THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

WANDA MORGAN,

Grievant,

v.

DOCKET NO. 07-HHR-131

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

BUREAU FOR CHILDREN AND FAMILIES, and

DIVISION OF PERSONNEL,

Respondents.

DECISION

This grievance was filed at level one of the grievance procedure by Grievant, Wanda Morgan, on March 13, 2007. Her statement of grievance reads:

> I wish to grieve the Department['']s discriminatory pay policies. There is no equal pay for equal work within job classifications or from one pay grade to another. I am currently earning approximately 3% less than an employee with approximately the same tenure as I. We were both Economic Service Workers doing the same job until I was promoted to Family Support Specialist I. I received a 5% increase from pay grade 10 to pay grade 11. After I left that position, Economic Service Workers received several increases which negated my promotion. This made their pay above that of an entry level Family Support Specialist. In addition I make an average of 25% less than the other 4 employees in my unit (same pay grade) for performing the same job responsibilities.

The relief sought by Grievant is “at least a 10% pay increase to help establish internal equity.”

Grievant's supervisor responded to the grievance at level one on March 19, 2007, stating she lacked the authority to grant the relief requested. Grievant appealed to level two on March 20, 2007, and a level two conference was held on March 27, 2007. The leveltwo response was issued on April 2, 2007, denying the grievance, because the second level supervisor lacked authority to grant the relief requested. Grievant appealed to level three on April 4, 2007. The grievance was dismissed at level three, without hearing, because the level three grievance evaluator was without authority to grant the relief requested. Grievant appealed to level four on April 17, 2007. A level four hearing was held before the undersigned Administrative Law Judge on January 24, 2008, in the Grievance Board's Westover office. Grievant represented herself, the Department of Health and Human Resources was represented by Jennifer K. Akers, Assistant Attorney General, and the Division of Personnel (“Personnel”) was represented by Karen O'Sullivan Thornton. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on February 27, 2008. (See footnote 1)

Synopsis

Grievant argued there is no equal pay for equal work in her work unit. She believed that the Legislative pay increases awarded to Economic Service Workers after she had been promoted from that classification, had effectively negated the pay raise she had received with her promotion from Economic Service Worker to Family Support Specialist. The West Virginia Equal Pay Act does not apply to state employees covered by the civil service system. The only requirement is that all classified employees must becompensated within their pay grade. Grievant is being paid within the pay range of the pay grade assigned by Personnel to her classification.

Second, Grievant asserted she was making an average of 25% less than the other four Family Support Specialists in Ohio County. While Grievant is the lowest paid Family Support Specialist in Ohio County, her experience and years of service are not comparable to those of the other Family Support Specialists in Ohio County. The salaries in Grievant's unit are not inconsistent with the Internal Equity provision of Personnel's Pay Plan Implementation Policy. Even if the salaries in Grievant's unit were inconsistent with the Internal Equity provision, this policy provides that *it is within the agency's discretion to recommend a salary increase* of up to 10% for employees who fit within the

situation described in the policy. An agency's decision not to recommend a discretionary pay increase generally is not grievable.

The following Findings of Fact are made based upon the record developed at the level four hearing.

Findings of Fact

1. Grievant is employed by the Department of Health and Human Resources ("HHR") as a Family Support Specialist in Ohio County, West Virginia. She has been employed by HHR for six years, and her annual salary, at the time the grievance was filed, was $23,256.00.

2. Grievant was promoted from an Economic Service Worker to a Family Support Specialist at some point in her career, and received a five percent pay increase with the promotion. 3. After Grievant's promotion, the West Virginia Legislature approved a pay increase for Economic Service Workers. No similar pay increase was approved for Family Support Specialists.

4. The Family Support Specialist classification is in pay grade 11. The Economic Service Worker classification is in pay grade 10. Grievant's salary is within the salary range for pay grade 11.

5. The other four Family Support Specialists in Ohio County do earn more than Grievant, but only one of these employees earns more than 20% more than Grievant. That employee, however, has 26 years of service. The other three Family Support Specialists in Ohio County have 9, 19, and 15 years of service.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See* W. Va. Code § 29-6A-6. (See footnote 2) *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). "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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argued there is no equal pay for equal work in her work unit. She supported this conclusion with three points. First, she believed that the Legislative pay increases awarded to Economic Service Workers after she had been promoted from that classification, had effectively negated the pay raise she had received with her promotion. Second, by Grievant's calculations, she was making an average of 25% less than the other four Family Support Specialists in Ohio County. Finally, at the level four hearing, Grievant asserted it was not fair that she is being paid almost $3,000 less than one Family Support Specialist in Ohio County, who is shown on Grievant's Exhibit 1 as having three years of tenure. Grievant acknowledged, however, that this employee had worked in another position for HHR which had been in a higher pay grade, and had taken a pay cut when she became classified as a Family Support Specialist. Further, at the time this grievance was filed, the position this particular employee later filled was vacant.

Respondents pointed out that the West Virginia Equal Pay Act is not applicable to state employees covered by the civil service system. The concept of equal pay for equal work for a civil service employee requires only that the employee be compensated within the pay range of the employee's classification, as is Grievant. In addition, Respondents noted that the pay increases given Economic Service Workers were legislative pay increases. Respondents argued that within Ohio County, Grievant's Family Support Specialist co-workers at the time this grievance was filed, all had more experience thanGrievant. In particular, they noted that the only co-worker making 20% more than Grievant had more than 20 years of experience. Respondents concluded from these facts that the salaries in Grievant's unit are consistent with the Internal Equity provision of Personnel's Pay Plan Implementation Policy. Finally, Respondents pointed out that even if HHR requested a discretionary pay increase for Grievant, it would not be approved, as there is a freeze on discretionary salary increases (see footnote 4).

It is understandable that Grievant would be upset that, after she was promoted to Family Support Specialist, all the Economic Service Workers received a pay increase, which effectively negated all or part of the increased salary she had earned as a result of her promotion. However, that pay increase was not her employer's decision. It was a Legislative decision.

The analysis of the concept of equal pay for equal work for a state employee involves a limited inquiry. “The 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 and Div. of Personnel*, 192 W. Va 239, 452 S.E.2d 42 (1994). "'[E]mployees who are performing the same tasks with the same responsibilities should be placed within the same job classification,' but a state employer is not required to pay these employees at the same rate. *Largent* at Syl. Pts. 2 & 3. The requirement is that all classified employees must be compensated within their pay grade. *See Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26, 1997); *Brutto v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-076 (July 24, 1996); *Salmons v. W. Va. Dep't of Transp.*, Docket No.94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dep't of Transp.*, Docket No. 94-DOH- 435 (Feb. 28, 1995); *Tennant v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health & Human Res.*, Docket No. 91- H-177 (May 29, 1992). *See AFSCME v. Civil Serv. Comm'n,* 181 W. Va. 8, 380 S.E.2d 43 (1989)." *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006).

"The State Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2). (See footnote 3) The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by [the] State Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Moore v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). *See Callaghan v. W. Va. Civil Serv. Comm'n*, [166 W. Va. 117,] 273 S.E.2d 72 (W. Va. 1980)." *Harvey-Gallup v. Dep't of Health an Human Res.*, Docket No. 04-HHR-149J (Feb. 21, 2008). Grievant is being paid within the pay range of the pay grade assigned by Personnel to her classification. Personnel's Pay Plan Implementation Policy (revised July 1, 2005) contains a provision entitled "Internal Equity," which Grievant relied upon in asserting her entitlement to a pay increase based upon a comparison of salaries in her work unit. That provision reads as follows:

> In situations in which one or more employees are paid at least 20% less than other employees in an agency-defined organizational unit and the same job class *who have comparable training and experience, duties and responsibilities, performance level, and years of State/classified service,* the *appointing authority may recommend* an in-range salary adjustment of up to 10% of current salary to each employee in the organizational unit whose salary is at least 20% less than other employees in the unit. Internal equity increases shall be limited to once every five years for the same job class in the same organizational unit.

