

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHELLE LYNN JONES,

Grievant,

v.

Docket No. 2017-0880-MAPS

WEST VIRGINIA STATE PAROLE BOARD,

Respondent.

DECISION

Grievant, Michelle Lynn Jones, filed a level one grievance against her employer, Respondent, the West Virginia State Parole Board, dated August 26, 2016, stating as follows: "I was approved a 15% pay increase the first week of July 2016. This was requested by my boss, Benita Murphy. It was approved by the Cabinet Secretary and the Governor's Office. Due to problems with OASIS my pay increase was not able to be entered. Please note, I resigned my position effective August 26, 2016." As relief sought, Grievant stated "I would like to receive the money I was approved to have. The increase would have been approximately \$2.09 her (sic) hour. There have been 7 weeks in between the time I was approved and my last day of employment. 7 weeks = 280 hours plus 16 hours overtime and 332 Annual Leave hours. Which equals the total amount owed approximately \$1,329." Also on August 26, 2016, Grievant and Respondent, by Chairperson Benita F. Murphy, jointly agreed in writing that this matter be waived to level three of the grievance process for hearing.

A level three hearing was originally scheduled to be held on October 6, 2016, at the Grievance Board's Charleston, West Virginia, office before the undersigned administrative law judge. On that date, Respondent appeared *pro se* by agency representatives Chairperson Murphy and Travis Hayes. Grievant also appeared at the

level three hearing in person, *pro se*. At which time, the parties requested time to discuss settlement of this matter in private, which was granted, and they reportedly reached a tentative settlement. No details of this tentative settlement were announced during the hearing or in the presence of the ALJ. Given the parties' representations, by Order entered October 7, 2016, the hearing was continued and this grievance was placed in abeyance for thirty days to allow them time to finalize their settlement agreement and inform the Grievance Board.

Thereafter, the Grievance Board received no indication that the tentative settlement had been finalized, and began attempts to reschedule the level three hearing. The matter was first rescheduled to be held on December 30, 2016. The Grievant moved to continue that hearing, and Respondent did not object. Accordingly, by Order entered December 16, 2016, that hearing was continued. The matter was next rescheduled to be heard on February 28, 2017. On or about February 21, 2017, the Grievance Board received an email from Celeste Webb-Barber, Assistant Attorney General, seeking a continuance of the hearing because her office had not received notice of the same. However, it is noted that no counsel had filed any Notice of Appearance in the matter, and Respondent had no attorney of record. Chairperson Murphy was still listed as the only agency representative. Assistant Attorney General Webb-Barber submitted a formal Motion to Continue and Notice of Appearance of Counsel for Respondent on February 22, 2017. By Order entered February 23, 2017, the Respondent's Motion to Continue was granted. Assistant Attorney General William R. Valentino submitted a Notice of Appearance of Counsel for Respondent on March 3, 2017. The grievance was next rescheduled to be heard on April 18, 2017.

The level three grievance hearing was held on April 18, 2017, before the undersigned ALJ at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, *pro se*. Respondent appeared by counsel, William R. Valentino, Assistant Attorney General. Chairperson Benita F. Murphy and Travis Hayes appeared in person as the representatives of the agency. At the commencement of the hearing, the parties explained to the undersigned ALJ that this matter had significantly changed since the filing of this grievance in that the parties agree that Grievant should have received the pay increase, but they dispute the amount owed because, since the last hearing, the parties have learned that Grievant owes a sum to Respondent. Therefore, the parties agree that money is owed, but dispute how much and to whom. The undersigned ALJ then confirmed with the parties that such was the issue they now wish decided in this grievance.

Further, Grievant explained that she had questions about her tax consequences that she would like answered. However, the ALJ explained that she could not answer such questions as she could not provide her with legal advice. Further, counsel for Respondent explained that he could not answer such questions either. The ALJ suggested that the State Auditor's Office may be where Grievant could find the answers she was seeking. The ALJ further advised the parties that after the hearing, should they resolve this matter on their own and no longer want a decision from the Grievance Board in this matter, they should inform the ALJ as soon as possible. The Grievance Board has received no indication from either party that they have resolved this matter on their own, or that a ruling from the Grievance Board is not desired.

