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EMPLOYEES GRIEVANCE BOARD**
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JAMES COOPER

v.

Docket No. DHS-88-060

WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES

D E C I S I O N

Grievant, James E. Cooper, was employed by the West Virginia Department of Human Services (DHS) as a Social Service Coordinator in its Area 25 office until his retirement on December 31, 1988. He initiated a grievance at Level I September 28, 1988 alleging he had been improperly denied a five percent (5%) merit raise. A decision at that level was adverse to the grievant as were decisions following the Level II conference held October 14, 1988 and the Level III hearing¹ held November 2, 1988. A Level IV hearing was conducted February 3, 1989² and proposed findings

¹ The transcript of the Level III hearing was made part of the record and is hereinafter referred to as T3.

² A hearing scheduled for December 9, 1988 was continued upon the joint motion of the parties.

of fact and conclusions of law were received by March 6, 1989.

PRELIMINARY MOTIONS

On February 3, 1989, prior to the commencement of the Level IV hearing, DHS presented to the grievant and the undersigned a motion to dismiss the grievance, which in pertinent part provided,

MOTION TO DISMISS
FOR LACK OF JURISDICTION

A. As the grievant is no longer employed by DHS, he lacks standing to grieve.

. . . .

B. As the grievant has filed a similar claim with the Human Rights Commission, the [West Virginia Education and State Employees Grievance Board] lacks jurisdiction to hear this grievance.

. . . .

C. As a merit salary increase is the result of a discretionary action, and is not a right, denial of such should not be grievable; Moreover, W.Va. Code §29-6A-2(i) should not be interpreted to encompass such claims.

Grievant responded briefly and the motion was denied insofar as claims A and C were concerned. Specifically, claim A was rejected upon a finding that grievant was an employee of DHS on September 28, 1988 when the grievance was filed. Claim C was rejected on the grounds that W.Va. Code §29-6A-1, et seq. has been broadly construed to allow for maximal employee access to the grievance procedure for state employees contained therein. Hayes v. West Virginia Department of Natural Resources and West Virginia Civil Service Commission, Docket No. NR-88-038 (March 28, 1989). See also, Harvey v. West Virginia Governor's Office

of Community and Industrial Development, Docket No. CID-88-061 (February 27, 1989); Mann v. West Virginia Division of Vocational Rehabilitation, Docket No. VR-88-066 (February 8, 1989).

At the conclusion of the Level IV hearing the parties were directed to include in their proposed conclusions of law legal support for their positions in regard to claim B of the motion to dismiss. Grievant merely asserted the claim presented in his complaint with the Human Rights Commission (HRC) is entirely different from that presented in his grievance and cited no statutory or case law in support of his contention that the claim should be rejected. DHS contends a previous decision in a case of similar circumstances before the West Virginia Civil Service Commission (CSC)³ in which a grievance was rejected on the grounds that a HRC complaint was filed should be controlling. The decision found that the CSC was without jurisdiction to hear the matter pursuant to W.Va. Code §5-11-13(a), which in pertinent part provides:

Except as provided in subsection (b), nothing contained in this article shall be deemed to repeal or supersede any of the provisions of any existing or hereafter adopted municipal ordinance, municipal charter or of any law of this state relating to discrimination because of race, religion, color, national origin, ancestry, sex, age, blindness or handicap, but as to acts declared unlawful by section nine [§5-11-9] of this article the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the

³ The case was styled Betty Richmond v. Workers' Compensation Fund, Appeal No. 1590 (Exhibit C appended to Respondent's motion).

same grievance of the complainant concerned. If such complainant institutes any action based on such grievance without resorting to the procedure provided in this article, he may not subsequently resort to the procedure herein.

DHS contends grievant's complaint with HRC filed December 16, 1988 has, pursuant to these provisions, given HRC the exclusive jurisdiction of the matter. The complaint and HRC's notice of filing to DHS (DHS Exhibit B appended to motion) reveal grievant's claim therein is that he was denied a merit raise because of his age.

