WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WANDA FAYE CASTO
Grievant,

v. **Docket No. 2008-1719-DOA**

DEPARTMENT OF ADMINISTRATION/
CHILDREN'S HEALTH INSURANCE PROGRAM,
Respondent.

D E C I S I O N

Grievant, Wanda Faye Casto, filed this grievance against Respondent, Department of Administration/Children's Health Insurance Program ("CHIP"), on April 30, 2008, alleging entitlement to a pay increase. The grievance statement reads, "Pay Plan Implementation/ Internal Equity; Co-Worker is part-time and making as much as me at full-time. As relief Grievant seeks adjustment of salary to suit work load."

The parties agreed to waive the lower levels of the grievance procedure and proceed directly to level three. A level three hearing was held before the undersigned Administrative Law Judge on July 21, 2008, in the Grievance Board's Charleston office. Grievant appeared pro se, and represented her interest, and Respondent was represented by Sharon L. Carte, Executive Director, WVCHIP. This case became mature for decision on August 4, 2008, the mailing deadline for the submission of the parties' proposed findings of fact and conclusions of law. Neither party submitted post-hearing proposals.

Synopsis

Grievant alleges entitlement to an increase in salary. Discretionary pay increases are currently prohibited by the Governor's office. A salary increase resulting from

reallocation of a position is not a discretionary merit increase. Grievant may eventually receive a pay increase as a result of her position's classification; however, Grievant failed to prove her salary was in violation of policy controlling state employee salary ranges and Respondent is required to grant her an increase in pay as a result of applicable provision(s). This grievance is denied.

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

Findings of Fact

1. At the time of the filing of this grievance, Grievant was employed by Respondent as an Accounting Technician 3.

2. Grievant was employed as an Accounting Technician 3 with another state agency prior to applying for and accepting a position with CHIP, on or about January 17, 2007. This change in employment was a lateral job change, and Grievant's salary remained virtually the same after she began working in the new position.

3. Pursuant to the applicable Division of Personnel's (DOP's) Pay schedules, individuals employed within the Accounting Technician 3 classification are compensated at Pay Grade 7 with a salary range of $15,816 to $29,268 annually.

4. At the time of this grievance, Grievant is being compensated at the rate of approximately $21,012 annually. Grievant is being paid within the proper pay grade and range for an Accounting Technician 3 classification.

5. Grievant accepted employment with the CHIP program aware that the position was classified as an Accounting Technician 3 position. Grievant was aware that

Respondent was attempting to have the position reclassified[1] by the Division of Personnel (DOP).

6. In early 2007, DOP evaluated the position currently occupied by Grievant and determined that the position did not warrant reallocation to an Accounting Technician 4 classification and declined to reallocate the position.

7. Subsequently, in 2008, Grievant completed a new Position Description Form[2] and, with the blessing of Respondent, reapplied and submitted it to the Division of Personnel for reallocation consideration. This re-submission was a collaborative effort by Respondent and Grievant.

8. DOP reviewed the new Position Description Form and other relevant information to evaluate the position to determine the job classification which best fit the position.

9. A July 17, 2008, Memorandum from the West Virginia Division of Personnel informed Respondent that based upon the application submitted, the DOP has determined that the position meets the requirement of the Accounting Technician 4 classification.

10. An Accounting Technician 4 classification position is compensated at Pay Grade 9 with a salary range of $18,120 to $33,540 annually.

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[1] The term "reallocation" more accurately describes what Grievant and Respondent sought. Defined pursuant to DOP Administrative Rules as the reassignment of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position. *See* 143 C.S.R. 1 § 3.75 (2007). The parties erroneously used the term reclassification and reallocation synonymously. Generally speaking, reclassification involves a new class or class series effecting multiple positions, while reallocation is limited to a single position.

[2] The Position Description Form is a document which describes the officially assigned duties, responsibilities, supervisory relationships and other pertinent information relative to a position. This document is the basic source of official information in position allocation. 143 C.S.R. 1 § 3.70 (2007).

11. The July 17, 2008, Memorandum specifically noted that "[t]he Governor's directive of April 29, 2005 does not allow for an agency to grant more than the mandatory increase on a promotional/reallocation."

12. The July 17, 2008, Memorandum from DOP was received by Respondent just prior to the instant level three Grievance Board hearing held on July 21, 2008.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

Grievant wants an increase in salary. In an attempt to secure such an increase, Grievant highlights that a former co-worker was compensated at a rate in excess of her (Grievant's) salary. Grievant, among other contentions, avers that Respondent violated Division of Personnel's Pay Plan Implementation Policy. Further, Grievant argues that her rate of pay is not equivalent to the work load. Grievant is requesting that she be given an "equity" pay increase, not a merit raise.

_____This is not a unique or unprecedented grievance. Grievant contends that a co-worker with the same or similar classification makes a significantly higher salary. Grievant argues this isn't fair. The instant record contains little, to no, verified information regarding Grievant's co-worker's salary. Grievant's statements regarding this comparison worker are unsubstantiated and unclear regarding the current employment status of the individual.[3] Grievant is requesting a salary increase pursuant to the Division of Personnel's ("DOP") Pay Plan Implementation Policy (revised July 1, 2005).[4] The Policy contains a provision entitled "Internal Equity," which reads 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.