This matter became mature for decision on June 2, 2017, upon receipt of

Respondent's proposed Findings of Fact and Conclusions of Law. Grievant did not avail herself of the opportunity to file proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as an Executive Secretary. Grievant was approved for a 15 percent pay increase in July 2016, but the same was never implemented. Grievant resigned her position effective August 26, 2016. On that same day, Grievant filed this grievance seeking payment of the additional sum of money she would have been paid had the pay increase been implemented as approved. Respondent did not dispute that Grievant was owed the pay increase, but asserted that Grievant's calculation of the amount owed was incorrect. The parties do not dispute that Grievant received an additional \$1,200.00 pay check in September 2014 that Respondent failed to recoup when she left employment. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as an Executive Secretary until she resigned, effective August 26, 2016.
2. Benita F. Murphy is the Chairperson of the Respondent West Virginia State Parole Board. At the time at issue, Travis Hayes was employed by Respondent as an Administrative Services Assistant 1 in human resources.
3. Grievant was approved for a 15 percent salary increase by the Cabinet Secretary of the Department of Military Affairs and Public Safety on June 28, 2016.

4. The 15 percent pay increase was approved by the Governor of the State of West Virginia on July 7, 2016.

5. However, despite the proper approvals, Grievant's salary increase was not implemented before she resigned effective August 26, 2016. Respondent has asserted that the increase was not implemented because of restrictions in the OASIS computer system.

6. Grievant filed this grievance on the date her resignation became effective seeking a lump sum payment of the pay increase that she had been granted but was never properly implemented.

7. Respondent does not dispute that Grievant was granted the pay increase and that such was never implemented. Respondent does not assert that Grievant is not entitled to that pay. The parties disagree on the amount Grievant is due as a result of that pay increase. Further, Respondent discovered after Grievant's resignation and payment of her final pay check that Grievant owed it \$1,200.00 from an extra pay check that had been issued to her in 2014.¹

8. Respondent made a mistake by not withholding the \$1,200.00 from Grievant's final regular pay check(s). Respondent was not aware of the extra pay check

¹ By a Memorandum issued on September 25, 2014, the West Virginia State Auditor announced the implementation of an arrears pay conversion for employees hired before July 1, 2002, which would end the practice of "current" pay for state employees. Employees who had been hired after July 1, 2002, were being paid one pay period, or two weeks, in arrears. Those hired before that date, were not being paid in arrears. To implement this payroll change, all state employees who were being converted to arrears pay were issued a one-time "no hardship" pay check to prevent them from missing a pay day. The amount of this "no hardship" pay check was the equivalent of one pay period, which, for Grievant was \$1,200.00. See, Respondent's Exhibit 3, September 25, 2014, Memorandum; Respondent's Exhibit 4, "WV OASIS Arrears Pay Conversion for West Virginia State Government Employees, Frequently Asked Questions."

from 2014 or the procedure established by WV OASIS to recoup that amount.

9. A representative of WV OASIS explained to Respondent's representatives that it would require Grievant to pay back the \$1,200.00 before paying her for her accrued annual leave hour balances. As such, Grievant entered into a written agreement with Respondent to pay back \$1,200.00.² After the parties entered into this agreement, WV OASIS issued Grievant the payment for her accrued annual leave hours balance.

10. Grievant has not paid the \$1,200.00 to Respondent.

11. Respondent admits that it owes to Grievant \$1,121.52 for the pay increase that had been approved, but never implemented.³

12. If the amount Grievant owes Respondent is offset by the amount of money Respondent owes to Grievant, Grievant would still owe Respondent \$78.48.

Discussion

As this is not a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "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*

² See, Respondent's Exhibit 2, September 30, 2016, Agreement.