The above-cited exclusivity clause is clearly inapplicable to the present case as it relates solely to a determination by HRC as to whether it has jurisdiction of a complaint once the complainant has instituted an action in another forum. The provisions are irrelevant in a determination of whether or not the West Virginia Education and State Employees Grievance Board has jurisdiction of a grievance instituted prior to the filing of an HRC complaint. Moreover, an examination of both reveal them to be substantially different claims and even the HRC's authority to invoke the clause is questionable. See Liller v. West Virginia Human Rights Commission, 376 S.E.2d 639 (W.Va. 1985). Claim B of DHS' motion to dismiss is therefore **DENIED**.

MERITS OF GRIEVANCE

By memorandum dated July 25, 1988 Regina Lipscomb, then Commissioner of DHS, informed all area administrators that their areas had been authorized to recommend 5% of current staff for a one-step (5%) salary advance and 10% for a ½ step (2½%) advance. Administrators were notified that "[r]ecommendations for your area/division should be based on special meritorious performance" and attached guidelines were to be used when considering the recommendations. The guidelines contained the following preface:

The agency subscribes to the principle of rewarding good performance, not seniority alone, thus enhancing our possibility of retaining the best employees. Considering this principle and the fact that the length of service does not predict performance and potential for growth, at least equal if not greater weight should be given to factors other than seniority such as productivity (quality and quantity), and motivation.

The guidelines then listed eighteen (18) factors to weigh in the determination of which employees should receive the raise and concluded with:

Considering how important these factors are to your operation, you may want to encourage employee participation in the procedure to be utilized in your area or division.

An employee who has received a merit raise increase is not automatically entitled to a successive award at the next review period even if his/her performance continues at the same level as that which earned the first increase.

In any event, employees should be made aware that your area or division intends to recommend a limited number of individuals for salary advancements and the guidelines which you plan to follow.

Ms. Joyce Phipps, then Interim Area Administrator,⁴ determined that the advancements should be spread among the various units within the area office, i.e., clerical, social services, economic services and supervising or administrative staff. Grievant, as a coordinator responsible for the supervision of the supervisors of the various social service units, fell into the last category. Supervisors of all units were asked to use the factors contained in the guidelines to recommend individuals for the increase in salary. Fifteen (15) persons were ultimately awarded raises. Of that number four (4) were clerks, three (3) were economic service workers, four (4) were social service workers, one (1) was a social service supervisor, two (2) were economic service supervisors and one (1) was a homemaker. The parties stipulate that these raises were awarded upon a review of performance between July 1, 1987 and July 1, 1988. It is not entirely clear how much input grievant had on the raises awarded in social services but his recommendation that a social service supervisor receive one was accepted by Ms. Phipps. It is clear that grievant communicated to Ms. Phipps his desire for a merit raise.

⁴Ms. Phipps assumed this position on April 1, 1988 and previously served as the area's Economic Services Coordinator.

Grievant's contention, simply stated, is that Ms. Phipps did not adhere to the guidelines promulgated by the Commissioner of DHS and if she had he would have been awarded a raise. In support of this contention, grievant points to the complete lack of documentation of the methods she used in her determinations. DHS maintains the guidelines were followed and that any such selection process is a substantially subjective one not requiring written justifications. The record as a whole reveals that while Ms. Phipps did not adhere to what might be considered good personnel policy, her determination of which employees would receive raises was neither violative of DHS policy nor arbitrary.

Inasmuch as grievant does not allege any impropriety in the selection of which clerical, social service, or economic workers would receive the salary increases, the only significant question posed is whether the guidelines were followed when the determination of which supervisory staff would receive them was made. It appears that at least three raises were at some point allocated for that group of employees but this figure can only be derived from the list of which persons were ultimately awarded the raise and it is certainly not clear that any decision was initially made to choose only three from the group. As the former Economic Services Coordinator, Ms. Phipps obviously had a greater knowledge of the performance of the economic service supervisors when she made her decision. The evidence does not, however, indicate she was uninformed or biased when considering

the performance of social service administrative staff including grievant's. Specifically, Ms. Phipps testified that she reviewed grievant's personnel file, along with others, and after consideration of her personal knowledge of grievant's abilities gained through their working relationship as coordinators, concluded his performance in the previous year did not warrant the raise. It is evident that this determination was by no means the result of a systematic or comparative analysis of performance but that fact in itself does not render the decision not to recommend grievant an arbitrary one. The guidelines which the grievant claims were violated contain a number of factors to be considered which could be quantified by reference to workload, tenure, attendance, etc. but overall they provide for and even require a great deal of reliance on subjective criteria.⁵

