sullivan Thornton, Assistant Attorney General. This telephone conference was not recorded.

On November 19, 2007, Respondents filed a joint Motion to Dismiss the grievance, on the grounds that the relief requested cannot be granted, because the salary increase sought by Grievants is discretionary, and because the Grievants do not have standing to file a grievance on behalf of the other employees for whom they seek a salary increase or an increase in the starting salary. Grievants did not respond to this motion. This grievance became mature for decision on November 19, 2007. On April 8, 2008, this matter was transferred to the undersigned Administrative Law Judge, due to the retirement of Acting Chief Administrative Law Judge Reynolds.

Synopsis

Grievants had requested from HHR administrators an across the board salary increase for all employees in Berkeley, Jefferson, and Morgan counties, and the ability to hire above the base salary, due to the problems they were having hiring and retaining qualified staff in those three counties. This request was denied, and they filed this grievance, seeking as relief a $7,000.00 pay increase for all HHR employees under their supervision, and for themselves, and the ability to hire new employees at a higher rate of pay. Respondents filed a Motion to Dismiss. Grievants do not have standing to grieve about how much another employee is paid. Further, the failure of HHR to approve the discretionary pay increase requested by Grievants is not grievable. This Motion to Dismiss is GRANTED. For purposes of ruling on the Motion to Dismiss, the following facts are accepted as true.

Findings of Fact

1. Grievants are employed by the Department of Health & Human Resources/Bureau for Children and Families ("HHR") as supervisors in Berkeley, Jefferson and/or Morgan Counties (or "the Eastern Panhandle").

2. Grievants asked the appropriate HHR administrators for an across the board salary increase for all employees in Berkeley, Jefferson, and Morgan counties, and the ability to hire above the base salary, "due to our inability to hire and retain qualified staff in those three counties due to the cost of housing." That request was denied.

3. The State Personnel Board approved HHR's proposal #2395. In this proposal, HHR Secretary Martha Walker requested a special hiring rate above the minimum pay rates, and a salary increase of 3.5%, for employees in one classification.

4. In Berkeley, Jefferson and Morgan Counties, it takes Grievants longer than the normal time period to hire for any position, because so many of the initial candidates turn down the job offer. Grievants then must offer the position to the second or lower choice.

5. The "housing wage" for a modest apartment in Berkeley, Jefferson and Morgan Counties is $12.60/hour. The lowest paid staff in the Eastern Panhandle HHR office are the Office Assistants II. The average yearly salary of the Office Assistants II is $19,191.43, not including increment. These salaries are artificially high because several of the Office Assistant II positions were filled by persons

who transferred to the Eastern Panhandle HHR office, and brought their salaries with them. Taking the average OfficeAssistant II salary and dividing it by 2080 hours equals $9.22 per hour. Subtract $9.22 from $12.60 and there is a difference of $3.38/hour. Multiply $3.38 by 2080 and it equals $7030.00.

6. While HHR's ability to properly function may be hampered by the low salaries paid to employees in the Eastern Panhandle, Grievants are not personally harmed by the salary paid to the employees under their supervision, or by the salary paid to new hires.

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Discussion

Pursuant to the Procedural Rules of the West Virginia Education & State Employees Grievance Board, 156 C.S.R. 1 § 4.12 (2004) (See footnote 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 unavailable to the grievant is requested." While Grievants are seeking a pay increase for themselves, the focus of their grievance, as evidenced by the statement of grievance, is a salary increase for the employees under their supervision, and the authority to offer new hires more money. Grievants do not have standing to grieve about how much another employee is paid.

> "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). In order to have a personal stake in the outcome, Grievants must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for Grievants to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [they seek] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, Grievants are without standing to pursue this grievance. *Lyons v. Wood County Bd. of Educ.,* Docket No. 89-54-601 (Feb. 28, 1990). Even if the employer has misapplied applicable regulations regarding the classification and/or a corresponding salary increase to another employee, where a grievant is not personally harmed, there is no cognizable grievance. *See Cremeans v. Bd. of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992). Although poor morale among the workers resulting from such an error is a real and difficult problem, it simply does not give Grievants standing to contest [another employee's] reallocation, which did not otherwise personally harm them.

