THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANIEL ARMENTROUT, et al.,
Grievants,

v. **Docket No. 2021-1890-CONS**

DIVISION OF HIGHWAYS,
Respondent.

DISMISSAL ORDER

Daniel Armentrout and fifty (50) other employees[1] of Respondent, Division of Highways, filed separate grievances regarding their placement in the new classification system established by Respondent in its Classification and Compensation Career Plan ("CCCP") policy. The grievances were filed over a period of time ranging from the end of November 2020, through early May 2021. All the level one grievance forms allege:

> This grievance is a result of the DOH reclassifying employees due to the new pay plan, which gave a handful of employees salary increases on their following paychecks, then being reclassified again which has taken those salary increases partially or completely away. Records show Nobody would receive a puycut (sic) with the new plan!

As relief Grievant's seek:

> I am not only seeking to keep the increase that was visible on my paycheck dated 11/06/2020 but am seeking the uniform retention raises for all employees that were given on 12/01/2017, or this current increase, whichever is greater. This increase is to be retroactive 12/01/2017 as the statute "SB 2003" intended.[2]

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[1] Referred to hereafter as "Grievants".
[2] *See* FOFs 11 & 12 below for more detail.

Additional information and documents were attached to the grievances in an effort to support Grievants claims. The grievances were consolidated into the present consolidated action by orders entered as they were received.

A level one conference was held on January 12, 2021. Respondent made an oral motion to dismiss at the conference and submitted the motion in writing on January 20, 2021. Grievants did not respond to the written motion. A level one decision denying the grievances was issued on February 3, 2021.[3] Grievants made timely appeals to level two and a mediation was conducted on June 14, 2021. Thereafter Grievants perfected a timely appeal to level three.

On October 15, 2021, Respondent filed a Motion to Dismiss. Grievants were given notice and a copy of the motion the same day. A hearing on the motion was conducted through the Zoom video platform on October 20, 2021. Respondent appeared in the person of Matthew Ball and was represented by Jesseca Church, Esquire. Grievants Daniel Armentrout and Connie Howard appeared and all Grievants were represented by Gordon Simmons.

The parties were given an additional opportunity to send written responses and the last was received from Grievants on December 10, 2021. The matter is mature for a ruling on the motion.

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.

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[3] The decision is titled as an Order Granting the Motion to Dismiss. However, W. VA. CODE § 6C-2-4(a)(4) requires: "The chief administrator shall issue a written decision." No authority is provided for issuing dismissal orders. Therefore, the order issued shall be construed as a written decision in this particular instance.

Findings of Fact

1. Pursuant to legislation,[4] Respondent DOH was authorized to implement a classification and pay plan for its employees which is separate from the plan established by the Division of Personnel.

2. Respondent developed a classification pay plan policy entitled the Classification and Compensation Career Plan ("CCCP"). This plan was submitted to the State Personnel Board and was approved by that Board. One provision of that plan was "no employee will receive a reduction in current pay as part of the implementation of the plan."

3. On or about December 2, 2020, DOH reclassified its approximately 4,500 employees setting their classification based upon the CCCP. The reclassification was a discrete event based upon each employee's years of employment with the state (not just DOH), their present job classification and duties and the best fit for those duties in the new classification system.

4. The DOH recognized that some mistakes were likely to be made in the initial classification. In anticipation of possible mistakes, Respondent informed employees that if they were mistakenly overpaid due to an incorrect initial classification, the employee would not have to reimburse any overpayment when the classification was corrected.

5. A process for appealing the initial classification was established. Employees were given until January 15, 2021, to appeal. Some appeals were submitted shortly after that deadline but were considered, nonetheless.

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[4] Senate Bill 2003, passed October 17, 2017, in effect from passage.

6. Some Grievants filed appeals and some did not. Often in response to their appeal the employee received a simple statement that the DOH has reviewed your classification and determined it to be correct. No further explanation.

7. Many, if not all Grievants received a salary increase in their checks on or about November 6, 2020.[5] After one or two pay periods DOH realized these employees were initially misclassified.

