THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

KAREN EBERT ALLEN,

Grievant,

v. **Docket No. 06-DOH-224**

Janis I. Reynolds

Senior Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Karen Ebert Allen, filed this grievance against her employer, the Division of Highways ("DOH"), on January 24, 2006. Her Statement of Grievance reads:

> On January 6, 2006, the Human Resources Division, notified me that a request for a salary adjustment is being "returned . . . and cannot be processed due to a prohibition of discretionary salary increases by the Office of the Governor". (sic) It is my belief that the Human Resources Division acted arbitrary (sic) and capriciously, and possibly in a discriminatory manner, when not giving my request the proper consideration it warranted. The Human Resources Division did not follow its established criteria (§ III-C of the West Virginia Pilot Strategic Compensation Policy) when refusing my request to correct an internal [pay] inequity.

Additionally, it is also my belief that the Human Resources Division misinterpreted the prohibition of salary increases from the Office of the Governor.

Grievant's Relief Sought is a "10% salary adjustment retroactive to September 26, 2005."

This grievance was denied at all lower levels. Grievant appealed to Level IV on July 6, 2006, and a Level IV hearing was held on September 5 and 28, 2006, in the Grievance Board's Charleston office. Grievant was represented by Bren Pompanio, Esq., DOH wasrepresented by Barbara Baxter, Esq., and Division of Personnel was represented by Karen Thornton, Assistant Attorney General. This case became mature for decision on October 31, 2006, after receipt of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserts the April 29, 2005 memo from Office of the Governor specifically permitted the inequity increase she was seeking, and DOH misinterpreted the memo when it refused to process Grievant's request for this Internal Equity increase. Grievant also avers DOH was required to distribute the Pilot Strategic Compensation Policy to all employees as soon as it went into effect, this failure resulted in arbitrary and inequitable salary increases, and, because of this failure to distribute the Pilot Strategic Compensation Policy, the employer is estopped from denying Grievant's request because of the Governor's memo. (See footnote 1)

Respondents argue the raise Grievant was seeking was discretionary, and all discretionary increases are currently prohibited by the Governor. Respondents also assert there has been no discrimination and to require DOH to give Grievant an increase would require both the Division of Personnel and

Division of Highways to commit an ultra vires act.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by DOH as a Community Development Specialist 2. She has eight-plus years of service because she worked part-time several years.

2. There are two other Community Development Specialists 2 in her section. Both these employees have more than twenty years of seniority with DOH, but have less time in their current positions than Grievant. These male employees are not as proficient as Grievant is, but they earn 20% more a year than she does. Both Grievant and the other Community Development Specialists 2's in her section are paid within their pay grade. (See footnote 2)

3. In 2004, DOP developed and put into place the Pilot Strategic Compensation Policy, in part, to establish variable and flexible compensation practices that would reward exemplary employees, encourage employee growth and development, and reduce the misuse of reallocations and promotions.

4. With the approval of the State Personnel Board, the Pilot Strategic Compensation Policy was incorporated into the Pay Plan Implementation Policy. This addition became effective on July 1, 2005. The purpose of this plan was "[t]o establish a uniform policy for the implementation of the pay regulations and the salary schedule for theclassified staff." Compensation requests must be approved by the agency before they can be sent to the Division of Personnel for review and/or approval.

5. The Pay Plan Implementation Policy allows for "Internal Equity" salary adjustments and states:

> 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).

6. The Pay Plan Implementation Policy defines an in-range salary adjustment as "[a] discretionary increase in an employee's salary range of the employee's current job class." (Emphasis added).

7. On April 8, 2005, Jeff Black, Director of DOH's Human Relations, informed DOH Administrators about the Pilot Strategic Compensation Policy. DOH had not distributed the Plan sooner because of its "far reaching nature," and because DOH did not want a "rush" of applications because it was not an entitlement policy. Test. Black, Level III 3.

8. On April 29, 2005, Governor Manchin's Chief of Staff, Larry Puccio, issued a memorandum ("Governor's memo") informing all Cabinet Secretaries they were not to grant any discretionary merit or salary increases, but non-discretionary increases were to be granted pursuant to the Division of Personnel's Rules. The types of non-discretionary increases included were advances received on promotion, upward reallocation, temporaryupgrades, and pay differentials approved by the State Personnel Board "to address circumstances such as class-wide recruitment and retention problems, regionally specific geographic pay disparities, shift differentials for specific work periods, and temporary upgrade programs."

