MELVIN SINGLETON,

Grievant,

v. **Docket No. 95-HHR-490**

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/SHARPE
HOSPITAL and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Melvin Singleton, contends "William R. Sharpe, Jr. Hospital has promoted me to Psychologist I without fair compensation." He requests "[t]o be made whole in every way to include but not limited to being properly compensated." This grievance was denied at all lower levels. Grievant appealed to Level IV, and a hearing was held on January 31, 1996. This case became mature for decision on February 14, 1996, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

The facts of this grievance are not in dispute and will be set out below as formal findings of fact.

Findings of Fact

1. Grievant received his Masters Degree in Psychology in December 1994.

2. In January 1995, he was reallocated from a Psychological Assistant to a Psychologist I with a change in pay grade from a 10 to a 12, and a 10% increase in salary as required by W. Va. Administrative Rule 5.05(a).

3. Grievant's pay increased approximately $2,000.00, and his yearly salary became $21,432.00.

4. Grievant's supervisor had requested Grievant's pay on reallocation be increased to $23,568.00, which would have been approximately a 21% increase.

5. In prior years, discretionary pay increases, larger than 5% per pay grade, had been

recommended and approved for employees at Sharpe Hospital ("SH").

6. Approximately sometime in mid-July 1994, Department of Health and Human Resources' ("HHR") Secretary Gretchen Lewis decided there would be no discretionary pay increases for classified employees due to fiscal restraints.

7. Secretary Lewis delegated to Mr. Calvin Robbins, Deputy Secretary for Operations, the authority to implement her directive.

8. Dr. Michael Todt, Administrator of SH, was informed of this new directive at an administrative meeting. Level III Hrg. at 8.

9. One SH employee, Ms. M. (See footnote 1) , received a 21% increase in September 1994, when she was promoted from a Psychological Assistant to a Psychologist I. 10. This greater than 10% increase was in error, should not have occurred, and it is unclear how this error occurred. Test. Level IV Hrg. - Mr. Michael McCabe, Director of Personnel Services.

11. Ms. M. resigned her position four months after she received her promotion and pay increase.

Issues

Grievant raised four issues. First, Grievant states he was promoted without fair compensation. Second, he argues this failure to compensate him adequately results in a violation of W. Va. Code §29-6-10, which requires equal pay for equal work. Third, Grievant states the policy to deny discretionary increases was changed without prior notice (See footnote 2) to the SH Administrator, and thus, was arbitrary and capricious. Grievant's fourth complaint is somewhat unclear, but appears to be one of discrimination (See footnote 3) . Respondents argue Grievant was properly promoted and given the pay raise directed by the Administrative Rules. Respondents also argue W. Va. Code §29-6-10 does not apply, that notice was given to administrators about the decision to grant no discretionary pay increases, and Grievant was treated fairly.

Discussion

Grievant's first contention, reallocation without adequate compensation, must fail. Grievant's pay increase upon promotion followed Rules 5.05(a) and (b) of the W. Va. Administrative Rules which states:

5.05

Pay on Promotion - When an employee is promoted, the employee's pay shall be adjusted as follows:

(a)

Minimum Increase - An employee whose salary is at the minimum rate for the pay grade of the current classification shall receive an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted. An employee whose salary is within the range of the pay grade for the current classification shall receive an increase of one increment, as established by the State Personnel Board, per pay grade advanced to a maximum of 3 pay grades, or an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted, whichever is greater.

(b)

Additional Increase - The appointing authority may grant additional incremental increases, as established by the State Personnel Board, to an employee being promoted if the employee has sufficient qualifications in excess of the minimum required for the new class. The employee must possess at least six months of pertinent experience or an equivalent amount of pertinent training for each additional incremental increase granted . . . .

(Emphasis Added).

Grievant's former salary, which was within the range of Pay Grade 10, was increased 5% per pay grade resulting in a 10% increase in his salary upon promotion to a Pay Grade 12. Thus, although Grievant did not receive the salary increase he had hoped for, his raise did follow the rules which govern these increases. Grievant is correct that an employee may receive more than 5% per pay grade, but this type of increase is within the discretion of the appointing authority and HHR is not required to follow the request of the hospital or agency. W. Va. Administrative Rule 5.05(b).

Grievant's equal pay for equal work argument must also fail. First, “[t]he West Virginia Equal Pay Act, W. Va. Code §21-5B-1 [1965], does not apply to the State or any municipal corporation so long as a valid civil service system based on merit is in effect.” Syl. Pt. 2, Largent v. W. Va. Div. of Health, 192 W. Va. 239 (1994). Grievant's employer has “in place a duty-linked civil service system”, and thus, is not covered by the Equal Pay Act. Id. at 243. Further, although W. Va. Code §29-6-10 does require employees who are performing the same responsibilities to be placed in the same

classification, that Code Section does not require these employees to be paid exactly the same. Id. at Syl. Pt. 3 and 4.

