THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOHN WESLEY OGLESBEE,

Grievant,

v. **Docket No. 05-HHR-470**

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

Respondent.

DECISION

This grievance was filed by Grievant, John Wesley Oglesbee, against his employer, the Department of Health and Human Resources/Bureau for Children and Families ("HHR"), on October 6, 2005. The statement of grievance reads "[n]ot receiving across the board pay raise." As relief Grievant sought:

> Pay raise just like all other state employees. This "cost of living" raise affects everyone, not just workers who were here before 5-2-05.

A conference was held at level one on October 6, 2005, and Grievant's supervisor responded on that date that he was without authority to grant the relief requested. Grievant appealed to level two, and a conference was held at that level on October 17, 2005. The grievance was denied at level two on October 20, 2005, and Grievant appealed to level three on that same date. On October 28, 2005, a

Dismissal Order was entered at level three, dismissing the grievance because the issue presented was not a grievable event.

Grievant appealed to level four on November 3, 2005, and his grievance was mistakenly consolidated with other grievances into *Lucas, et al., v. Department of Health and Human Resources*, Docket No. 05-HHR-383. On January 9, 2006, a Decision was issued by Administrative Law Judge Denise M. Spatafore, denying the grievance. It was not until January 2009, that Grievant brought to the Grievance Board's attention that his grievance should not have been consolidated with the *Lucas* grievance. A letter was sent by the Grievance Board apologizing for the error, and asking if Grievant still wished to pursue his grievance. Grievant responded that he wished to pursue his grievance.

A level four hearing[1] was held before the undersigned Administrative Law Judge, on September 23, 2009, in the Grievance Board's Westover office. Grievant appeared *pro se* by telephone, and HHR was represented by B. Allen Campbell, Senior Assistant Attorney General. The parties declined to submit written argument, and this grievance

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[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.

became mature for decision at the conclusion of the level four hearing, on September 23, 2009.[2]

Synopsis

Grievant filed a grievance in 2005, when he learned he was not eligible for an across-the-board salary adjustment approved by the West Virginia Legislature, because the authorizing legislation provided that only persons who were permanent state employees on May 2, 2005, were eligible. Grievant became an employee after that date. HHR did not make the decision which gave rise to this grievance, nor did it have any discretionary authority with regard to this matter, so it does not constitute a grievable issue.

The following Findings of Fact are properly made from the record developed at level four.

Findings of Fact

1. At the time this grievance was filed, Grievant was employed by the Department of Health & Human Resources/Bureau for Children and Families ("HHR") as an Economic Service Worker in the Keyser office. He began working for HHR on June 16, 2005.

2. In 2005, the West Virginia Legislature approved a salary adjustment for eligible state employees, effective November 1, 2005. As approved by the Legislature, only persons who were permanent state employees on May 2, 2005, were eligible for the

[2] Grievant was admonished by the undersigned Administrative Law Judge for interrupting Mr. Campbell during his closing argument, and chose to end the telephone connection, and his participation in the hearing.

approved salary adjustment. The salary adjustment for Economic Service Workers was $1,350.00.

3. As Grievant was not a state employee on May 2, 2005, he did not receive the salary adjustment.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 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).

Grievant believes there was no basis for the chosen employment eligibility date of May 2, 2005. HHR made clear during the hearing on this matter that it did not choose this date, rather, this was a legislative decision. HHR pointed out that it had no choice but to comply with the requirement that employees had to be employed on that date in order to receive the salary adjustment.

The issue presented in this grievance has already been addressed by the Grievance Board. In *Ford and Powers v. Department of Health and Human Resources/Bureau for Children and Families and Division of Personnel*, Docket No. 05-HHR-408 (April 7, 2006), the grievants were not employed by HHR on May 2, 2005, and challenged the choice of

this date as the cut off for receiving the salary adjustment. Administrative Law Judge Spatafore made clear that HHR did not make the decision regarding who would receive the salary adjustment, and that HHR was without authority to act with regard to this salary adjustment, except as authorized by the Legislature. "'Any matter in which authority to act is not vested with the state department, board, commission or agency utilizing the services of the grievant shall not be the subject of any grievance. W. VA. CODE §§ 29-6A-2(g) and (l).' *Smith v. Department of Health & Human Resources*, Docket No. 05-HHR-218 (Aug. 5, 2005)." *Id.* Administrative Law Judge Spatafore concluded that the grievants had not presented a grievable issue.

That same conclusion applies here. The salary adjustment was authorized by the West Virginia Legislature, and it was the Legislature which put the employment date of May 2, 2005, in the authorizing legislation. HHR had no authority to change this legislation, and applied the salary adjustment only as it was authorized to do. Likewise, the undersigned has no authority to countermand legislative authorizations. HHR followed the applicable law. Grievant's complaint is with the Legislature, not his employer.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 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. "'Any matter in which authority to act is not vested with the state department, board, commission or agency utilizing the services of the grievant shall not be the subject of any grievance. W. VA. CODE §§ 29-6A-2(g) and (l).' *Smith v. Department of Health & Human Resources*, Docket No. 05-HHR-218 (Aug. 5, 2005)." *Ford and Powers v. Dep't of Health and Human Res. and Division of Personnel*, Docket No. 05-HHR-408 (Apr. 7, 2006).

3. "[HHR] did not make the decision which gave rise to this grievance, so it does not constitute a grievable issue for [HHR] employees." *Id.*

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. 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.

BRENDA L. GOULD
Administrative Law Judge

Date: September 30, 2009