Some written record of the processes used in the deliberations over who should be awarded the raises would have certainly been advisable and may have even precluded the filing of the grievance but absent any evidence of bias or prejudice, the failure to keep such records is also insufficient to establish arbitrariness. The absence of written records would be strongly indicative of manipulation of the process if it were shown that Ms. Phipps was biased toward grievant or favored other

⁵Grievant's frustration in his attempts, through both pre-hearing discovery and questions of Ms. Phipps, to produce some tangible evidence of her considerations is understandable. Such difficulties are perhaps inherent in cases involving personnel decisions which are based primarily on subjective criteria. Those difficulties were given full consideration in the determinations herein regarding grievant's burden of proof.

employees. The only evidence of record in this regard is the slight disparity between the number of raises given social service personnel and those given economic services personnel and the fact that Mr. Bill Kessell was given one of the raises awarded to administrative personnel. The disparity is negligible and any special considerations given Mr. Kessell were allowable under the guidelines. He was apparently promoted to a social services supervisor position and at the time promised a raise when funds and the authority to grant such were received.⁶ Although the guidelines emphasize consideration of a great many factors, they specifically provide that administrators may accord some weight to inequities in pay which were the result of a "past pattern of personnel transactions". There was no evidence presented that undue weight was given this factor in the determination of whether or not Mr. Kessell should receive a raise and the fact that he received one is, therefore, insufficient to establish any favoritism on Ms. Phipps' part.

⁶Grievant, himself, brought this concern to Ms. Phipps' attention and was advised to consider it when he made his recommendations for raises in the social services division. It is unclear what weight grievant gave it but he nonetheless recommended Mr. Kessell for a raise.

In addition to the foregoing, the following findings of fact and conclusions of law are incorporated herein.

FINDINGS OF FACT

1. Grievant was employed by DHS for approximately twenty-seven (27) years and prior to his retirement on December 31, 1988, served as the Social Services Coordinator in Area 25 in Beckley.

2. Pursuant to a directive dated July 25, 1988 from the Commissioner of DHS, the Interim Area 25 Administrator, Joyce Phipps, requested and received recommendations from the supervisors of various units within the area regarding merit pay increases for employees within those units.

3. Grievant made such recommendations indicating to Ms. Phipps his own desire to have an increase in salary. Grievant had the opportunity to fully explain the reasons for his recommendations and his own past achievements and performance which he felt justified a raise.

4. Ms. Phipps reviewed the personnel files of persons recommended, including grievant, and the guidelines included in the Commissioner's directive. Fifteen (15) employees were ultimately awarded raises, three of which were administrative staff.

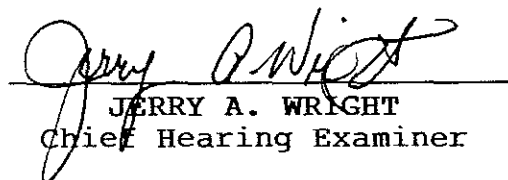
CONCLUSIONS OF LAW

1. It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Mann v. WV Division of Vocational Rehabilitation, Docket No. VR-88-066 (February 8, 1989); Payne v. WV Department of Energy, Docket No. ENGY-88-015 (November 2, 1988); Hanshaw v. McDowell County Board of Education, Docket No. 33-88-130 (August 19, 1988).

2. Grievant failed to establish that DHS misapplied or contravened its own policy or any legal requirement in its award of merit raises in Area 25 nor did he establish the awards were arbitrary or capricious.

Accordingly, the grievance is **DENIED**.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Raleigh County and such appeal must be filed within thirty (30) days of receipt of this decision (W.Va. Code §29-6A-7). Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.


JERRY A. WRIGHT
Chief Hearing Examiner

Dated: June 6, 1989