³ See, Respondent's Exhibit 5, DOP calculation of back pay owed.

of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Respondent and Grievant agree that each owes the other a sum of money. However, they disagree as to the amount owed. The parties appeared to state at the level three hearing that they were asking for a decision on the amount owed, if any. Respondent asserts that it owes to Grievant \$1,121.52 in back wages for the pay increase that was never implemented based upon a calculation prepared by DOP. Grievant asserts that this number is incorrect because the DOP calculation starts on July 22, 2016, and not July 7, 2016. Grievant stated that she did not understand why the calculation begins on July 22, 2016; therefore, she questioned the DOP calculation. Neither party called anyone from DOP to testify. Grievant presented no evidence other than her own testimony to support her claim that the DOP calculation was not accurate, and the allegation in her statement of grievance that \$1,329.00 is owed to her.

The parties agree that between the filing of the grievance and the level three hearing, the issues in this grievance evolved. Respondent admits that it owes Grievant for the pay increase that was not implemented. The parties dispute this amount. The parties have now learned of the “no hardship” payment of \$1,200.00 made to Grievant in September 2014, and they do not dispute the same. Grievant asserts that the amounts owed should be offset entirely, leaving neither party owing the other anything. As evidence, Grievant has offered her own testimony, that of Benita Murphy, and nothing further to support her allegations. Further, it appeared that rather than advocating for her position, Grievant instead wanted answers to her questions about the DOP calculation and tax consequences of any payments she is to make. Again, it is noted that the undersigned ALJ informed Grievant that she could not answer her questions, and such

were not issues raised in the statement of grievance. Further, counsel for Respondent informed Grievant he did not know the answers to her questions about tax consequences or the DOP calculation.

The burden of proof is on the Grievant to prove her claim by a preponderance of the evidence. Grievant has asserted that she is owed more than what the DOP calculation suggests. Grievant also stated that she would like the two amounts offset entirely resulting in the parties owing nothing to each other. Grievant presented no evidence to support her allegation that she is owed more than \$1,121.52 for the pay increase that was approved, but never implemented. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)). Grievant has failed to demonstrate that her calculation is correct, or that the DOP calculation is incorrect. Again, Grievant only stated that she did not understand why the DOP calculation started on July 22, 2016, instead of July 7, 2016. No evidence was presented by either party to explain the start date of the calculation. Respondent argued that DOP calculated the back pay owed, Respondent had nothing to do with the calculation, and cannot change it. In other words, Respondent argued that it had no authority to override DOP’s calculation.

Further, at the level three hearing, Respondent explained that it had no authority to agree to anything other than the DOP calculation. In its proposed Findings of Fact and Conclusions of Law, Respondent asks the Grievance Board to deny this grievance “to the extent that Grievant’s back wage claim of \$1,121.52 is totally offset by Grievant hardship

pay debt to Respondent in the amount of \$1,200.00 by \$78.48..(sic).”⁴ Respondent also asserts that, “[t]aking such offset into account, a request for recovery of back wages would be tantamount to a request for relief which is wholly unavailable in that Grievant has signed a written agreement to reimburse her hardship pay to Respondent in an amount exceeding her back wage claim by \$78.48.”⁵ While Respondent references language in the Grievance Board’s procedural rule regarding dismissal and the “wholly unavailable relief” language above in its proposed Findings of Fact and Conclusions of Law, Respondent does not move for dismissal therein. Instead, Respondent clearly asks that this grievance be denied, but Respondent does not ask the Grievance Board to Order Grievant to pay it \$78.48.

The evidence presented demonstrates that Grievant did not meet her burden of proving that Respondent owes her \$1,329.00. Grievant did not prove that the DOP calculation showing that Respondent owed her \$1,121.52 for the pay increase was incorrect. Grievant did not prove that the back pay amount should be entirely offset by the “no hardship” payment amount. Accordingly, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this is not a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence W.VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep’t of Health and Human Res.*, Docket No. 89-DHS-72 (Nov. 29,

⁴ This is an exact quote from Respondent’s proposed Findings of Fact and Conclusions of Law, and includes typographical errors. See, Respondent’s proposed Findings of Fact and Conclusions of Law, pg. 7.

⁵ See, Respondent’s proposed Findings of Fact and Conclusions of Law, pg. 6.

1990). “A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). “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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. of Directors/ Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

3. Grievant failed to prove her claims by a preponderance of the evidence.

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: September 27, 2017.

Carrie H. LeFevre
Administrative Law Judge