THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KATHERINE MARIE SAYRE,
Grievant,

v. **Docket No. 2010-0731-DHHR**

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

DECISION

Grievant Katherine Marie Sayre filed a grievance against her employer, Department of Health and Human Resources/Bureau for Children and Families, on December 2, 2009. Her statement of grievance reads, "I have been required to work 3 counties since the other worker retired. I am the only APS worker for 3 counties." For relief, Grievant seeks, "increase in pay till [sic] new APS worker is able to take over case work."

This grievance was denied at level one by letter dated December 11, 2009. Grievant appealed and a mediation was held on April 12, 2010. After a timely appeal to level three, a hearing was held at the Grievance Board's Charleston office on October 12, 2010. This case became mature on that date, as the parties declined to file proposed findings of fact and conclusions of law.

Synopsis

Grievant is an Adult Protective Service Worker ("APS"). Upon the retirement of her co-worker, Grievant began handling three counties. As such, Grievant believes she should be compensated.

Respondent first asserts this grievance should be dismissed as former Governor Manchin's Chief of Staff, Larry Puccio, issued a memorandum informing all Cabinet

Secretaries they were not to grant any discretionary merit or salary increases. Respondent also argues that, while Grievant covers three counties, her caseload is lower than average. Grievant is also compensated for overtime and travel, and Grievant is paid within her pay range.

Grievant has not met her burden of proof in this matter. Therefore, this grievance is DENIED.

Findings of Fact

1. Grievant is employed by Respondent as an APS worker. She is assigned to the Mason County office. There are two APS worker positions in that office.

2. In the middle of October 2009, the other APS worker retired, leaving only Grievant. Upon the retirement, Grievant became responsible for the welfare of those in Mason, Jackson, and Roane Counties.

3. Since being the only APS worker, Grievant has occasionally had to work overtime. When that happened, she would adjust off, so as not to charge overtime to the agency. If she could not adjust her schedule so as to stay at 40 hours, she was paid overtime.

4. Grievant has a state car available for her use, and if she has to take her personal vehicle, she is paid mileage.

5. In 2009, Grievant was paid approximately $37,700. This pay is within the pay range developed by the West Virginia Division of Personnel.

6. From October 2009 through September 2010, Grievant received on average 12.17 referrals a month within the tri-county area. The average expected referrals in West Virginia is 14 a month.

7. The average pay for an APS worker is $30,408 a year.

8. Respondent has attempted to fill the vacant APS worker position in the Mason County office. The position was originally posted in January 2010 and then again at the end of July 2010. Because it is a difficult position with low pay, the position is difficult to fill.

9. Respondent has instituted a working back-up plan for Grievant. All Child Protective Service Supervisors in the three areas are to fill in if a referral comes in and Grievant is not available.

Discussion

Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

Grievant asserts she should be additionally compensated for working three counties while the second APS worker position is vacant.[1] The State Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. VA. CODE § 29-6-10(2). The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by

[1]Grievant is not asserting she is working out of classification. Grievant merely wants additional compensation for dealing with the additional counties.

[the] State Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Moore v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). *See Callaghan v. W. Va. Civil Serv. Comm'n*, 166 W. Va. 117, 273 S.E.2d 72 (W. Va. 1980). In addition, "[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. HHR*, 07- HHR-131 (June 5, 2008)."

There is no dispute here that Grievant is compensated within the pay grade for her classification. Grievant simply believes she should be additionally compensated by receiving a discretionary raise while she is the only APS worker for the three counties. However, in April 2005, former Governor Manchin's Chief of Staff, Larry Puccio, issued a memorandum informing all Cabinet Secretaries they were not to grant any discretionary merit or salary increases.[2] The former Governor's moratorium on discretionary salary increases has effectively removed merit salary advancement from state agencies' purview.

The memorandum issued by the former Governor has created a quandary throughout state government. As this Grievance Board has previously noted, "[u]nfortunate as it may be, the provisions of the Governor's office edict are clear, and discretionary salary increases are prohibited." *Saas v. Dep't of Transp.*, Docket No. 07-DOH-005 (July 25, 2007). Undoubtedly, one would be hard pressed to find a state employee who does not

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[2]Respondent submitted a Motion to Dismiss on September 24, 2010, citing this Memorandum as its basis. Because prior cases dealing with the Puccio Memorandum have addressed the merits and simply not dismissed the grievance, the undersigned chose to follow that practice and address the merits of this current grievance.

believe that the general prohibition on discretionary pay increases is unfair and/or unnecessary.

There is no legal obligation on Respondents' part to raise Grievant's salary, especially in light of the state-wide prohibition on discretionary pay increases. Accordingly, this grievance must be DENIED.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

2. The State Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. VA. CODE § 29-6-10(2). The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner.

3. Also, the rules promulgated by [the] State Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Moore v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). *See Callaghan v. W. Va. Civil Serv. Comm'n*, 166 W. Va. 117, 273 S.E.2d 72 (W. Va. 1980).

4. "[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. HHR, 07- HHR-131 (June 5, 2008)."

5. The 2005 Memorandum from former Governor Manchin's office clearly prohibits discretionary salary increases.

6. There is no legal obligation on Respondents' part to raise Grievant's salary, especially in light of the state-wide prohibition on discretionary pay increases.

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: January 13, 2011

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Wendy A. Elswick
Administrative Law Judge