ZONA MESKINISH,

Grievant,

v. DOCKET NO. 01-HHR-597

W. VA. DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/ BUREAU FOR

CHILDREN AND FAMILIES and

W. VA. DIVISION OF PERSONNEL,

Respondents.

DECISION

On August 30, 2001, Grievant Zona Meskinish filed this grievance at Level I seeking to have six years of employment time earned while she was an employee of the Mercer County Health Department (MCHD) used in the calculation of her increment pay. After the grievance was denied at Levels I and II, the Level III Grievance Evaluator joined the W. Va. Division of Personnel (DOP) as an indispensable party by Order dated October 9, 2001. A Level III Decision denying the grievance was issued on November 30, 2001, and the matter proceeded to Level IV.

A Level IV hearing was held on January 15, 2002, at the Grievance Board's Beckley office, at which time Grievant appeared with her AFSCME Representative, Kevin Church, Respondent W. Va. Department of Health and Human Resources/Bureau for Children and Families (DHHR) was represented by B. Allen Campbell, Esq., Assistant Attorney General, and Respondent DOP was represented by Steve Forsythe. Following the hearing, theparties agreed to submit their proposed Findings of Fact and Conclusions of Law by March 4, 2002, on which date the matter became mature for decision.

The following Findings of Fact are derived from a preponderance of the evidence contained in the lower-level record and adduced at the Level IV hearing, and are not in dispute:

FINDINGS OF FACT

1. Grievant was first hired by Respondent DHHR in May 2000 as an Office Assistant II in its Beckley office, and she transferred to its Princeton office in February 2001.

2. For approximately six years, from 1963 to 1969, Grievant was employed as a stenographer

by the MCHD.

3. Respondent DHHR granted Grievant credit for 30 days (out of 70) of unused sick leave accrued when she worked at MCHD. Her six years of employment with MCHD are also used in calculating Grievant's accrual rate for sick leave and annual leave, and will be used for retirement benefit purposes.

4. Grievant requested that her MCHD employment also be used to calculate her annual increment pay, but this request was denied by DHHR and DOP based on the statute awarding increment pay.

DISCUSSION

In non-disciplinary matters Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant seeks to prove that her employment withMCHD should be used to calculate her increment pay. Respondents argue that the law authorizing increment pay does not allow that experience to be considered.

Increment pay for state employees is authorized by statute in W. Va. Code §§ 5-5-1 and 5-5-2. These sections state, in pertinent part:

> **§5-5-1. Definitions.**
>
> For the purposes of this article: (1) “Eligible employee” means any regular full-time employee of the state or any spending unit thereof who is eligible for membership in any state retirement system of the state of West Virginia or other retirement plan authorized by the state . . . (2) “years of service” means full years of totaled service as an employee of the state of West Virginia; (3) “spending unit” means any state office, department, agency, board, commission, institution, bureau or other designated body authorized to hire employees.

> **§5-5-2. Granting incremental salary increases based on years of service.**
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> Effective for the fiscal year beginning the first day of July, one thousand nine hundred ninety-six, every eligible employee with three or more years of service shall receive an annual salary increase equal to fifty dollars times the employees' years of service, not to exceed twenty years of service. In each fiscal year thereafter and on the first day of July, each eligible employee shall receive an annual increment increase of fifty dollars for that fiscal year.

Grievant argues that she is an eligible employee, and that her six years of employment with MCHD meet the “years of service” requirement. Respondent agrees that Grievant is currently an

eligible employee, but denies that MCHD personnel are “employees of the state,” therefore time employed there is not “years of service.”

County health departments are under the control of County Boards of Health, which W. Va. Code § 16-2-3 mandates that each county commission create if no other local board of health serves the community. The legislature further authorizes, by W. Va. Code § 16-2-11(b)(2), the county board to employ personnel who are covered by the rules of the DOP. Thus, employees of a county health department, although they enjoy some of thebenefits of state employees, are employees of their particular county's Board of Health and not of the state. Because “years of service” only includes “service as an employee of the state of West Virginia,” Respondents are correct in their assertion that they may not count Grievant's service as an employee of MCHD. *See* Cook v. Dep't of Health and Human Resources, et al., Docket No. 00-HHR-352 (June 29, 2001).

Grievant argues that county health departments are “spending units” because they receive state money, which makes their employees “eligible employees.” Her reliance on the definition of “eligible employee” is misplaced. Whether county health departments are “spending units” or not is utterly irrelevant to the issue of whether Grievant may use time worked there as “years of service.” The “years of service” definition does not say, “service as an eligible employee,” or “service as an employee of a spending unit.” Instead, it plainly limits those years that may be counted for increment pay purposes to service “as an employee of the state of West Virginia.” W. Va. Code § 5-5-1(2). Because Grievant was an employee of a local board of health, her years of service with MCHD do not fall within the definition of “years of service” and may not be counted for increment pay purposes.

Although not specifically argued by the parties, it should be pointed out that this matter is distinguishable from another grievance in which the Supreme Court of Appeals of West Virginia held that county board of health personnel are employees for purposes of a quite different statute. In Chafin, et al. v. W. Va. Dep't of Health and Human Resources, et al., 191 W. Va. 202, 451 S.E. 2d 768 (1994), the court found that employees of county health departments may use the state employees' grievance process. However, this decision was based on language in W. Va. Code § 29-6A-2 that refers to an employee “hired by . . . any agency, commission or board of the state created by an act of thelegislature.” The court found that local boards of health are created by the legislature, qualifying their employees under this particular language. The court stopped short of holding that local board of health employees are state employees. Had W. Va. Code § 5- 5-1 used similar, more

encompassing language, then the foregoing analysis would be very different. As it is, the legislature chose to use the much more limiting language, “employee of the state of West Virginia.”

The following conclusions of law supplement this discussion:

CONCLUSIONS OF LAW

1. In non-disciplinary matters Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996)

2. County health departments are under the control of County Boards of Health, created by County Commissions pursuant to W. Va. Code § 16-2-3. They are authorized by W. Va. Code § 16-2-11(b)(2) to employ personnel who are covered by the rules of the DOP, but those personnel are employees of their particular county's Board of Health and not of the state.

3. Eligible employees of the State of West Virginia are entitled to an incremental salary supplement by W. Va. Code § 5-5-2, based on their “years of service” as that term is defined in W. Va. Code § 5-5-1. “Years of service” includes the time an employee is employed by the State of West Virginia, but not time the employee is employed by a county health department. *See* Cook v. Dep't of Health and Human Resources, et al., Docket No. 00-HHR-352 (June 29, 2001). 4. In the case of Chafin, et al. v. W. Va. Dep't of Health and Human Resources, et al., 191 W. Va. 202, 451 S.E. 2d 768 (1994), the Supreme Court of Appeals of West Virginia did not determine that employees of local boards of health are state employees.

5. Grievant has not demonstrated that Respondents are may consider her prior employment with MCHD in calculating her incremental salary increase.

Accordingly, this grievance is hereby **DENIED.**

Any party 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. However, the appealing party is required by W. Va. Code §29-5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

DATED: March 11, 2002 _____

M. Paul Marteney

Administrative Law Judge