Section III. D.3.

Under the circumstances presented, Grievant may be correct in her assertion that a co-worker in her classification makes significantly more than she, and it is

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[3] Other than Grievant's testimony, regarding her unsubstantiated beliefs, there is no verification regarding the co-worker's salary or employment status. In fact, it is unclear from the record whether this comparative individual is still employed or is a former co-worker.

[4] Section III. A.3 of the West Virginia Division of Personnel Pay Plan Implementation Policy cautions that "[t]he appointing authority shall be responsible for assuring that original appointments above the entry rate are applied in a consistent manner with due consideration to the salaries and relative qualifications of incumbent employees in the same classification." Other than her good faith belief presented as testimony, Grievant did not elicit any testimony or present any reliable evidence to suggest that the CHIP is not "assuring that original appointments above the entry rate are applied in a consistent manner with due consideration to the salaries and relative qualifications of incumbent employees in the same classification."

understandable that she is upset by this situation. Nevertheless, as discussed in *Allen v. Department of Transportation*, Docket No. 06-DOH-224 (Jan. 31, 2007), the granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of Respondent. Moreover, discretionary increases are clearly prohibited by the Governor's moratorium, which remains in effect.[5] As recently noted in *Morgan v. Department of Health Human Resources*, Docket No. 07-HHR-131 (June 5, 2008):

> Even if the salaries in Grievant's unit were inconsistent with the Internal Equity provision, this policy does not confer upon Grievant an entitlement to a salary increase should she prove her situation fits within the policy. It is within the agency's discretion to recommend a salary increase of up to 10% for employees who fit within the situation described in the policy. . . . "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). 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).

Thus, even if Grievant's co-worker (or former co-worker) with the same classification as Grievant makes a higher salary, this information alone does not establish a mandatory adjustment to Grievant's salary. Salaries may be affected by factors such as experience and training. Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W.

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[5] The Governor's moratorium on discretionary salary increases has been in place since April of 2005. Discretionary salary increases have effectively been removed from state agencies' purview. As of the date of this decision, the Governor's directive was still in effect, and recommendations for discretionary salary increases were not being approved.

Va. 239 at 246, 452 S.E.2d 42 (1994). That case also noted that applicable WEST VIRGINIA CODE requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. *Id.* at Syl. Pts. 2, 3 & 4. The requirement is only 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 also AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989).

Pursuant to Grievant's theory of the case, she has failed to prove by a preponderance of the evidence that Respondent has a mandatory obligation to increase her salary. Grievant's salary is within the pay range of the pay grade assigned by DOP to her job classification. It is a well-discussed concept that state employees in the same classification need not receive identical pay, so long as they are paid in accordance with the pay grade of their job classification. Unfair is not necessarily unlawful. "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). 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); *Morgan v. Department of Health Human Resources*, Docket No. 07-HHR-131 (June 5, 2008).

In a distinct, albeit related vein of consideration, Grievant believes that the heightened level of responsibility of her current position, specifically entitles her to a higher salary. And given that DOP has authorized Respondent to reallocate Grievant's position to an Accounting Technician 4 position (Resp. Ex. 1), it is almost certain that Grievant will receive a salary increase. The amount of the promotional/reallocation increase is determined by Grievant's current pay grade, current salary and the number of pay grades, the change would increase the position in discussion. There is an established range for promotional/reallocation salary increases governed by DOP rules and regulations.[6]

Grievant was informed of this potential salary increase at or near the time of the level three hearing, and she still chose to proceed with the instant matter. Grievant had every right to proceed with this matter; however, she was aware that Respondent had expressed every intention of altering her salary in accordance with their newly accrued authorization.

Nevertheless, in accordance with the facts, applicable law, and circumstances as discussed above, Grievant has not established that her salary is the result of unlawful action or that Respondent has violated any statute, rule or policy.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket

[6] *See* 143 C.S.R. 1 § 5.4 through 5.9 (2007).

No. 89-DHS-72 (Nov. 29, 1990); *See 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).

2. Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va. 239 at 246, 452 S.E.2d 42 (1994).

3. Employees 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).

4. State employers may grant salary increases of up to 10% to employees who are paid at least 20% less than similarly situated employees, pursuant to DOP's Pay Plan

Implementation Policy; however, the granting of such increases is purely within the discretion of the employing agency. *See Morgan v. Department of Health Human Resources*, Docket No. 07-HHR-131 (June 5, 2008). 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).

5. Grievant has failed to prove by a preponderance of the evidence that she is entitled to a mandatory pay increase pursuant to DOP policy in that her salary is within the pay range of the pay grade assigned by Personnel to her job classification.

6. Grievant failed to demonstrate that Respondent has violated any rule, regulation, policy or statute in the circumstances presented.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: March 17, 2009

Landon R. Brown
Administrative Law Judge