

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DESMOND K. ONUKWUGHA,

Grievant,

v.

Docket No. 2022-0089-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES
AND DIVISION OF PERSONNEL,**

Respondents.

DECISION

Grievant, Desmond K. Onukwugha, is employed by Respondent, Department of Health and Human Resources (“DHHR”) within the Bureau for Children and Families. On August 6, 2021, Grievant filed this grievance against Respondent stating, “I passed probation on March 30, 2021, and should have been given an increase in salary as stated upon being hired. The state failed to process my salary increase timely and now only wants to back pay me for one month instead of four months which will include April, May and June. They only want to back pay me for July 2021.” For relief, Grievant seeks “to be paid what I am owed and nothing more. What is fair.”

On September 28, 2021, the level one chief administrator’s designee waived the grievance to level two of the grievance process. By order entered September 29, 2022, the Division of Personnel (“DOP”) was joined as a necessary party. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on February 10, 2022. A level three hearing was held on April 15, 2022, before the undersigned at the Grievance Board’s Charleston, West Virginia office. Grievant

appeared *pro se*¹. Respondent DHHR appeared by Michael Hale, Community Services Manager, and was represented by counsel, Steven R. Compton, Deputy Attorney General. Respondent DOP appeared by Wendy Mays, Assistant Director, and was represented by counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on May 31, 2022, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").²

Synopsis

Grievant is currently employed by Respondent as a Child Protective Services Worker. Grievant was initially employed as a Child Protective Services Worker Trainee. Grievant asserts Respondent failed to timely process his salary increase when his position was reallocated from Child Protective Services Worker Trainee to Child Protective Services Worker. Grievant asserts he is entitled to back pay from April 13, 2021 through July 31, 2021. Grievant proved that Respondent Department of Health and Human Resources failed to timely submit the initial request for reallocation to Respondent Division of Personnel, which entitles him to back pay from April 13, 2021 through June 30, 2021. However, Grievant failed to prove he is entitled to back pay for the month of July 2021. Accordingly, the grievance is granted, in part, and denied, in part.

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 is currently employed by Respondent as a Child Protective Services Worker ("CPSW").

¹ For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

² Respondent DHHR declined to file PFFCL.

2. Grievant was initially employed as a Child Protective Services Worker Trainee (“CPSWT”) beginning March 30, 2020.

3. The probationary period for a CPSWT is one year and training for a CPSWT is expected to take approximately one year.

4. CPSWTs are not automatically promoted to CPSWs upon completion of their training. Instead, once an employee holding the position of CPSWT becomes qualified to hold a position as a CPSW, the position is reallocated pursuant to the DOP’s administrative rule.

5. For the review of a CPSWT position, after the probationary period is complete, the employee’s supervisor must determine that the position is performing “advanced and complex social casework in the area of Child Protective Services” as required by the CPSW classification specification. Once the supervisor makes that determination, the employee and supervisor complete the Position Description Form (“PDF”), which is then forwarded to the appointing authority for the DHHR, the Office of Health and Human Resources Management (“OHRM”) for review. The OHRM then forwards the PDF to the DOP to make the classification determination. If the DOP determines the position must be reallocated, then the DOP notifies the DHHR to submit a personnel transaction in the computer system to effectuate the change.

6. In the past, the DOP had erroneously permitted reallocation to occur without a PDF review, but this practice was officially discontinued by memorandum dated December 10, 2015.

7. During orientation, the movement from a CPSWT to a CPSW was discussed with Grievant and he understood that discussion to mean that he would

become a CPSW and receive a salary increase upon his one-year anniversary as a CPSWT.

8. Upon completion of his training and one-year probationary period, Grievant completed a PDF on February 25, 2021. Grievant's supervisor signed the PDF on February 26, 2021.

9. For reasons not made clear in the record, the OHRM did not submit the PDF to the DOP until July 1, 2021.

10. The DOP reviewed the PDF and determined the position should be reallocated to the CPSW classification on July 6, 2021.

11. The DOP notified the DHHR of their determination by letter of the same date.

12. The DHHR processed the transaction to be effective July 31, 2021.

13. The payment of back wages upon reallocation of a position is governed by the DOP's *Settlement Agreements/Back Wages* policy in section III.B.2.a, which states as follows:

A settlement agreement for back wages shall only be authorized when delays occur at any phase(s) of the established process set forth below, unless otherwise determined by a Level 3 grievance decision or court order:

1) The appointing authority provides a completed Position Description Form (PDF) to the DOP for a classification determination within forty-five (45) calendar days after the dated signature by the Supervisor.

2) The DOP communicates a classification determination to the appointing authority within sixty (60) calendar days of receipt of a signed PDF.

3) The appointing authority processes the corresponding personnel transaction within thirty (30)

calendar days of receipt of the classification determination from the DOP.

14. The DHHR failed to submit the PDF to the DOP within forty-five (45) calendar days as required by the policy.

15. The DOP very quickly reviewed the PDF upon receipt, making its determination in only five days when the policy requires only that the determination be made within sixty days.

16. The DHHR timely processed the personnel transaction once it received the determination from DOP.

17. The delay in reallocating the position occurred between Grievant's supervisor's approval of the PDF and OHRM's submission of the PDF to the DOP, between April 13, 2021 and June 30, 2021.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant asserts he is entitled to back wages from April 13, 2021 through July 31, 2021. Grievant asserts he is entitled to this back pay because he was told during new employee orientation that he would receive a salary increase after one year, he was never

shown the applicable policy³, and he believes the denial of backpay is unfair. Respondent DOP asserts it properly followed its policy and that Grievant is only entitled to back wages from April 13, 2021 through June 30, 2021, pursuant to the policy.