9. Initially, Mr. Black did not think the Governor's memo applied to the salary increases in the Pilot Strategic Compensation Policy.

10. On June 3, 2005, Grievant's supervisor wrote Mr. Black, explained Grievant's situation, and asked about using the Pilot Strategic Compensation Policy to obtain a pay increase. Mr. Black responded on July 6, 2005, and stated the increase could be pursued if Grievant met the criteria, and he directed Grievant's supervisor to complete the required form. Grievant's Exh. 5 at Level III.

11. Approximately three months later, Grievant's supervisor completed the required paperwork requesting an Internal Equity adjustment on September 26, 2005, and submitted it to DOH's Human Resources.

12. Fifteen raises were processed by DOH and DOP from June 15, 2005, to October 18, 2005, under the Pilot Strategic Compensation Policy.

13. At some time unclear from the record, Joe Smith, Personnel Consultant with the Governor's office, found out these discretionary raises were being processed and told Mr. Black and Mr. Basford, the Division of Personnel's Manager of the Classification and Compensation Section, that these increases were prohibited by the Governor's memo. 14. After that time, DOH did not submit any more requests to DOP, and DOP did not approve any increases under the Pilot Strategic Compensation Policy. The first DOH disapproval was on October 20, 2005. (See footnote 3) Respondent Exh. 1 at Level IV.

15. On January 6, 2006, Mr. Black returned Grievant's paperwork informing her the "transaction cannot be processed due to the prohibition of Discretionary salary increases by the Office of the Governor."

16. The Pilot Strategic Compensation Policy was never intended to grant salary advances automatically, as the purpose of the Policy is to give

agencies a way to address compensation issues in a discretionary manner. Test. Black; Basford, Level IV Hearing.

17. Grievant's request for an Internal Equity increase is not covered under the permitted pay differentials identified in the Governor's memo. See Finding of Fact 8.

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 (2000); 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). "The preponderance standard generally requires proof that a reasonableperson would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the grievant has not met his or her burden. Id.

Grievant has raised many issues, but the key to resolving this grievance is the plain wording of the Pilot Strategic Compensation Policy.

I. Pilot Strategic Compensation Policy

Grievant requested an Internal Equity adjustment and asserts DOH and the Division of Personnel misinterpreted the Governor's memo. As stated in the Pilot Strategic Compensation Policy and the Pay Plan Implementation Policy, when discussing Internal Equity adjustments, "the appointing authority

may recommend an in-range salary adjustment. . . ." (Emphasis added). These same Policies define an in-range salary adjustment as "[a] discretionary increase in an employee's salary range of the employee's current job class." (Emphasis added).

When the plain language of a policy or regulation does not compel a different result, deference must be extended to the agency in interpreting its own rules, regulations, and mandates. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). Where the language in a policy or regulation is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth., Docket No. 97-PEDTA- 420 (May 7, 1998). See generally W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

It is clear from the plain language of these Policies that an Internal Equity adjustment is a discretionary increase. It is also clear the Governor's memo discontinued the granting of any discretionary increases. Additionally, since Mr. Smith's interpretation of the Governor's memo is not contrary to the plain meaning of the language contained in the Policies, it is entitled to deference. Accordingly, Grievant's assertion that Division of Personnel and DOH misinterpreted the Governor's memo is without merit. (See footnote 4)

Further, the granting of discretionary increases falls under the arbitrary and capricious standard of proof. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered,

explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary andcapricious standard is a high one, requiring willful and unreasonable action and disregard of known facts. It cannot be considered arbitrary and capricious to follow the mandate of the Governor concerning discretionary increases.

II. Delay in sending out the Pilot Strategic Compensation Policy

Grievant is correct. DOH did not distribute the Pilot Strategic Compensation Policy as soon as it was available. DOH was not sure what effect these discretionary increases would have on its agency and delayed distributing it until the agency decided to participate. Grievant did not cite to any rule, regulation, statute, or policy that required the distribution of the Pilot Strategic Compensation Policy at any given time. Accordingly, no violation has been established.