(Emphasis added.)

The majority of Grievant's complaint related to the salaries paid to Economic Service Workers. These employees are not in the same classification as Grievant, so this provision is not applicable to any comparison Grievant wishes to make between herself and Economic Service Workers. Grievant is the lowest paid Family Support Specialist in Ohio County, *but her experience and years of service are not comparable to those of the other Family Support Specialists in Ohio County*. If the inquiry is expanded to Hancock County, and to all of Region 1, Grievant is paid less than other Family Support Specialists who have more years of service than she. However, with three exceptions, she is paid more than those Family Support Specialists who have fewer years of service than she. The three Family Support Specialists shown on Grievant's Exhibit 2 as having four years of service, with salaries higher than Grievant's, were paid less than $1,000.00 more than Grievant, which is not a 20% difference. The evidence does not support a finding that thesalaries in Grievant's unit are inconsistent with the Internal Equity provision of the Pay Plan Implementation Policy.

Even if the salaries in Grievant's unit were inconsistent with the Internal Equity provision, this policy does not confer upon Grievant an entitlement to a salary increase should she prove her situation fits within the policy. *It is within the agency's discretion to recommend a salary increase* of up to 10% for employees who fit within the situation described in the policy. (See footnote 4) "The grievance board simply does not have the authority to second guess a state employer's employment policy." *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997). An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't of Health and Human Res.*, Docket No. 07-HHR-141 (May 14, 2008).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., 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. "The 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. West Virginia Division of Health and Division of Personnel*, 192 W. Va 239, 452 S.E.2d 42 (1994).

3. "W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but that Code Section does not require these employees to be paid exactly the same. Syl. Pts. 3 and 4, *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 452 S. E.2d 42 (1994); *Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26, 1997)." *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006).

4. The differences between Grievant's salary and the salaries of Grievant's co- workers who were in her same classification at the time this grievance was filed, were not inconsistent with the Internal Equity provision of Personnel's Pay Plan Implementation Policy (revised July 1, 2005), as all of these co-workers had significantly more years of State/classified service than Grievant.

5. An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't of Health and Human Res.*, Docket No. 07-HHR- 141 (May 14, 2008).

Accordingly, this grievance is **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. *See* W. Va. Code § 29-6A-7 (See footnote 2). 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 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 properly transmitted to the appropriate circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: June 5, 2008

Footnote: 1

Grievant asked that the record be left open for submission of information she had requested from Respondent regarding salaries in her region for Economic Service Workers and Family Support Specialists. This request was granted. Grievant submitted this information with her written argument. The five pages of information on salaries for Economic Service Workers and Family Support Specialists, and their tenure with Respondent, for Region 1, is marked as Grievant's Exhibit 2, and is ORDERED admitted into the record.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 3

Section 5.1 of [Personnel's] Rules notes the purpose and intent of the classification plan is to "[t]o attract qualified employees and retain them in the classified service" and the State Personnel Board "shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various agencies and on comparability to pay rates established in other public and private agencies and businesses."

Footnote: 4

Even this discretion has been removed from HHR and other state agencies. Respondent's Exhibit 2, a Memorandum from Michael F. McCabe, Director, Office of Personnel Services, to DHHR Administrative Staff, dated May 5, 2005, states in paragraph one:

> *Larry Puccio, Chief of Staff, Office of the Governor, has directed that discretionary salary increases must be approved by the Governor's Office. He further indicated that approval for such increases would occur only under the most extenuating circumstances such as settlement of litigation.*

As of the date of the level four hearing, this directive was still in effect, and recommendations for discretionary salary increases were not being approved.