WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KATHY SERGENT,
Grievant,

v. **Docket No. 2008-1283-MAPS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/ WESTERN REGIONAL JAIL and DIVISION OF PERSONNEL,
Respondents.

DECISION

Kathy Sergent ("Grievant") filed this grievance on March 11, 2008, against her employer, Regional Jail and Correctional Facility Authority, Western Regional Jail ("RJCFA"), generally alleging that she "was promoted without the customary pay increase." As relief, Grievant seeks "a minimum pay increase of 10% retroactive to when I [Grievant] began assuming the responsibilities of the vacant First Sergeant position which was November 22, 2007." This grievance was denied at Level One. On or about June 12, 2008, the Division of Personnel ("DOP") was joined as an indispensable party. An August 27, 2008, Level Two mediation was unsuccessful.

A Level Three evidentiary hearing was held before the undersigned Administrative Law Judge ("ALJ") on February 13, 2009, in Charleston, West Virginia. Grievant appeared pro se. RJCFA was represented by Chad M. Cardinal, Esquire. The DOP appeared by and through its counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on March 13, 2009, the date proposed findings of fact and conclusions of law were due. The Respondents have submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant is employed as a Correctional Officer 4 at Western Regional Jail and holds the rank of First Sergeant. Prior to January, 2008, she applied for and was awarded a Correctional Officer 4 position that increased her internal ranking from Sergeant to First Sergeant. She argues that this change constituted a promotion and she should have received a salary increase. Additionally, she claims a violation of the DOP internal pay equity policy and that she was discriminated against. Grievant does not assert her position is misclassified.

On January 1, 2008, Grievant's position was placed under the civil service system. Hence, DOP classification and compensation rules apply. There are no indicium that Grievant is being paid at a rate outside of her classification. Nor is there any indication the Grievant was illegally discriminated against. This Board has no authority to stand in the place of the agency and grant Grievant a discretionary pay raise. Accordingly, this grievance is **DENIED.**

The following findings of fact are based upon a thorough review of the record produced in this matter:

Findings of Fact

1. Grievant holds the position of Correctional Officer 4 ("CO 4") at the Western Regional Jail. She is currently ranked as a First Sergeant within the RJCFA rank structure.

2. Prior to January, 2008, Grievant was a CO 4, paygrade 12. Her internal rank was that of Sergeant. *See* Level Three, Grievant's Exhibit 2.

3. On or about November 22, 2007, Grievant took on some additional administrative

duties within Western Regional Jail.[1]

4. On November 29, 2007, Grievant applied for a CO 4 position, paygrade 12, with the rank of First Sergeant. The closing date for this position was December 12, 2007. *See* Level Three, Grievant's Exhibit 1. This position required an examination, and the examination was given on January 31, 2008.

5. On March 10, 2007, the West Virginia Legislature passed House Bill 2253 ("H.B. 2253") mandating civil service designation for the majority of RJCFA employees, effective January 1, 2008.[2] On January 1, 2008, the RJCFA was legally mandated to comply with all civil service laws, rules and policies of the DOP. This meant that any RJCFA employee whose position changed from that of a Sergeant to a First Sergeant was not considered to be promoted and was not entitled to a 5% pay increase.

6. Prior to passage of H.B. 2253, the RJCFA was not affiliated with the civil service system and did not have to comply with the civil service system mandates and the laws, rules and policies of the DOP. Prior to falling under the civil service system, when a CO 4 became a First Sergeant, the employee was given a 5% pay increase for the change in duties regardless of the fact that the employee's position was not reallocated to a higher classification and the position remained classified in the CO 4 classification.

7. On January, 31 2008, Grievant was the successful applicant for the CO 4 position with a rank of First Sergeant. She accepted the position. This change in rank or

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[1] Insofar as Grievant took on additional duties between November 22, 2007, and January 1, 2008, she has provided no law, rule or policy requiring her to receive any additional compensation for these duties. Nor is this issue clearly addressed by the Grievant. Therefore, it not further addressed.

[2] *See* W.VA. CODE § 31-20-27(a)(2008).

position had no effect upon the Grievant's classification as a CO 4.