Respondent DOP is charged with establishing and applying a system of classification and compensation for all positions in the classified and classified-exempt service. W. VA. CODE § 29-6-5(b). Respondent DOP is authorized to promulgate rules and issue policies to administer its classification and compensation system. W. VA. CODE § 29-6-10. Pursuant to the DOP's administrative rule, the DOP's Director "has the sole authority for the classification process." W. VA. CODE ST. R. § 143-1-4.4. Under this process, "[w]henver significant changes occur in the duties and responsibilities permanently assigned to a position, the Director shall reallocate the position to its proper class. . . ." W. VA. CODE ST. R. § 143-1-4.7. "[T]o allocate a position to its proper class," the DOP utilizes a Position Description Form ("PDF"), which is the "official record of the duties and responsibilities assigned to a position." W. VA. CODE ST. R. § 143-1-4.7.

For the review of a CPSWT position, the process to reallocate the position begins once an employee completes the one-year probationary period and training but it is not automatic at that time. After the probationary period is complete, the employee's supervisor must then determine that the position is performing "advanced and complex social casework in the area of Child Protective Services" as required by the CPSW classification specification. Once the supervisor makes that determination, the employee and supervisor complete the PDF, which is then forwarded to the appointing authority for the DHHR, the Office of Human Resources Management ("OHRM") for review. The

³ Grievant refers to a "DHHR worker compensation policy" but the policy at issue is the DOP's policy as discussed in this decision.

OHRM then forwards the PDF to the DOP to make the classification determination. If the DOP determines the position must be reallocated, then the DOP notifies the DHHR to submit a personnel transaction in the computer system to effectuate the change.

Respondent DOP's policy sets the timeframes by which these actions must be completed, and back pay may only be paid if those timeframes are exceeded. In this case, it was only during the submission of the PDF from the employer to the DOP that the policy timeframe was exceeded. This is the period of time from April 13, 2021 through June 30, 2021, that Respondent DOP asserts back pay is due.

Grievant asserts he should not be bound by the policy because Respondent DHHR did not notify him of the existence of the policy and because he was told upon his hire that he would receive a pay increase after one year. Neither of these theories entitle Grievant to relief. As stated, Respondent DOP is authorized to promulgate rules and issue policies to administer its classification and compensation system. W. VA. CODE § 29-6-10. Grievant's ignorance of the rules and policies that govern his employment as a classified employee do not provide a cause of action. See *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991). Even if it is true that someone told Grievant he would receive an automatic raise upon one year and it was not just a misunderstanding on Grievant's part, Respondents are not bound by this misinformation. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. *Cunningham v. County Court of Wood County*, 148 W.Va. 303, 310, 134 S.E.2d 725, 729 (1964)." Syl. Pt. 1, *West Virginia. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv. Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985). "Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all

employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.” *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985) (citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)).

As to Grievant’s argument that denying him back pay is unfair, “[a] general claim of unfairness or an employee’s philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. See *Olson v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-513 (Apr. 5, 2000), citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).” *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030R (Nov. 20, 2002); Also see *Lusher, et al. v. Dep’t. of Transportation, Div. of Highways* Docket No. 05-DOH-157 (June 15, 2005). Regardless, Grievant is entitled to back pay from April 13, 2021 through June 30, 2021, so the only back pay still at issue is for the month of July. There was no delay in July. The DOP processed the PDF in five days and DHHR entered the transaction in the computer system almost immediately. Because of the constraints of pay periods, the earliest Grievant’s new salary amount could start was July 31st, which is when it did start. Therefore, Grievant’s new salary was unreasonably delayed for two and a half months and that is the amount of back pay he will receive. While it is certainly understandable why Grievant would be upset by the delay, it is not unfair to limit his back pay to that which he is entitled under the policy.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST.

R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. The Division of Personnel is charged with establishing and applying a system of classification and compensation for all positions in the classified and classified-exempt service. W. VA. CODE § 29-6-5(b).

3. The Division of Personnel is authorized to promulgate rules and issue policies to administer its classification and compensation system. W. VA. CODE § 29-6-10.

4. The Division of Personnel’s Director “has the sole authority for the classification process.” W. VA. CODE ST. R. § 143-1-4.4.

5. Whenever significant changes occur in the duties and responsibilities permanently assigned to a position, the Director shall reallocate the position to its proper class. . . .” W. VA. CODE ST. R. § 143-1-4.7.

6. “[T]o allocate a position to its proper class,” the Division of Personnel utilizes a Position Description Form (“PDF”), which is the “official record of the duties and responsibilities assigned to a position.” W. VA. CODE ST. R. § 143-1-4.7.

7. A grievant’s ignorance of the rules and policies that govern his employment as a classified employee do not provide a cause of action. See *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991).

8. “A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. *Cunningham v. County Court of Wood County*, 148 W.Va.

303, 310, 134 S.E.2d 725, 729 (1964).” Syl. Pt. 1, *West Virginia. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv. Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985). “Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.” *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985) (citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)).

9. "A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. See *Olson v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-513 (Apr. 5, 2000), citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997)." *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030R (Nov. 20, 2002); Also see *Lusher, et al. v. Dep't. of Transportation, Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

10. Grievant proved he is entitled to back pay from April 13, 2021 through June 30, 2021, pursuant to the Division of Personnel's policy but failed to prove he was entitled to additional back pay for the month of July 2021.

Accordingly, the grievance is **GRANTED, in part, and DENIED, in part.**

Respondent is **ORDERED** to pay Grievant the shortfall of back wages for reallocation of his position due to the delay in processing the Position Description Form in a timely manner for the period of April 13, 2021 through June 30, 2021, plus interest.

Any party may appeal this decision to the Intermediate Court of Appeals.⁴ Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: July 14, 2022

Billie Thacker Catlett
Chief Administrative Law Judge

⁴ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.