Mason, et al., v. W. Va. Dep't of Transp., Docket No. 00-DOH-345 (Mar. 28, 2001).

The remaining issue is whether the Grievants should each get a discretionary pay increase of $7,000.00. While Grievants probably would not turn down a pay raise for themselves, the grievance really is about getting more money for their subordinates, because of the hiring and retention problems they are having. Grievants simply include themselves if all the other employees are getting a raise. As Grievants have no standing to grieve for other employees, the entire grievance should be dismissed.

Even standing on its own, however, the requested relief for Grievants themselves is not relief which can be granted by the Grievance Board. Grievants have not alleged a violation of any statute, rule, regulation, or policy, nor have they alleged that they aresomehow entitled to a pay increase. The basis of their grievance is that the salaries HHR offers to its employees in the Eastern Panhandle are so low that some employees cannot afford housing, and HHR is having hiring and retention problems. Whether HHR pays employees in the Eastern Panhandle, including Grievants, more money is within HHR's discretion.

This is the second time some or all of these Grievants have filed a grievance seeking a pay differential for HHR employees in the Eastern Panhandle. The first grievance alleged discrimination. The statement of grievance read:

> 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.

That grievance was dismissed by the Grievance Board for failure to state a claim upon which relief could be granted. *Lucas, et al., v. Dep't of Health and Human Resources*, Docket No. 05-HHR-383 (Jan. 9, 2006). Although the analysis in dismissing that grievance centered upon a discrimination claim (it was not discriminatory for employees of HHR not to be given a pay increase, when employees of the Department of Transportation in the Eastern Panhandle were awarded a pay raise), the decision also pointed out that, with regard to discretionary employment practices, “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)." *Id.* In *Brining, et al., v. Division of Corrections*, Docket No. 05-CORR-284 (December 7, 2005), which was similar to the first *Lucas* grievance, in addition to finding no discrimination, the Administrative Law Judge stated, "[the Division of Personnel] is not *required* to issue pay differentials, even when requested to do so by an employing agency. Its authority in this regard is purely discretionary. However, in the instant case, no request for a pay differential was made by Grievant's employer, and its failure to do so is not grievable."

Accordingly, Grievants have failed to state a claim upon which relief can be granted, and this matter will 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 unavailable to the grievant is requested." Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.12 (2004).

2. "'Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy.' *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996)." *Mason, et al., v. W. Va. Dep't of Transp.*, Docket No. 00- DOH-345 (Mar. 28, 2001).

3.

> In order to have a personal stake in the outcome, Grievants must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for Grievants to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [they seek] toprotect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, Grievants are without standing to pursue this grievance. *Lyons v. Wood County Bd. of Educ.,* Docket No. 89-54-601 (Feb. 28, 1990). Even if the employer has misapplied applicable regulations regarding the classification and/or a corresponding salary increase to another employee, where a grievant is not personally harmed, there is no cognizable grievance. *See Cremeans v. Bd. of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992). Although poor morale among the workers resulting from such an error is a real and difficult problem, it simply does not give Grievants standing to contest [another employee's] reallocation, which did not otherwise personally harm them.

Mason, et al., v. W. Va. Dep't of Transp., Docket No. 00-DOH-345 (Mar. 28, 2001).

4. Grievants do not have standing to grieve about how much another employee is paid, even if that employee is under their supervision.

5. "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).

6. "DOP is not *required* to issue pay differentials, even when requested to do so by an employing agency. Its authority in this regard is purely discretionary. However, in the instant case, no request for a pay differential was made by Grievant's employer, and its failure to do so is not grievable." *Brining, et al., v. Div. of Corrections*, Docket No. 05- CORR-284 (Dec. 7, 2005).

Accordingly, this grievance is **DISMISSED** from the docket of the Grievance Board at level four.

Any party may appeal this dismissal order 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 by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court

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BRENDA L. GOULD

Administrative Law Judge

Date: May 14, 2008

Footnote: 1 In 2007, the Legislature in S.B. 442 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 being 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. The Public Employees

Grievance Board adopted new Procedural Rules which became effective December 27, 2007, after this grievance became mature for decision. While this grievance will be decided under the former Procedural Rules, 156 C.S.R. 1 § 6.11 is nearly identical to former § 4.12.