8. Upon accepting this new position, Grievant continued the additional administrative duties.

9. Grievant's annual salary is approximately $32,520. Level Three, Grievant's Exhibit 4.[3] There are approximately twenty-two (22) CO 4s with a lower salary. *Id*. There are approximately twenty-eight (28) CO 4s with a higher salary. *Id*. Pursuant to DOP policy, the salary range for the CO 4 position is $23,772.00 to $41,112.00. All RJCFA CO 4s are paid within the requisite pay range.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 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 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 raises four arguments in this grievance. First, she argues that she should have received a pay increase when she accepted the position of CO 4, First Sergeant,

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[3] It is noted that Grievant's Exhibit 2 lists her approximate salary as $35,499. This ALJ used the salary figure provided by Grievant in Grievant's Exhibit 4. The discrepancies in the two amounts were not made clear through the tesimony.

because she took on additional duties and, in the past, an increase in rank has been accompanied by a 5% salary increase. Next, she claims that there are internal pay inequities that require her to receive a pay raise. Thirdly, she contends that, in fairness, this Board should award her a pay increase. Lastly, Grievant maintains that she is being discriminated against. Grievant's arguments are unpersuasive and this grievance must be denied.

First, the Grievant's claim for a pay increase based upon the change[4] in internal rank must be denied because DOP laws, rules and policies apply and Grievant falls within the CO 4 classification. On January 1, 2008, RJCFA CO positions were placed under the civil service system. On this date, the RJCFA was required to follow DOP rules. *See* W.VA. CODE § 31-20-27(a)(2008). *See also* W.VA. CODE § 29-6-10 (authorizing the DOP to promulgate rules for classification and compensation under the civil service system). After January 1, 2008, Grievant assumed the duties of a CO 4, First Sergeant.

In light of the change in law, Grievant is not entitled to a 5% pay increase because DOP's classification and compensation scheme does not mandate a pay increase where there is a mere change in work duties. Grievant does not maintain that she is misclassified.[5] Rather, she simply avers that her rank has been increased, her duties have

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[4] Grievant characterizes this change as a promotion. However, it does not fit within the applicable definition of "promotion." 143 C.S.R. 1 § 3.73 defines "promotion" as "a change in the status of an employee from a position in one class to a vacant position in another class of higher rank as measured by salary range in increased level of duties and responsibilities." In this matter, the Grievant remained within the CO 4 classification.

[5] Upon review of the classification specification for the positions of CO 4 and CO 5, it is clear that the best fit for the Grievant's position is the CO 4 classification because, as indicated in the classification specifications, a distinguishing characteristic of the CO 5 classification is that the employee holds the rank of Lieutenant. A distinguishing

been increased and she should be awarded a pay increase. There is no indication that the placement of the Grievant's position in the civil service system violated a law or rule. This act was done through the legislative process. Accordingly, this general argument must fail.

Secondly, Grievant argues that she should be awarded a salary increase based upon the disparity between her salary and the salaries of other CO 4s within the RJCFA. As previously indicated, the salary increase the Grievant now seeks must flow from DOP laws, rules or policy.[6] DOP's Pay Implementation Policy provides that:

> 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.

Level 3, Grievant's Exhibit 3 (Section III. D.3). The granting of an internal equity pay increase 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 the RJCFA. *Allen v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007); *Harris v. Dep't of Transp./Div. of Highways*, Docket No. 2008-1594-DOT (Dec. 15, 2008); *Casto v. Dep't of Admin./Children's Health Ins. Program*, Docket No. 2008-1719-DOA (Mar. 17, 2009). At the present time, there is a state-wide moratorium upon pay increases. *See* Level Three,

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characteristic of the CO 4 classification is that the employee holds the rank of sergeant. Grievant's rank is within the sergeant rank.

[6] There is *no* evidence providing that the RJCFA has an internal pay raise policy that applied after January 1, 2008.

Grievant's Exhibit 3.

In recognition of the discretionary nature of pay increases, the Grievant's claim for additional compensation based upon pay equity must be denied. This Board does not have the authority to second guess agency policy and, even if the Grievant fits within the policy, she has no entitlement to a pay increase. *Morgan v. Dep't of Health & Human Res.*, Docket No. 07-HHR-131 (June 5, 2008). All that is required under the law is that employees within a particular classification be paid within the specified salary range. *Largent v. W.Va. Div. of Health & Div. of Pers.*, 192 W.Va. 239, 452 S.E.2d 42 (1994). The Grievant is paid within the appropriate pay range for the CO 4 classification. *See* Finding of Fact 9 *supra*. Grievant has not proven, by a preponderance of the evidence, that she is entitled to a pay increase based upon DOP's discretionary internal equity policy.

