WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MELISA JUNE GREEN,

Grievant,

Docket No. 2011-1577-DHHR

v.

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

Respondents.

DECISION

Melisa June Green ("Grievant") is employed by the Department of Health and Human Resources ("DHHR" or "Agency") in the Bureau for Children and Families ("BCF"). Grievant filed a grievance on May 2, 2011. Her statement of grievance reads as follows:

> Equal pay sought for equal work performed. It is documented that I am paid 20% less than similarly qualified and tenured employees in the same job class and organizational unit. Is [sic] being sought for failure to comply with laws and rules pertaining to equal pay for equal work (Internal Equity) as defined in Title 43 of Legislative Rule, WV Department of Personnel, Series 1 Administrative Rules, Section 5.9, entitled Salary Advancements.

The relief originally sought by Grievant was:

> "an increase in my salary of at least 10% in order to eliminate the salary inequity that exists between my co-workers plus any back pay or other relief deemed appropriate under the laws and regulations of the state of West Virginia."

The grievance was denied at level one on May 6, 2011. Grievant appealed to level two and a mediation session was held on November 14, 2011. Grievant's request for a ten percent internal equity increase was approved in November of 2011, and was effective beginning December 1, 2011. Grievant appealed to level three on November 22, 2011.

On June 26, 2012, prior to the level three hearing, Grievant filed a Notice of Relief Sought Change requesting additional relief as follows:

> "I seek an increase in my annual salary of at least 10% in order to eliminate the salary inequity that exists between my co-workers from 5/2/11 to 12/1/2011, plus any back pay, with interest, and any other relief deemed appropriate under the laws and regulations of the state of West Virginia."

A level three hearing was held in Charleston, West Virginia on July 11, 2012, at the office of the Public Employees Grievance Board. Grievant appeared in person at the hearing and was represented by Desmond Byrne. Respondent DHHR/BCF was represented by Anne B. Ellison, Assistant Attorney General. Respondent Division of Personnel ("DOP) was represented by Karen Thornton, Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was received at the West Virginia Public Employees Grievance Board on August 20, 2012. This grievance became mature for decision on that date.

Synopsis

Grievant applied for an internal equity pay increase of at least ten percent after the moratorium on discretionary salary increases for West Virginia's state employees was lifted by Governor Earl Ray Tomblin's administration in late March, 2011. Respondents DHHR and BCF were charged by the Governor's administration to re-implement the Pay Plan Implementation Policy so as to equitably provide discretionary salary increases to employees of DHHR. Grievant was eligible for the discretionary internal equity pay increase and made a request in late April of 2011, for that raise. Soon after her request, Grievant learned that the re-implementation of the aforesaid policy would take time, perhaps several months or more, and that until the reimplementation was accomplished,

she could not be approved for a discretionary pay increase. Therefore, Grievant promptly filed a grievance on May 2, 2011, requesting the internal equity raise because she believed that she would be entitled to the pay increase, if granted, retroactive to the date she filed her grievance. After the Pay Plan Implementation Policy was effectuated and guidelines were provided by Respondent DHHR and BCF for the re-implementation, Grievant was granted the raise she sought, effective December 1, 2011. On June 26, 2012, just prior to a level three hearing, Grievant filed a Notice of Relief Sought Change requesting additional relief; the ten percent pay raise she had been granted, retroactive from May 2, 2001 through December 1, 2012. She asserted she was entitled to the increase because Respondents had not acted promptly enough to re-implement the Pay Plan Implementation Policy, and to determine whether they would grant her appeal for a salary increase. However, the internal equity pay adjustment which was granted to Grievant was purely discretionary and not an entitlement. Respondents were not bound by a timetable or deadline in responding to Grievant's appeal for a raise. Grievant failed to point to any rule, regulation, statute, policy or procedure in support of her assertion that she was entitled to back pay for the aforesaid period. This grievance is denied.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. There was a moratorium on discretionary salary increases for West Virginia's state employees, beginning in 2005, which freeze was imposed by Governor Joe Manchin's administration.