III. Discrimination

Grievant has also asserted she has been discriminated against. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as, "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." Administrative notice is taken that the West Virginia Supreme Court of Appeals recently revised the legal test for discrimination/favoritism claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing:

(See footnote 5)

> (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.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant has not met her burden of proof. While it is true that DOH and the Division of Personnel processed some salary increases under the Pilot Strategic Compensation Policy, these increases were in error and in contravention of the Governor's memo. As discussed below, such error cannot require an agency to violate a mandate again. Once DOH and the Division of Personnel talked to Mr. Smith, all employees were treated the same.

IV. Ultra Vires

Grievant asserts that since some raises were granted, hers should be processed as well. It should be noted that there initially appeared to be some confusion of the part of DOH and the Division of Personnel. Once the error of

their ways became clear to them, no more discretionary increases were processed. (See footnote 6) To grant Grievant an Internal Equity increase after it was clear this act was prevented by the Governor's memo would be an ultra vires act. This Grievance Board has discussed the issue of ultra vires acts at some length. "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 repeat such violative acts." Guthrie v. Dep't of Health and Human Serv., Docket No. 95- HHR-297 (Jan. 31, 1996). See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991); Franz v. Dep't of Health and Human Res., Docket No. 99- HHR-228 (Nov. 30, 1998).

This rule is clear. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers[,] and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc., 174 W. Va. 605, 328 S.E.2d 356 (1985). The granting of prior increases were ultra vires acts, are considered non-binding, and cannot be used to force an agency to repeat such violative acts. Guthrie, supra. See Crosston v. Div. of Highways, Docket No. 96-DOH-503 (Oct. 31, 1997).

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. 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 (2000); 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). "The preponderance standard generally requires proof that a reasonableperson would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the grievant has not met his or her burden. Id.

2. The plain language of the Pilot Strategic Compensation Policy states that an Internal Equity adjustment is a discretionary increase. As such, it is clearly prohibited by the Governor's memo.

3. Grievant did not demonstrate DOH violated any statute, policy, rule, or regulation when it did not distribute the Pilot Strategic Compensation Policy as soon as it was issued by the State Personnel Board.

4. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as, "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."

5. In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004), the West Virginia Supreme Court of Appeals revised the legal test for discrimination claims raised under the grievance procedure statutes. 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.Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

6. Grievant did not meet her burden of proof and established she was treated differently than any other employees after the Governor's memo was clarified.

7. "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 repeat such violative acts." Guthrie v. Dep't of Health and Human Serv., Docket No. 95- HHR-297 (Jan. 31, 1996). See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991); Franz v. Dep't of Health and Human Res., Docket No. 99- HHR-228 (Nov. 30, 1998).

8. The granting of prior increases were ultra vires acts, are considered non-binding, and cannot be used to force an agency to repeat such violative acts. Guthrie, supra. See Crosston v. Div. of Highways, Docket No. 96-DOH-503 (Oct. 31, 1997).

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. 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.

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Janis I. Reynolds

Senior Administrative Law Judge

Date: January 31, 2007

Footnote: 1

Grievant also asserted the memo was "distributed to selective employees." As no evidence was presented on this issue, it will not be addressed further.

Footnote: 2

Largent v. West Virginia Division of Health and Division of Personnel, 192 W. Va 239, 452 S.E.2d 42 (1994) noted W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification. Largent at Syl. Pts. 3 and 4. Specifically, Largent held "employees 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).

Footnote: 3

There have been salary increases granted after the Governor's memo was issued, and after the Governor's office personnel talked to Mr. Black and Mr. Basford, but these increases are ones specifically allowed by the memo and DOP's Rules. For example, employees who are reallocated to a higher pay grade receive the required increase, and pay differentials specifically requested and documented by an agency and subsequently approved by the State Personnel Board are given.

Footnote: 4

See Findings of Fact 8 and 16.

Footnote: 5

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, andthose brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Footnote: 6

Of course, as demonstrated by Grievant's evidence, non-discretionary increases continued to be granted.