BETTY CHILDERS,

Grievant,

v.

Docket No. 01-T&R-142

DEPARTMENT OF TAX AND REVENUE

and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This grievance was filed by Grievant Betty Childers against Respondent, Department of Tax and Revenue ("Tax"), on or about July 31, 2000. The statement of grievance reads:

> As a current state employee, I should be receiving recognition for 10 years and 2 months of previous service as a Deputy Circuit Clerk for purposes of computing annual increment pay (West Virginia Code 5-5-1 and 5-5-2 and the Personnel Policy on Increment Pay) and annual leave (West Virginia Administrative Rule 15.04(i)).
>
> As directed by Norma Holstein, Supervisor of S.E.U., I made a request for a decision on these issues in January of 1998, addressed to Patty Haddy, the Director of Payroll. I have not received a reply, nor been awarded any of these benefits.

As relief Grievant seeks:

> 1) That my previous "unused" sick leave be added to my current balance of accrued sick leave, 2) Recognition of my previous years service as a Deputy Circuit Clerk for purposes of computing annual increment pay and annual leave, 3) Backpay for any annual increment pay that should have been previously awarded, and 4) That .50 days of annual leave for every month of service with the Tax Department be added to my accrued annual leave. (See footnote 1)

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievant has been employed by Tax since January 1997.

2. Prior to being employed by Tax, Grievant had been employed as a Deputy Circuit Clerk in Clay County for 10 years and 2 months. Her hiring was approved by the Clay County Commission and the Clay County Circuit Judge. Her position was funded by the Clay County Commission, and her paycheck was from the county. She participated in the Public Employees Retirement System during this time.

3. Grievant was employed in the private sector between the time she left her employment with the Clay County Circuit Clerk's Office, and the time she became employed by Tax.

4. Grievant's employment with the Clay County Circuit Clerk's Office is not counted by Tax toward her years of service with the State of West Virginia in determining Grievant's leave or increment pay, and she was not allowed to carry any sick leave from her Clay County employment to Tax.

Discussion

Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). Grievant argued the Clay County Circuit Clerk's Office is a “spending unit” of the State of West Virginia, and therefore, she was an “eligible employee” during her employment with the County, and her years of employment there should be counted in the calculation of her increment pay.

Respondents argued Grievant was not an employee of the State of West Virginia when she was employed in the Clay County Circuit Clerk's Office, and because of this, her employment there cannot be counted in any calculation of her increment pay.

Increment pay is authorized by statute in W. Va. Code §§ 5-5-1 and 5-5-2. These Code sections provide, 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: Provided, That the mandatory salary increase required by this article shall not apply to any faculty employee at public institutions of higher learning or any employee of the state whose compensation is fixed by statute or by statutory schedule, (except that the clerks, deputy clerks and magistrate assistants of magistrate courts shall be eligible for the incremental salary increases provided in this article and with such increases to be allowable in addition to the maximum salaries and compensation for such employee offices under the magistrate court system statutes of article one [§§ 50-1-1 et seq.], chapter fifty of the code), nor shall this article be construed to mandate an increase in the salary of any elected or appointed officer of the states; (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.

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 presented no authority for the proposition that the Office of a county Circuit Clerk is a "spending unit" of the State of West Virginia. The terms used in defining the term "spending unit" are not defined in article five, chapter five, and a review of the West Virginia Code reveals that at least some of these terms can have varying definitions. Employees of a county Circuit Clerk's Office are employees of the county commission and the elected county official(s) in that Office. Fury v. County Court, 608 F. Supp. 198 (S.D.W. Va. 1985). Counties are political subdivisions of the State. W. Va. Const. Art. X, § 6a. This Grievance Board has concluded that an employee of a county is not an employee of the State of West Virginia, and employment with a county cannot be counted as "years of service" for the purpose of determining the amount of an employee's increment pay. Meskinish v. W. Va. Dep't of Health and Human Resources, Docket No. 01-HHR-597 (Mar. 11, 2002); Cook v. Dep't of Health and Human Resources, et al., Docket No. 00-HHR-352 (June 29, 2001).

Meskinish further determined that whether an entity is a "spending unit" of the State of West Virginia is irrelevant, because the issue is whether the county employment is included as "years of

service," and the definition of "years of service" omits the phrase "spending unit," referring only to service as an "employee of the state of West Virginia." This conclusion reads the words "spending unit" out of the statute. The undersigned concludes that the two cited sections of article five, chapter five, should be read together, and that, contrary to the statement in Meskinish, supra, the issue of whether an entity is a "spending unit" can indeed be a relevant consideration in determining whether particular employment is included in the calculation of increment pay. The end result is the same, however, as the undersigned further concludes that, for purposes of article five, chapter five, a county is not a spending unit of the State of West Virginia, as employment by a county is not considered state employment for the purposes of this article. Grievant's employment with Clay County cannot be counted as "years of service" when determining the amount of her increment pay.

As to Grievant's claim that her years of employment with the Clay County Circuit Clerk's Office should be counted when determining the rate at which she accrues annual leave, she has not demonstrated that Personnel's Rules were applicable to her employment with the county. Personnel's Rules on the accrual of annual leave are found in § 14.3. An employee accrues annual leave at varying rates, depending upon her length of service. With regard to what service is included in this determination, Rule 14.3 provides:

> (b) Service to Qualify - Qualifying service for length of service category is based on State employment or employment in the classified service. No service credit accrues for periods during which an employee is not paid a wage or salary unless otherwise provided by State or Federal statute.