2. Grievant is employed by DHHR in the BCF. In April of 2011, Grievant learned that Rob Alsop, Governor Earl Ray Tomblin's Chief of Staff, had written a Memorandum dated March 29, 2011, to the Cabinet Secretaries lifting the statewide freeze on discretionary pay increases.[1] ("Discretionary Salary Increases Memo") The Discretionary Salary Increases Memo notes, in pertinent part, that "all portions of the Pay Plan Implementation Policy … that are being reinstated pursuant to this memorandum, include the following: … E. Internal Equity." The Discretionary Salary Increases Memo further states:

> It is your responsibility to manage the public fisc [sic] in a responsible manner. While I trust that these policies will be followed in such a way that are applied uniformly within an agency, I request that you seek the approval of the Office of the Governor for any discretionary increase above that which is mandatory so that we may provide guidance to ensure that each agency's practice is externally fair among the various agencies. … Each of the discretionary increases that are now permissible still have Division of Personnel restrictions and must be funded from your current appropriated/unappropriated Personal Service Budget.[2]

3. Grievant informed her supervisor, Ms. Gail Totten, that she wished to apply for an internal equity raise given that the freeze had been lifted.

4. DOP's Pay Plan Implementation Policy ("Policy") at Section III, D., 3., entitled "Internal Equity," states:

> 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

[1] Level Three Hearing - Grievant's Exhibit 1.
[2] *Id.*

> increases shall be limited to once every five years for the same job class in the same organizational unit. (Emphasis added).[3]

5. Ms. Totten asked Grievant to research the pay and tenure of her co-workers in support of her request for an internal equity raise. Grievant drafted a memo and presented it to Ms. Totten on April 21, 2011. On April 27, 2011, Ms. Totten revised the memo on her own letterhead and sent it to BCF Deputy Commissioner Mr. Douglas Robinson. The letter stated that Ms. Totten was, "requesting consideration for approval of a ten percent raise [on Grievant's behalf] … as provided for under the Internal Equity Policy."[4]

6. Grievant also discussed her request for an internal equity pay increase with BCF Deputy Commissioner Douglas Robinson. DHHR is a massive agency and before re-implementing the Policy, it had to define organizational units and set guidelines to ensure uniformity and fairness among all of its employees in granting discretionary pay increases. The process would be potentially time consuming. Therefore, soon after her initial request for a raise, Mr. Robinson advised Ms. Green that it could take several months to approve it.

7. After learning from BCF Deputy Commissioner Robinson that DHHR and BCF were in the process of developing a policy to equitably advance discretionary pay increases and that developing that process would, by necessity, take time, Grievant filed the instant grievance in May of 2011.

8. DHHR Cabinet Secretary, Mr. Michael Lewis ("Secretary Lewis"), provided the Discretionary Salary Increases Memo to Mr. Harold Clifton, Human Resources Manager for DHHR, on March 30, 2011, and requested Mr. Clifton to analyze how to best

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[3] Level Three Hearing-Respondent's Exhibit 1.
[4] Level Three Hearing-Grievant's Exhibit 4.

re-implement the Policy so as to equitably provide discretionary salary increases. Secretary Lewis and Mr. Clifton conferred again on April 20, 2011, as to how to fairly implement the Policy throughout the agency. Mr. Clifton was directed by the Secretary to use the relaxation of the discretionary pay increases as a tool to do the most good for the most people and to maximize the positive effect it could have upon the agencies. In addition to the internal equity salary increase, the Discretionary Salary Increases Memo dictated that numerous (nine) other "pay promotion" portions of the Policy had to be addressed and put into effect.

9. DHHR is comprised of five Bureaus, two auxiliary offices and currently employs six thousand one hundred employees. DHHR's five Bureaus deliver varied services and have a multiplicity of employee classifications. In evaluating how to implement the Policy, each Bureau had to consider that though they operated differently from one another, they needed to maintain equity in compensation across DHHR. After developing the implementation plan, Mr. Clifton was obligated to present it to Secretary Lewis for his approval.[5]

10. Therefore, in order to put the Policy into effect, DHHR first looked at its financial standing to determine whether it was feasible. After that feasibility determination, DHHR's nearly twenty Human Resources employees met on June 28, 2011, to work on implementation of the policy. Mr. Clifton met with BCF leadership in July and August of 2011. DHHR and BCF had scores of logistical determinations to make in providing guidelines to equitably implement the Policy as to all DHHR employees, as DHHR had six thousand one hundred employees, offices in fifty-four counties, and approximately fifty-four

[5] *Id.*

classifications for positions and BCF was DHHR's largest bureau, with two thousand six hundred employees.[6]

11. Ms. Green was ineligible for a pay increase at the time of her initial request, as no guidelines were in place for BCF to allow that increase immediately following the lifting of the freeze.[7]

12. The Division of Personnel ("DOP") and the Governor's Office must give approval before any employee may receive an internal equity raise. DHHR cannot finally process a raise until it receives approval from the Governor's Office.[8]

13. There was no rule or policy of which Mr. Clifton was aware which required DHHR or BCF to grant an internal equity raise to an employee within any specific time frame. Further, he was unaware of any instance in which an award of back pay had been granted in relation to a request for a discretionary raise.[9]

14. BCF Deputy Commissioner Douglas Robinson was made aware of the Discretionary Salary Increases Memo in late April or early May of 2011. Following his notification that the freeze on discretionary raises was lifted, each agency was directed to re-implement the Policy so that raises going forward would be awarded in a standard and uniform manner. BCF had to identify employees in different places throughout DHHR/BCF who had the same classification and work duties in its efforts to determine who should comprise an "organizational unit" for the purposes of determining eligibility for internal equity pay increases. Until this process was completed as to all employees, no one could

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[6] Level Three Hearing-Testimony of Mr. Harold Clifton.
[7] *Id.*
[8] *Id.*
[9] *Id.*

receive a raise. The agency had to first determine whether it had adequate funds to award discretionary raises. Any raises granted would also be predicated on work performance, job responsibilities, and time with the agency. Finally, the agency had to determine whether it had adequate funds to award discretionary raises.[10]

15. Mr. Robinson was unaware of any instance in which back pay was awarded to an employee from the time the employee requested a discretionary raise to the time that one was finally approved and processed. Mr. Robinson explained that discretionary raises are not an entitlement and are paid going forward from the date of their approval. In contrast, when an employee is reallocated or placed in a temporary appointment, for example, those raises are non-discretionary and salary increases go into effect on a certain date.

16. On September 19, 2011, BCF put in place the "DHHR BCF Guidelines/ Clarification for the Internal Equity Portion of the Pay Plan Implementation Policy. September 19, 2011 (Revised 10/17/11)" ("Pay Plan Implementation Policy Guidelines") which allowed the agency to make crucial determinations regarding employee eligibility for the discretionary pay increases.[11]

17. Immediately thereafter, on September 20, 2011, Mr. Robinson submitted a memorandum to BCF Commissioner Jason Najmulski recommending a 10% raise for Grievant based upon the Internal Equity provision. Even though the highest paid staff in the unit had left the Bureau by September 19, 2012, Mr. Robinson nonetheless requested, out of "fairness" to Grievant, that the 10% internal equity salary adjustment, "should be

[10] Level Three Hearing-Testimony of Mr. Douglas Robinson.
[11] Level Three Hearing-Respondent DHHR's Exhibit 2.

based on the agency defined organizational unit as it existed … at the time Gail Totten submitted the request for Ms. Green."[12]

18. DOP also developed the "Pay Plan Implementation Request for Approval Form" ("Implementation Form") to be used by agencies when they request discretionary pay increases for employees. The Implementation Form requires the agency head (appointing authority) or his designee to sign-off on the request. The Implementation Form is then submitted to the director of DOP who reviews the request and takes action as deemed appropriate. DOP finally submits the Implementation Form to the Governor's office for final action. These steps were followed with respect to Grievant's request.

19. Mr. Clifton approved the request for Grievant's internal equity raise on October 17, 2011.

20. The Pay Plan Implementation Policy is a DOP Policy. Ms. Barbara Jarrell, Assistant Director for the Classification and Compensation Division, explained that after the agency completes its internal practices and recommends an employee for a discretionary raise to DOP, the request is sent to DOP's Classification and Compensation Division to ensure that all of the necessary criterion allowing the raise are met.[13] This process was followed with regard to Grievant's request and the Director of DOP, Sarah Walker, approved Grievant's request on November 4, 2011. By memo dated November 7, 2011, DOP submitted the request to Governor's Office.[14]

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[12] Level Three Hearing-Grievant's Exhibit 5.