8. Respondent immediately reclassified the employees and corrected their salary. All or some of the initial increase was removed from the employees, subsequent pay, consistent with the pay grade of the corrected classification.

9. Notwithstanding the reduction resulting from the classification correction, all Grievants received no less pay than they were receiving prior to the implementation of the classification in early December 2020. Thus, no Grievant received a reduction in current pay due to the implementation of the CCCP.

10. Thirty (30) grievances were filed with forms dated from the end of November through December 2020, with the following statement of grievance:

> This grievance is a result of the DOH reclassifying employees due to the new pay plan, which gave a handful of employees salary increases on their following paychecks, then being reclassified again which has taken those salary increases partially or completely away. Records show Nobody would receive a puycut (sic) with the new plan!

11. On the vast majority of the grievance forms the phrase "See attached" was written in the form section for "Relief Sought" yet nothing was attached. At least one form

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[5] *See* grievance form statement of Christopher Wayne Weaver, dated December 1, 2020.

said "See Attached" and there was an attachment in which the following relief was specified:

> I am not only seeking to keep the increase that was visible on my paycheck dated 11/06/2020 but am seeking the uniform retention raises for all employees that were given on 12/01/2017, or this current increase, whichever is greater. This increase is to be retroactive 12/01/2017 as the statute "SB 2003" intended.[6]

Other grievance form set out as relief on their attachments: 1) "To have pay reinstated back to reclassification level" and 2) "Looking for 334.71, per hour (sic) that was removed from my paycheck period 11-20-20 to 12-4-20. As well as any missed wages after 12-05-20." All the attachment remedies related to permanently receiving the amounts that were originally paid in early November and corrected in early December 2020.

12. In an email dated December 1, 2020, Grievants' representative told Respondent "The requested remedy is to be made whole in every way including the restoration of pay with backpay and interest." This remedy seems to be a vague restatement of the remedies sought in the original grievance forms.

13. Grievants do not dispute that their rate of pay is equal to or higher than it was immediately prior to the implementation of the CCCP.

14. There is no dispute that the initial pay increase that some or all Grievants received on or about November 6, 2020, was due to what DOH believed to be a mistake in the original classification of Grievants' position and was adjusted based upon the corrected classification.

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[6] *Id.* Other forms had attachments seeking relief such as "To have pay reinstated back to reclassification level" and "Looking for 334.71, per hour (sic) that was removed from my paycheck period 11-20-20 to 12-4-20. As well as any missed wages after 12-05-20."

15. There is no dispute that Grievants were not required to repay the amount they received in their checks which was paid due to Respondent's alleged mistaken classification.

17. Grievants' representative alleges that the new classifications for Grievants make no sense. He states that the relief the Grievants seek is transparency in the classification placements which would allow Grievants to discern the reasons for each determination.

Discussion

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 et seq." *Rules of Practice and Procedure of the West Virginia Public Employees Grievance*, 156 C.S.R. 1 § 6.2 (2018). It is within an administrative law judge's discretion as to whether a hearing needs to be held before a decision is made on a motion to dismiss. *See Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

Respondent argues that there is not relief that can be granted to Grievants pursuant to their grievances and any decision would only amount to an advisory opinion and therefore the grievances must be dismissed. This motion amounts to an affirmative defense. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. *See, Lewis v. Kanawha County Bd. of Educ.,* Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.,* Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.,* Docket No. 95-29-315 (Jan. 25,

1996). *See generally, Payne v. Mason County Bd. of Educ.,* Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.,* Docket No. 95-39-413 (May 8, 1996).

Respondent argues that Grievants do not actually complain that they were misclassified. Rather they assert that in the classification process, they were first improperly placed in a classification where they received a salary increase. Thereafter the mistaken increase was corrected. Grievants seek to keep the salary increase permanently. A cursory examination of the various statements of the remedy sought by Grievant on their forms indicate that all want the mistaken increase restored and made permanent.

Grievants' representative argues that the allegations raised on all the grievance forms was only meant to be an example. He argues that Grievants are actually alleging that there was no basis for their placement in individual classifications rendering the policy arbitrary and capricious as a whole. However, there is simply no support for that allegation in the wording of the grievance statements.