Relatedly, Grievant claims that this Board should award her an increase in salary because this is an extenuating circumstance. As aforementioned, there is currently a Governor's moratorium on discretionary pay increases. Grievant cites the Governor's memorandum establishing this moratorium on discretionary pay increases and argues that, based upon the memorandum's language, the Grievance Board has the authority to award a pay increase in extenuating circumstances and this instant grievance provides an extenuating circumstance. *See* Level Three, Grievant's Exhibit 9. This Board has no authority to stand in the place of an agency and award discretionary pay increases. *See generally Largent*, *supra*; *Morgan*, *supra*; *Casto*, *supra*. Grievant has provided no law or rule which would permit this Board to award a pay increase. Accordingly, Grievant's argument must fail.

Finally, Grievant argues that she was discriminated against because other employees in the same classification of CO 4 have positions that do not require them to do any of the administrative duties that Grievant's position requires. "Discrimination" is defined by statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish either a claim of discrimination or favoritism under the grievance statutes, Grievant must prove, by a preponderance of the evidence:

> (a) that she has been treated differently from one or more similarly situated employee(s);
> (b) that the different treatment is not related to her actual job responsibilities; and
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52 (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).[7] Grievant compares herself to "line sergeants" who do not perform administrative duties. These employees are not similarly situated to the Grievant as her position is administrative in nature and not security focused. *See* Level Three, Grievant's Exhibit 10. Relatedly, the difference in treatment, that is, the Grievant completing additional tasks, *is* based upon her actual job responsibilities; job responsibilities are the very core of the Grievant's complaint. Accordingly, Grievant has not established

[7] Although these cases addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions were virtually identical to those contained in the current statute.

discriminatory treatment that is unrelated to her actual job duties.[8]

In summation, the Grievant has not established that she is entitled to a pay increase. This ALJ empathizes with the Grievant's situation: she took on additional duties without additional pay. Unfortunately, there in no indication that the RJCFA violated any law or rule. The Grievant has not established a legal entitlement to a pay increase by a preponderance of the evidence. This grievance must be denied.

The following conclusions of law are appropriate:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 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 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).

2. 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. Syl. Pts. 2 & 3*, Largent v. W.Va. Div. of Health*

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[8] Insofar as Grievant's claim could be construed as pay discrimination, it is not discrimination for employees within a classification to be paid at different rates. *Thewes & Thompson v. Dep't. of Health & Human Res.*, Docket No. 02-HHR-366 (Sept. 18, 2003); *Roush v. W.Va. Dep't of Transp./Div. of Highways*, Docket No. 2008-0782-DOT (Oct. 31, 2008); *Meyers v. W.Va. Dep't of Transp./Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009). *See Largent*, *supra*. "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." *Id*. at Syl. Pt. 2. Grievant's claim for discrimination must fail.

& Div. of Pers., 192 W.Va. 239, 452 S.E.2d 42 (1994). 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 & Human Res.*, Docket No. 05-HHR-315 (May 16, 2006).

3. 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 Res.*, Docket No. 07-HHR-131 (June 5, 2008).

4. Grievant has failed to prove, by a preponderance of the evidence, that she is entitled to a mandatory pay increase pursuant to DOP policy or *Largent v. West Virginia Division of Health & Division of Pers.*, 192 W.Va. 239, 452 S.E.2d 42 (1994).

5. In order to establish either a discrimination or favoritism claim under the grievance statutes, Grievant must prove, by a preponderance of the evidence:

> (a) that she has been treated differently from one or more similarly situated employee(s);
> (b) that the different treatment is not related to her actual job responsibilities;

and
(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52 (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).

6. Grievant has failed to establish discrimination or favoritism by a preponderance of the evidence.

7. Grievant has not established a violation of law, rule or policy.

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: April 27, 2009

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Mark Barney
Administrative Law Judge