Personnel argued that Grievant's employment with Clay County was not "qualifying service." At first blush it would appear this is correct, because Grievant's service was not State employment or employment in the classified service. However, paragraph (a) states that, "[e]xcept as otherwise noted in this rule, each **employee** is eligible to accrue annual leave with pay and benefits." "Employee" is defined in Personnel's Rules at § 3.37 as, "[a]ny person who lawfully occupies a position in an **agency** and who is paid a wage or salary and who has not severed the employee-employer relationship." "Agency" is defined broadly in Rule 3.4 as, "[a]ny administrative department of state government or a **political sub-division established by law or executive order**." As previously noted, counties are political subdivisions of the state.

Thus, under the definitions found in Personnel's Rules, when Grievant was Deputy Clerk, she

would have been an employee eligible to accrue annual leave with pay and benefits. W. Va. Dep't of Admin. v. W. Va. Dep't of Health and Human Resources, 192 W. Va. 202, 451 S.E.2d 768 (1994). However, the initial question is whether Personnel's Rules applied to Grievant's county employment; that is, whether the Office of the Circuit Clerk of Clay County was a member of the state merit system. Id. There was no evidence that the Clerk's Office was a member of the state merit system. Grievant has not demonstrated that Personnel's Rules were applicable to her county employment, and her county employment cannot be counted as qualifying service in determining the amount of annual leave she should accrue each pay period.

Grievant's claim that she was entitled to have her sick leave carried over from her county employment to her employment with Tax, is not supported by Personnel's Rules related to the transfer of sick leave. Personnel's Rules at § 14.4 provide with regard to that issue:

> (i) Transfer of Sick Leave
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> 1. When a classified employee transfers or otherwise changes employment from one agency to another, all hours of accrued sick leave shall be transferred. The previous employer shall provide written documentation of the sick leave balance to the other agency within thirty (30) calendar days after the employee commences work.
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> 2. At the discretion of the appointing authority, sick leave accrued while in other State employment may be transferable to covered agency employment.

Personnel pointed out that Grievant was not a classified employee when she was employed as a Deputy Circuit Clerk, so there was no requirement that any sick leave balance be transferred to Tax. Assuming her county employment were considered “other State employment,” and that she did not loose her sick leave balance when she severed her employment with the county, whether she was able to transfer her sick leave balance was “at the discretion of the appointing authority” for Tax. Grievant has not demonstrated that the appointing authority did not properly exercise his or her discretion in declining to accept her sick leave balance from her former employer.

Finally, Grievant submitted evidence that another state employee had received credit toward leave and increment pay for her years of service with the Clay County Prosecuting Attorney's Office, when she was hired by the Attorney General's Office. Respondents argued this was an error which

should not be perpetuated by giving Grievant the same benefits, and Personnel pointed out that the Attorney General is a Constitutional Officer, and his Office is not subject to Personnel's Rules. This employee further testified that she is now employed by the Division of Corrections, and she no longer receives any credit toward leave or increment pay for her employment with the county. This employee's situation does not demonstrate that Grievant should receive credit for her work for the county, inasmuch as this employee no longer receives this benefit. Further, to the extent that this other employee received credit for her county service in the calculation of her increment pay, this was an error. This "previous [error] may not be used to require an agency to perpetuate the violation. Singleton v. Dep't of Health and Human Res., Docket No. 95-HHR-490 (May 24, 1996)." Cook v. Dep't of Health and Human Resources, Docket No. 00-HHR-352 (June 29, 2001).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. "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 . . .. *See* Cook v. Dep't of Health and Human Resources, et al., Docket No. 00-HHR-352 (June 29, 2001)." Meskinish v. W. Va. Dep't of Health and Human Resources, Docket No. 01-HHR-597 (Mar. 11, 2002).

3. Employees of a county Circuit Clerk's Office are employees of the county commission and the elected county officials. Fury v. County Court, 608 F. Supp. 198 (S.D.W. Va. 1985).

4. For purposes of article five, chapter five of the West Virginia Code, Grievant was not an employee of the State of West Virginia, "or any spending unit thereof," when she was a Deputy Circuit Clerk, and her service in that position cannot be counted as "years of service" for the purpose of determining the amount of her increment pay. Cook v. Dep't of Health and Human Resources, et al., Docket No. 00-HHR-352 (June 29, 2001). See Meskinish v. W. Va. Dep't of Health and Human Resources, Docket No. 01-HHR-597 (Mar. 11, 2002).

5. Personnel's Rules on annual leave are applicable to employment with a county entity which is a member of the state merit system. W. Va. Dep't of Admin. v. W. Va. Dep't of Health and Human Resources, 192 W. Va. 202, 451 S.E.2d 768 (1994).

6. Grievant did not demonstrate that the Office of the Circuit Clerk of Clay County was a member of the state merit system covered by Personnel's Rules. Accordingly, her county employment cannot be counted in determining the rate at which she accrues annual leave.

7. Grievant was not a classified employee when she was employed as a Deputy Circuit Clerk, so there was no requirement that any sick leave balance be transferred to Tax. Grievant did not demonstrate she was otherwise entitled to have any sick leave balance transferred to Tax.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 § 29A-5-4(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.

BRENDA L. GOULD

Administrative Law Judge

Dated: July 17, 2002

Footnote: 1

The grievance was apparently denied at Level I. Grievant appealed to Level II, and a decision denying the grievance was issued on August 7, 2000. Grievant appealed to Level III, where a hearing was held on March 19, 2001. The grievance was denied at Level III on April 16, 2001. Grievant appealed to Level IV on April 26, 2001. The Division of Personnel was joined at Level IV as a party. After several continuances were granted, a Level IV hearing was held on May 22, 2002. Grievant was represented by Fred Tucker, Tax was represented by Floyd M. Sayre, III, Esq., and the Division of Personnel was represented by Robert D. Williams, Esquire. This matter became mature for decision on July 3, 2002, upon

receipt of the last of the parties' written arguments.