Grievant's fourth argument appears to be one of discrimination. W. Va. Code §29-6A-2(d) defines discrimination as "any difference in the treatment of employees unless such differences are related to the actual job responsibilities of the employeeor agreed to in writing." To prove discrimination a grievant is required to establish a prima facie case which consists of demonstrating:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which a respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, the grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Guthrie v. Dept. of Health and Human Servs./Off. of Maternal and Child Health and Div. of Personnel, Docket No. 95-HHR-277 (Jan. 31, 1996); Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant argued Ms. M. received a 21% pay increase when reallocated to a Psychologist I, Dr. Tom Bell, who has a PhD, was hired as a Psychologist I at 38% above the minimum pay grade, and Ms. Tammy Ruble received a 39% pay increase when she was promoted to a Psychologist I in 1991. Grievant is not similarly situated to Dr. Bell or Ms. Ruble. Dr. Bell has a PhD and was a new hire, and Ms. Ruble received her pay increase when discretionary pay increases were being permitted.

Grievant was similarly situated to Ms. M., has established a prima facie case, and has demonstrated a presumption of discrimination exists. HHR's response to this prima facie case was that Ms. M.'s 21% increase was in error, should not have occurred, and was an oversight. HHR

cannot explain how this error occurred. HHR also pointed out that as far as they have been able to discern, no other such errors were made during the time period. Respondent also argued that such a wrong, as occurred with Ms. M., should not be perpetuated and to do so would constitute an ultra vires act.

Grievant was unable to demonstrate the reason given by HHR was mere pretext, thus, Grievant failed to establish he was discriminated against. Further, "[u]nauthorized actions by a government agency that violate policy, are not binding and cannot be used to require an agency to violate the established policy again." Guthrie, supra; see Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991). HHR's mistaken action of granting Ms. M. a pay increase cannot be used to force HHR to grant Grievant an increase.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. In a non-disciplinary action, a grievant has the burden of proving his case by a preponderance of the evidence. Tucci v. Dept. of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995).

2. Grievant has failed to prove HHR violated W. Va. Administrative Rule 5.05(a) and (b) when it granted Grievant a 10% pay increase on his promotion to a Psychologist I.

3. W. Va. Code §21-5B-1, the Equal Pay Act, does not apply to HHR because it has "in place a duty-linked civil service system." Largent v. W. Va. Div. of Health, 192 W. Va. 239, 243 (1994).

4. State employees who perform the same responsibilities are to be placed within the same classification and pay grade, but do not have to be paid exactly the same. Id. at Syl. Pt. 3 and 4.

5. "Evidence that an employer has deviated from established past practice regarding personnel matters is not, in and of itself, sufficient to demonstrate wrongdoing on the employer's part." Justice, et al. v. W. Va. Dept. of Health and Human Resources, Docket Nos. 91-HHR-255/277 (Mar. 11, 1993), citing Cowger v. Webster County Bd. of Educ., Docket No. 92-51-348 (Mar. 12, 1993).

6. Grievant established a prima facie case of discrimination. 7. Respondent successfully rebutted Grievant's prima facie case of discrimination, and Grievant was unable to demonstrate that Respondent's reasons for its action was pretextual.

8. "Unauthorized actions by a governmental agency that violate policy are not binding and cannot be used to require an agency to violate the established policy again." See, e.g., Guthrie v. Dept. of Health and Human Resources/Off. of Maternal and Child Health and Div. of Personnel, Docket No. 95-HHR-277 (Jan. 31, 1996).

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: May 24, 1996

Footnote: 1

The parties agreed to refer to this ex-employee by her last initial only.

Footnote: 2

This argument is without merit. First, HHR's decision to grant additional increases is and always has been discretionary. Second, no rule or statute requires prior notice to HHR's agencies. Third, prior notice was given, and fourth, Grievant has not demonstrated how he would be or was harmed if HHR did fail to notify his administrators.

Footnote: 3

Grievant also argued that HHR contracts with individuals at West Virginia University to perform some psychological services at SH. He stated these employees are paid at a much higher rate than he. Mr. McCabe stated these individuals were contracted employees, not classified employees, and thus, were not governed by Division of Personnel's rules and regulations. He also testified these employees were paid from current expenses not personal services, as are all classified employees. Thus, Grievant is comparing "apples and oranges."