[13] Level Three Hearing-Respondent DOP's Exhibit 4. (Note that this exhibit incorporated several documents.)

[14] *Id.*

21. The Governor's Office approved the request on November 11, 2011, and returned the request form to DOP.[15]

22. By memo dated November 14, 2012, DOP notified DHHR that Grievant's discretionary increase had been approved by the Office of the Governor and directed DHHR to complete the WV-11 form necessary to process Grievant's pay increase.[16]

23. The WV11 Payment Transaction Form processing Grievant's discretionary pay increase was entered into DHHR's system on November 15, 2011.[17] The State Budget Office mandates that the WV-11 be submitted and dated two to three weeks prior to the start of a pay period. Therefore, the first effective pay date after DHHR submitted the WV-11 was December 1, 2011.

24. Grievant's WV-11 could not have been processed without the approval of the Governor's Office and no discretionary raise can go into effect prior to the approval of the Governor's Office.[18]

25. Ms. Jarrell found nothing unusual about the time taken by DHHR to establish its own internal policies and procedures, review its funding and to determine how it would proceed with the directives of the Discretionary Salary Increases Memo. Ms. Jarrell stated that DOP had not established any timelines dictating when responses should be made to employee requests for discretionary pay increases. Ms. Jarrell explained that the agency makes its own determination concerning whether it will submit such requests to DOP and that employees are not entitled to discretionary pay raises.

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[15] *Id.*

[16] *Id.*

[17] Level Three Hearing-Respondent DOP's Exhibit 3 WV-11, or Personnel Action Form, authorizing Grievant's raise.

[18] Level Three Hearing-Testimony of Ms. Barbara Jarrell.

26. Ms. Jarrell was not aware of any circumstance in which an employee has received a discretionary pay increase prior to the date upon which his/her raise was processed and approved through the above-described channels. She stated that DOP is unable to process a payment for work performed which pre-dates the approval of a pay increase by the Governor's Office.[19]

27. Ms. Totten knew Grievant's requested salary increase was discretionary, not an entitlement, and that the decision to request that raise rested solely with the agency. Ms. Totten knew of no time-related deadlines that the agency had to observe in processing a discretionary raise.

28. The Pay Plan Implementation Policy guidelines specifically provide a note, as follows:

> The internal equity salary adjustment, as well as the other positions of the Pay Plan Implementation Policy, is defined as a discretionary salary adjustment and the submission of a request under the policy is not a guarantee that a salary adjustment will be forthcoming. Other factors, such as adequate funding, **approval by the Secretary's Office and the Governor's Office is necessary to affect a salary increase under this policy**. (Emphasis added).[20]

29. The memorandum from State Auditor Glen B. Gainer, III, dated November 16, 2011 ("Auditor's Memorandum"), provides that it is unlawful to pay state employees retroactive pay increases with limited exception.[21] It states that:

> "The ONLY exception to the retroactive pay prohibition is a Level III Grievance decision, court order, or a properly executed settlement agreement resulting from an internal administrative review."

The Auditor's Memorandum further states that:

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[19] Level Three Hearing-Respondent's Exhibit 4.
[20] Level Three Hearing-Respondent's Exhibit 2.
[21] Level Three Hearing-Grievant's Exhibit 6.

> "The failure to process the proper personnel transaction **in the allotted time or period** does not authorize the agency to request the changes to be made retroactively and does not require or allow the State Budget Office or State Auditor's Office to process these retroactive changes. Failure to timely file such **approved changes** could be grievable and/or actionable by the affected employee(s)…" (Emphasis added).