Pursuant to the wording of the grievance documents, Grievants received an increase in their pay period for one or two pay periods which resulted from a mistake and now wish to keep that increase permanently. "Mistakes in compensation do not create an entitlement to future incorrect reimbursement." *See Id.* citing to *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006). *See Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004); *Ritchie v. Dep't of Health and Human Res.,* Docket No. 96-HHR-181 (May 30, 1997)*; Pugh v. Hancock County Bd. of Educ.,* 95-15-128 (June 5, 1995). The relief Grievants seek is not available.

Though it was not raised in the grievances, Grievants allege to seek the CCCP as a whole to be overturned. The CCCP policy has been approved by the State Personnel Board which is not an employer subjected to the Grievance Boards jurisdiction as set out is W. VA. CODE § 6C-2-2(g). Accordingly, the Grievance Board has not looked behind the State Personnel Board's approval of policies. *See generally Goodman et al. v. Div. of Highways,* Docket No. 2019-0863-CONS (Jun. 22, 2021); *Crowder et al. v. Div. of Corrections,* Docket No. 2018-0417-CONS (Oct. 4, 2018).

Grievant may contest the application of the policy to their specific situation which they have not done in this matter. The parties agree that some Grievants have availed themselves of the appeal process provided in the CCCP and some have not. However, no Grievant seeks an appeal from those rulings in this action nor contests their specific classification.[7]

Grievance Board's administrative rules state:

> Failure to State a Claim -- A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.

W. VA. CODE ST. R. § 156-1-6.11 (July 7, 2008). *See R.D. v. Dep't of Health and Human Ser.*, Docket No. 2017-1155-DHHR (Oct. 5, 2017).

As stated above, the remedy Grievants seek, to make the mistaken pay raise permanent is not available. Accordingly, the Motion to Dismiss is granted and this matter is **DISMISSED.**

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[7] It is worth noting that misclassification or misallocation claims require specific evidence related to the individual Grievant's position and how the duties of that discrete position fit into compensation scheme. Such claims are not susceptible to consolidated grievances where the evidence is largely the same for each claimant.

Conclusions of Law

1. "Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 et seq." *Rules of Practice and Procedure of the West Virginia Public Employees Grievance*, 156 C.S.R. 1 § 6.2 (2018). It is within an administrative law judge's discretion as to whether a hearing needs to be held before a decision is made on a motion to dismiss. *See Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

2. "Mistakes in compensation do not create an entitlement to future incorrect reimbursement." See Id. citing to *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006). See *Stover* v. *Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004); *Ritchie v. Dep't of Health and Human Res.,* Docket No. 96-HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.,* 95-15-128 (June 5, 1995).

3. The Grievance Board has repeatedly held that it has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore,* 200 W. Va. 700, 490 S.E.2d *787 (*1997); *Olson v. Bd. of Trustees,* Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources*, Docket No 97-HHR 461 (June 9, 1999)." *Frame* v. *Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001); *Simons v. Division of Highways*, Docket No 2011-1053-DOT (May 25, 2011).

4. The State Personnel Board is not an employer subjected to the Grievance Boards jurisdiction as set out is W. VA. CODE § 6C-2-2(g). Accordingly, the Grievance

Board has not looked behind the State Personnel Board's approval of policies. *See generally Goodman et al. v. Div. of Highways,* Docket No. 2019-0863-CONS (Jun. 22, 2021); *Crowder et al. v. Div. of Corrections,* Docket No, 2018-0417-CONS (Oct. 4, 2018).

5. Grievance Board's administrative rules state:

> Failure to State a Claim -- A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.

W. VA. CODE ST. R. § 156-1-6.11 (July 7, 2008). *See R.D. v. Dep't of Health and Human Ser.*, Docket No. 2017-1155-DHHR (Oct. 5, 2017).

6. The remedy Grievants seek, to make the mistaken pay raise permanent, is not available.

Accordingly, the Motion to Dismiss is granted and this matter is **DISMISSED.**

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *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 (2018).

DATE: January 27, 2022.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE