PAT FRANZ, et al. ,

Grievants,

v. **Docket No. 98-HHR-228**

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES/

HUNTINGTON STATE HOSPITAL, and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants, Pat Franz, Robin Walton, and Lou Hammond, (See footnote 1) are employed as nurses by the West Virginia Department of Health and Human Resources ("HHR") at Huntington State Hospital ("HSH"). This grievance, filed on February 24, 1998, grew out of another grievance filed on a pay equity issue. (See footnote 2) Grievants allege HHR exceeded its legal authority and interfered with the grievance process, when it directed the Level II Hearing Examiner to amend her decision on the pay equity grievance because it was clearly erroneous. Grievants seek as relief, the reinstatement of the first Level II decision granting therequested relief. The parties indicated they wished a decision on this grievance before a decision was reached on the original grievance.

This grievance was denied at all lower levels, appealed to Level IV, and a hearing was held on September 1, 1998. This case became mature for decision on October 5, 1998, the deadline for the parties' final proposed findings of fact and conclusions of law. (See footnote 3)

Discussion of Facts

Grievants filed a pay equity grievance on November 3, 1997, stating they had been discriminated against when they had not received a salary increase in 1993. Grievants requested back pay, plus interest, from 1993. This grievance was denied at Level I, and, on December 11, 1997, it was granted at Level II by Kieth Ann Dressler, the Human Resources Director at HSH. Ms. Dressler discussed this grievance with Mr. Desmond Byrne, the Hospital Administrator, and they agreed the grievance should be granted because the prior decision not to include Grievants in the pay equity increase was wrong; thus, the grievance should be granted. Ms. Dressler and Mr. Byrne also believed that timeliness was not an issue.

After granting this grievance, Ms. Dressler forwarded the written decision, on approximately January 5, 1998, to HHR's Office of Personnel Services ("OPS"), and requested a settlement agreement be drafted. When Ms. Jeannie Roberts, Director of OPS, received the decision, she called Ms. Dressler to discuss the decision and asked Ms. Dressler for some written information. This information was never received. Ms. Robertsalso discussed the situation with Mr. Mike McCabe, the Director of Personnel for HHR. Mr. McCabe reviewed the original pay equity document dated July 28, 1993, from Garrett Moran, then Commissioner for Community Support Programs, to Joseph Mulloy, then Hospital Administrator at HSH. This document detailed which studies on pay equity were conducted and which nurses were to receive the pay equity award and why. Grievants were specifically excluded from the pay equity award.

After this discussion with Mr. McCabe and subsequent discussion with the attorney general's office, Ms. Roberts wrote Ms. Dressler on January 30, 1998, and directed her to amend her decision because it was "based on completely erroneous representations" and untimely. Ms. Roberts attached a copy of the pay equity proposal for reference.

Ms. Dressler had attempted to find this document in her pay equity file, and testified she could not find it prior to making her decision. Ms. Dressler further explained that if

she had reread the July 28, 1993 memo on pay equity prior to making her Level II decision, her decision would have been different because that memo noted that salaries for nurses in Grievants' positions were not studied when the pay equity issue was reviewed, and that their positions were specially excluded.

Ms. Dressler also noted she thought all Level II decisions rendered by her were final and were not subject to any review or change, other than the next step in the grievance procedure. She was aware of the need for various signatures on the settlement agreement, but did not relate these signatures to a need for approval, although she stated in her decision granting the grievance that a salary adjustment will not be processed until "approval from all regulatory bodies . . .". Mr. McCabe testified that settlement agreements are required on all grievances that are granted at Level III and below that involve a monetary award. These settlement agreements must be signed off on by individuals from OPS, the West Virginia Division of Personnel ("DOP"), local agency officials, the Attorney General's office, Grievant, and the Director of Finance. These grievance decisions are considered draft decisions and not valid until these settlement agreements are signed and received. Mr. McCabe indicated this internal review of back pay awards was the result of agencies "misusing the grievance process by awarding retroactive payments and promotions."

All authority to grant back wages was removed from lower level evaluators (I through III) on November 16, 1990, but evaluators are still permitted to make recommended decisions granting back pay, and these decisions are reviewed by the "appropriate authorities " for final approval. The removal of this authority is supported by a November 16, 1990 memo from then Director of DOP Michael Smith, which discussed in detail the problems multiple agencies were having with monetary awards being granted at the lower levels. Although this memo speaks mainly to the granting of monetary awards in misclassification grievances, it also refers to problems with settlement agreements, reallocations, promotions, and awards paid from current fiscal years general revenue

accounts for expenses incurred in previous fiscal years. Mr. Smith noted the Auditor "will not approve any payroll for back wages unless ordered to do so by a body of proper authority or pursuant to a signed settlement agreement approved by the Attorney General." Mr. McCabe did not remember the exact method of how this decision was disseminated to employees, but he remembered he was directed to do so, and he did. Ms. Dressler remembers that at some point in time in the early 90"s that settlement agreements wererequired, but she does not remember a statement that these type of grievance decisions were recommendations only.