30. Grievant felt it necessary to promptly file a grievance, rather than waiting for the Policy to be put into action, in order that she might "protect her date." Grievant made the amendment to her grievance requesting back pay from May 2011 through December 2011, because she believed that it took BCF too long to develop its guidelines and to act upon her request for a pay increase.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.* A preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

Grievant's testimony was somewhat contradictory and the basis for her assertion that she is entitled to a retroactive discretionary pay raise is not entirely clear. However, Grievant contends that once her raise was approved, it should have been retroactive to May 2011, because Respondents did not act quickly enough to develop and publish their guidelines for granting discretionary raises pursuant to the Policy. As a consequence, Grievant alleges that she was denied a timely increase in her salary. She asserts that an award for back pay under these circumstances would be "appropriate and fair." Grievant asserts that filing a grievance and proceeding to a level three hearing was the only way that she could seek back pay for the time frame identified in her amended request for relief.

"[T]he 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 the Respondent." *Harris v. Dep't of Transportation*, Docket No. 06-DOH-224 (Jan. 31, 2007). 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). *See also, Brining, et al. v. Division of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *Allen v. Department of Transportation*, Docket No. 06-DOH-224 (Jan. 31, 2007). An agency's actions with regard to granting discretionary pay raises is within the discretion of the agency. The agency need not grant the ten percent salary increase referred in the "Internal Equity" portion of the Policy, even if the employee meets the criterion that would allow it. As recently noted in *Morgan v. Dep't of Health and 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 that 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….

See also, *Journell, et al. v. Dep't of Environmental Protection/Division of Mining and Reclamation,* Docket No. 2008-0609-CONS (Dec. 22, 2008). It is clearly within the discretion of the agency whether to grant discretionary pay increases. Respondents do not have in place any timetable dictating when they will address requests for discretionary pay raises. Lacking any authority to the contrary, the choice not to adopt and adhere to a timetable is also within the discretion of the Respondents.

Grievant has not demonstrated that Respondents have violated any laws, rules, regulations, procedures or policies in re-implementing the "Internal Equity" portion of the Policy. Nor has she pointed to any case law in support of her claim for back pay. There are no mandated timetables/deadlines imposed upon Respondents by the Policy to dictate the pace at which requests for pay equity raises are to be considered and decided. In this instance, the procedure to evaluate Grievant's request for a pay equity increase may very well have been slowed by DHHR's need to develop guidelines to effectuate the Policy to ensure fair practices among all employees for processing discretionary raises. Nonetheless, it is noted that once DHHR/BFC established their guidelines, Respondents promptly acted on Grievant's request for a salary increase, following their prescribed procedures, as earlier detailed.

Grievant contends that she is entitled to back pay based, in part, upon the Auditor's Memorandum, which provides that it is unlawful to pay state employees retroactive pay increases with limited exception.[22] The Auditor's Memorandum indicates that retroactive

[22] *Id.*

pay raises may be obtained through a Level III Grievance decision. However, in order to obtain retroactive pay as relief from the Grievance Board, Grievant must prove that she is entitled to it by virtue of some statute, regulation, policy, rule or procedure. Grievant has failed to point to any authority in support of her claim for back pay. Moreover, the Auditor's Memorandum is inapplicable to Grievant's claim for retroactive pay, as indicated by the following paragraph which states that,

> "The failure to process the proper personnel transaction **in the allotted time or period** does not authorize the agency to request the changes to be made retroactively and does not require or allow the State Budget Office or State Auditor's Office to process these retroactive changes. **Failure to timely file such approved changes could be grievable** and/or actionable by the affected employee(s)…" (Emphasis added).[23]

This paragraph cautions that the State Auditor's/State Budget Office is not required or allowed to process back pay when a personnel transaction has not been processed in an express "allotted time or period." In this instance, there is no "allotted time or period" dictating when a request for a discretionary internal pay equity raise must be considered and processed by Respondents. Therefore, the Auditor's Memorandum does not afford any support for Grievant's assertion of entitlement to back pay.

