CYNTHIA A. FORD and EVE POWERS,

Grievants,

v. **Docket No. 05-HHR-408**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES and DIVISION OF PERSONNEL,

Respondents.

DECISION

Cynthia Ford and Eve Powers ("Grievants") initiated this proceeding on October 12, 2005, alleging entitlement to a salary adjustment granted to other state employees. The grievance was denied at all lower levels, and Grievants appealed to level four on November 14, 2005. A hearing was conducted in Westover, West Virginia, on February 8, 2006, at which Grievants represented themselves; the Department of Health and Human Resources ("DHHR") was represented by Jennifer K. Akers, Assistant Attorney General; and the Division of Personnel ("DOP") appeared by Assistant Director Lowell D. Basford. This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 13, 2006.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievants are employed by the Bureau for Children and Families ("BCF") as Child Protective Service Worker Trainees in the Martinsburg office. 2. Grievant Ford began her employment with DHHR on July 18, 2005, and Grievant Powers was hired on August 16, 2005.

3. Pursuant to recommendations of a work group appointed by Governor Joe Manchin, the legislature approved funding for salary adjustments of $900 and $1350 for all eligible state employees, effective November 1, 2005.

4. In order to be eligible to receive the legislative salary adjustment, employees had to be employed on or before May 2, 2005. The reasoning for this eligibility requirement was based upon the premise that most state agencies require employees to complete a six-month probationary period. Therefore, most employees receiving the raise would have completed their probationary period before receiving the salary increase.

5. Unlike most state agencies, Respondent requires its employees to complete a one-year probationary period. Therefore, some of Respondent's probationary employees received the legislative pay raise.

6. At some point after being hired by Respondent, Grievants were told that a legislative pay raise was forthcoming and that they would receive it.

7. Because Grievants were not yet employed on May 2, 2005, they were not eligible to receive the pay raise.

Discussion

Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Grievants take issue with the fact that they were initially told they would be eligible for the pay raise, but did not ultimately receive it. In addition, they believe it is unfair for them to not receive the raise, allegedly due to their probationary status, when other probationary employees hired before them, who perform the same duties, were eligible.

Respondents counter that Grievants have failed to prove that the May 2 eligibility cutoff date was arbitrary and capricious, and that they are not similarly situated to employees who received the pay raise, due to their hiring date. They further argue that the eligibility date for the pay increase does not violate any "rule, regulation or statute, or constitute a substantial detriment to, or interference with, the employees' effective job performance or health and safety," as required by West Virginia Code § 29-6A-2(l).

Although not specifically alleged, it appears that Grievants are claiming discrimination, in that they

did not receive the raise, while other probationary employees performing the same job duties did. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d). A grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly- situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Lusher v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005). In the instant case, Grievants are not similarly situated to the employees who received the pay increase, by virtue of the eligibility cutoff date. Because they were not employees on May 2, 2005, they are not similarly situated to those who were and who received the raise. Therefore, they cannot establish discrimination under these circumstances.

Similarly, the determination which resulted in the action which Grievants challenge cannot be characterized as arbitrary and capricious. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997)*; Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). Since most state agencies use a six-month probationary period, the May 2 cutoff date did, indeed, have a rational basis. As recently observed in *Smith v. Department of Health & Human Resources*, Docket No. 05-HHR-218 (Aug. 5, 2005), a state agency is without authority to grant across-the- board pay raises beyond those authorized by the State Personnel Board and thelegislature. As noted in that case, and as DOP has argued here, "any matter in which authority to act is not vested with the state department, board, commission or agency utilizing the services of the grievant shall not be the subject of any grievance. W. Va. Code §§ 29-6A-2(g) and (i)." Grievants

admitted during the level four hearing that they were aware that it was not DHHR's decision as to whom the pay raise would be granted. Accordingly, DHHR was without authority to act in this instance, so it does not give rise to a grievable action by DHHR employees such as Grievants.

The following conclusions of law support this Decision.

Conclusions of Law

1. Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d).

3. A grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly- situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Lusher v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

4. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the

employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997)*; Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

5. Grievants have failed to establish that the May 2 eligibility date for the pay raise at issue was discriminatory or arbitrary and capricious.

6. "Any matter in which authority to act is not vested with the state department, board, commission or agency utilizing the services of the grievant shall not be the subject of any grievance. W. Va. Code §§ 29-6A-2(g) and (i)." *Smith v. Department of Health & Human Resources*, Docket No. 05-HHR-218 (Aug. 5, 2005).

7. DHHR did not make the decision which gave rise to this grievance, so it does not constitute a grievable issue for DHHR employees.

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. 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: April 7, 2006

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DENISE M. SPATAFORE

Administrative Law Judge