Ms. Dressler revised her Level II decision after receiving this letter from Ms. Roberts, and on February 9, 1998, she denied the grievance as untimely, but made no reference to the other issue raised by Ms. Roberts, whether Grievants were intended to receive the raise originally. Grievants filed this grievance alleging unlawful interference in the grievance process after receiving the amended decision.

Mr. Byrne testified differently from Ms. Dressler and maintained that when Ms. Dressler discussed the granting of the grievance with him he had a copy of the November 16,1993 memo on pay equity awards, and it appeared to him to be grounds to deny the grievance. However, since he disagreed with the decision of the prior Hospital Administrator, Commissioner, and Secretary of HHR, he thought the grievance should be granted, and he did not feel bound by the decision reached by the prior Hospital Administrator, Commissioner Moran, or Secretary Ruth Ann Panepinto.

Mr. Byrne also erroneously believed he was an "appointing authority" and could grant any back pay awards he thought were appropriate. He was aware that settlement agreements were written at the lower levels, but he did not understand they were required in order for money awards to be granted. He denied any knowledge of the policy referred to by Mr. McCabe concerning the approval of various individuals before a back pay award at the lower levels was considered official. Mr. Byrne assumed his position at HSH in 1994.

In decisions dealing with classification and compensation, DOP is considered an indispensable party. DOP was not included in the Level II conference.

Discussion of Law

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS- 72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

Grievants argue this grievance is exactly like the case of Miller v. Division of Highways, Docket No. 98-DOH-037 (July 6, 1998), in which this Grievance Board would not allow an agency to change a final Level III decision once the recommended decision had been approved by the proper agency authority. Grievants' reliance on Miller is misplaced as that case dealt with a recommended agency decision approved by the Assistant Commissioner, the individual delegated the authority to sign off on recommended decisions. Here, neither Ms. Dressler or Mr. Byrne had the required authority to bind HHR to a monetary award dating back to 1993, which ran into "tens of thousands of dollars", without the proper settlement agreement.

It is interesting that neither Ms. Dressler or Mr. Byrne was aware of the limitations that were placed on their power to grant monetary grievances. However this lack of knowledge does not allow them to ignore established procedure, nor does it force HHR to follow a Level II decision which should not have been written in the first place. Of course, it is suggested that HHR reinform all its agencies of the limitations established on the granting of monetary grievances at the lower levels. Mr. McCabe testified he frequentlyreceives calls from other agency heads seeking clarification about what they

may and may not grant at Levels I and II.

Additionally, although not directly raised by the parties, if the grievance process was knowingly used to circumvent HHR's policy or to grant a pay increase without review, this act would constitute an ultra vires act, and as such cannot be utilized to grant Grievants their requested relief. Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts. See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991).

The above discussion will be supplemented by the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Grievants filed a grievance in November 1997 over their failure to receive a pay equity award in 1993.

2. This grievance was granted at Level II without receiving the necessary approval from a variety of agencies who are required to sign off on a monetary award at the lower levels of the grievance procedure. Additionally, this grievance relating to compensation was granted without joining DOP.

3. Although Mr. Byrne knew the award would most likely be erroneous pursuant to the July 28, 1993 pay equity award memo, he decided to grant the grievance because he believed the decision reached by the prior Hospital Administrator and Secretary of HHR was incorrect. 4. The Level II decision was not a final decision because the necessary approval for its issuance was not received prior to its being sent to Grievants.

5. Mr. Byrne did not have the required authority to grant or direct Ms. Dressler to grant the grievance at issue because he is not considered an appointing authority.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS- 72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Nothing in the grievance procedure prevents an agency from making the decisions rendered at the lower levels from being recommended decisions prior to their approval by a designated authority. Grievance Evaluators are only vested with the authority granted them by W. Va. Code §§ 29-6A-1, et seq., and the appointing agency. See Gains v. Dept. of Transp./Div. of Highways, Docket No. 97-DOH- 203 (Dec. 12, 1997); Smith v. W. Va. Dept. of Tax and Revenue, Docket No. 97-ABCA-066 (Aug. 25, 1997).

3. DOP is to be involved in all grievances granting changes to an employee's classification and compensation. See Trimboli v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 93-HHR-322 (July 7, 1997).

4. A draft decision may be recalled and changed if it did not receive the necessary approval prior to its issuance. 5. HHR did not over step its authority by recalling a draft decision issued to Grievants when this decision had not received the necessary prior approval.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of

this decision. W. Va. Code §29-6A-7(1998). 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: November 30, 1998

Footnote: 1

Ms. Hammond died after the original grievance was filed. Both at Level III and at Level IV, Respondent moved to dismiss her as a party from these proceedings, but stated no legal precedent for this action. Since Ms. Hammond instituted this grievance prior to her death, the grievance represents a property interest, and her interests are represented by her son, her estate will continue to have standing to pursue this grievance.

Footnote: 2

Hammond, et al. v. W. Va. Dept. of Health and Human Resources, Docket No. 98- HHR-222.

Footnote: 3

HHR was represented by Assistant Attorney General B. Allen Campbell, Respondent Division of Personnel was represented by Mr. Lowell Basford, Assistant Director of Classification and Compensation, and Grievants were represented by Mr. Robert Nida, a co-worker.