In further support of her claim for back pay, Grievant cites three cases, all of which involve reclassification. In each case, back pay was properly awarded because an improper job classification had been made, which had deprived grievants of the pay to which they were entitled.[24] There is abundant and clear precedent allowing a grievant who

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[23] *Id.*

[24] *Long/Cramer v. West Virginia University,* Docket No. 05-HE-044 (June 22, 2005); *Lambert, et al., v. Higher Education Interim Governing Board/Marshall University*, Docket No. 01-HE-132 (Oct. 6, 2003); *Collins v. Bureau of Employment Programs/Workers' Compensation Division,* Docket No. 94-BEP-1080 (April 28, 1995).

has been misclassified to obtain back pay prior to the date of the filing of her grievance. *AFSCME v. Civil Service Comm'n of West Virginia,* 181 W.Va. 8, 380 S.E.2d 43 (1989); *Nafe v. W. Va. Dep't of Health and Human Res.*, Docket No. 96-HHR-386 (March 26, 1997); *Salmons v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-DOH-555 (March 20, 1995); *Brutto v. W. Va. Dep't of Health and Human Res.*, Docket No. 96-HHR-076 (July 24, 1996); *Tennant v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Nelson v. Dep't of Health and Human Res.*, Docket No. 05-HHR-315 (Nov. 20, 2001). Additionally, in cases in which a grievant has doubts regarding whether he/she is in the proper job classification, the grievant is well advised to "file a grievance at once, and certainly no later than her request for reclassification, or risk waiving any claim for back pay." *Thomas v. West Virginia Dep't of Health and Human Res./Welch Community Hospital and W. Va. Division of Personnel,* Docket No. 01-HHR-385 (May 13, 2005). *Aker v. W. Va. Dep't. of Health and Human Resources,* Docket No. 99-HHR-302 (Dec. 30, 1999); *Dudding v. W. Va. Dep't* of *Health and Human Resources,* Docket No. 91-HHR-440 (*September 30, 1992).* It may be this line of cases and authority that have caused Grievant's misinterpretation of the law as it pertains to her grievance. Grievant may have believed that she needed to file her grievance promptly to allow an award of back pay from the date of her filing based upon this case law. Grievant did not request a nondiscretionary reclassification pay raise, rather she requested a pay equity increase, which is not mandatory. Because this grievance concerns a discretionary pay increase, rather than a pay increase related to misclassification, these cases are inapplicable and Grievant has no right to back pay.

It is noted that at every stage of the process, Grievant's request for a pay equity raise was apparently viewed favorably. Her work must necessarily be well regarded. Otherwise, a raise would not have been approved. Even though the highest paid staff in the unit had left the Bureau by September 19, 2012, and the twenty percent pay differential no longer existed, Mr. Robinson nonetheless requested out of "fairness" to Grievant, that she should be given the ten percent internal equity salary adjustment. It is certainly understandable that Grievant may be displeased that the process of review and approval of her request for a discretionary pay raise did not go forward more quickly than it did. However, there is no legal basis to allow back pay under these circumstances. Respondents have developed guidelines, policies and procedures to evaluate and process requests for discretionary internal equity pay increases. "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).

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). "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. Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). A preponderance, "is generally recognized as evidence

of greater weight, or which is more convincing than the evidence which is offered in opposition to it." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. "[T]he 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 the Respondent." *Harris v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007). 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). The Grievance Board's prior decisions regarding discretionary pay increases make clear that the agency's actions with regard to these raises is entirely within the agency's discretion. Grievant is not entitled to a pay raise at all, let alone a retroactive pay raise, from the date of filing her grievance simply because she demonstrated that she was paid twenty percent less than similarly qualified and tenured employees in the same job class and organizational unit. *See Morgan v. Dep't of Health and Human Resources*, Docket No. 07-HHR-131 (June 5, 2008).

3. Respondents have developed guidelines, policies and procedures to evaluate and process requests for discretionary internal equity pay increases. There is not a timetable dictating when the request for an internal equity pay increase must be reviewed, acted upon, or processed. It would not be appropriate for the Grievance Board to second guess the agency's decisions concerning its timing in reviewing and processing a request for a discretionary pay increase. "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).

4. Grievant did not demonstrate a violation of any rule, policy, procedure, statute or regulation, or that she was otherwise entitled to the relief requested. Grievant's internal equity raise was discretionary on the part of the agency, and not an entitlement.

5. Grievant has failed to prove by a preponderance of the evidence that she is entitled to back pay from May 2011 to December 1, 2011, relating to the internal pay equity increase which she received.

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 (eff. July 7, 2008).

DATE: October 1, 2012

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SUSAN L. BASILE
ADMINISTRATIVE LAW JUDGE