THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TWILA JEAN MILAM,
Grievant,

v. **Docket No. 2009-0478-DOT**

WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION/DIVISION
OF HIGHWAYS,
Respondents.

DECISION

Grievant Twila Milam is employed by the West Virginia Department of Transportation in the Division of Highways ("DOH"). Grievant is classified as a Transportation Worker 3, Equipment Operator and is assigned to District One in Boone County, West Virginia. On October 1, 2008, Grievant was promoted from a Transportation Worker 2, Equipment Operator to a Transportation Worker 3, Equipment Operator. As part of the promotion, Grievant received a five percent pay increase. Twila Milam filed a grievance on October 8, 2008, alleging that other DOH employees in her District had received a ten percent raise in salary when they were promoted from Transportation Worker 2, Equipment Operator to Transportation Worker 3, Equipment Operator. Grievant avers that Respondent's failure to give her a ten percent pay increase for the same type of promotion constitutes unlawful discrimination. As relief, Grievant seeks to be made whole, including an additional five percent salary increase starting on October 1, 2008.

The grievance was denied at level one in a decision dated December 16, 2008, and a level two mediation was held on March 25, 2009. Grievant appealed and a level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance

Board on July 1, 2009. Grievant Milam appeared at the hearing and was represented by Gordon Simmons, UE Local 170, WVPWU.[1] Respondent was represented by Barbara L. Baxter, Esquire, DOH Legal Division. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law. Both parties submitted fact/law proposals, the last of which was received on July 31, 2009. This grievance became mature for decision on that date.

Synopsis

Grievant received a five percent pay increase when she was promoted from a Transportation Worker 2, Equipment Operator to a Transportation Worker 3, Equipment Operator on October 1, 2008. She contends that she should have received a ten percent pay increase because four male employees, who received the same promotion in or before 2004, received a ten percent increase. Grievant asserts that Respondent unlawfully discriminated against her by not giving her the same percentage pay increase that was previously given to the male employees.

Respondent counters that the ten percent increase that was previously paid to the employees was made up of a five percent required increase and a five percent discretionary increase. DOH quit giving employees the discretionary increase after a memorandum was issued by the Governor's Chief of Staff in April 2005. Respondent argues that after the 2005 memorandum all employees, including Grievant, have received the same five percent salary increase upon promotion, so the raise given to Grievant was not discriminatory.

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[1] West Virginia Public Workers Union.

Grievant did not prove that the five percent salary increase she received with her promotion was discriminatory. The grievance is DENIED.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by the Respondent Division of Highways for eleven years. She works in District One and is classified as a Transportation Worker 3, Equipment Operator ("TW 3 EQOP").[2]

2. Grievant is trained and certified to operate a wide variety of heavy equipment, including but not limited to, a motor grader, backhoe, track excavator and endloader. She is as qualified to operate heavy equipment as the other Transportation Workers ("TW") employed in District One and more qualified than most.

3. On October 1, 2008, Grievant was promoted from a TW 2 EQOP at pay grade 11 to a TW 3 EQOP at paygrade 12. Grievant received a five percent increase in pay with this promotion.

4. At different times during 2004, three men, classified TW 2 EQOP, were promoted to TW 3 EQOP. Each of these employees received a ten percent increase in pay in conjunction with the promotion. Five percent of the increase was required under the

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[2] The actual Classification Series is Transportation Worker 1, 2, 3, and 4. Within the Classification Series are job titles such as Mechanic and Equipment Operator. Notwithstanding the particular job title held by an employee, he or she is paid within the pay range established for the particular Transportation Worker Classification in which he or she is employed. The Classifications pay ranges start at Pay Grade 10 for a Transportation Worker 1 and move up one pay grade with each step, to conclude at Pay Grade 13 for a Transportation Worker 4.

policies of the Division of Personnel.[3] The remaining five percent was a discretionary increase provide by the DOH. At that time, it was the policy of the DOH to give a ten percent increase to all employees who were promoted from a TW 2 classification to TW 3 classification.[4]

5. In a memorandum to all West Virginia Cabinet Secretaries dated April 29, 2005, the Governor's Chief of Staff, Larry Puccio, advised that "merit or salary advancements" should not be granted until further notice, but nondiscretionary increases should continue, which would include pay increases associated with promotion, pay differentials, reclassification, reallocation, increment increases, and temporary upgrades.[5]

6. In response to the "Puccio Memo," the DOH changed their practice of granting employees a ten percent raise who were promoted from TW 2 to TW 3. Instead, when a TW is promoted to a higher pay grade, DOH now gives that employee the five percent pay increase required by the Division of Personnel Policy, but the employee does not receive the additional five percent discretionary increase.

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[3] With regard to the salary increase required in conjunction with a promotion to a higher pay grade, the Division of Personnel Pay Plan Implementation Policy § III (C) (2) states:

> Salaries within the range of the current classification shall be increased by one 5% increment per pay grade range advanced to a maximum of 3 pay grade ranges or to the minimum rate of the higher pay grade, whichever is greater.

[4] The employees who received these promotions in 2004 were Franklin Lovejoy, Rick Roe, and Pat Lusher. A fourth employee of District One, Mike Stover, also received a ten percent increase for a similar promotion some time prior to 2004.

[5] This memorandum has been discussed in several Grievance Board decisions and is generally referred to as the "Puccio Memo."

7. Joe Vance is employed by DOH in District 2. Mr. Vance was promoted from a TW 2 Mechanic to a TW 3 EQOP on January 16, 2007. This promotion took place under the DOH practice adopted after the issuance of the Puccio Memo. Mr. Vance received only the required five percent pay increase. There was not evidence that any DOH employee has received more than the required five percent per pay grade increase for a promotion after April 29, 2005.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 argues that she has been the victim of gender-based discrimination. She notes that at least four men have received a ten percent pay increase upon being promoted from a TW 2 EQOP to a TW 3 EQOP. Grievant only received a five percent increase for the same promotion. Because she was treated differently than the men who received those promotions, Grievant claims that the DOH has committed unlawful discrimination.

Gender-based discrimination claims are actionable under the West Virginia Human Rights Act, but this Grievance Board does not have authority to determine liability for

gender-based claims that arise under that Act (W. VA. CODE §§ 5-11-1, *et seq*). *See Bowman v. W. Va. Educational Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Rodak v. W. Va. Dep't of Tax and Revenue*, Docket No. 96-T&R-536 (June 23, 1997). Nevertheless, the Grievance Board is authorized by statute to provide relief to employees for discrimination, favoritism, and harassment, as those terms are defined in W. VA. CODE § 6C-2-2, even though such discrimination would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over gender-based discrimination claims. *English v. Logan County Bd. of Educ.*, Docket No. 2009-0365-LogED (May 28, 2009); *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (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. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant avers that she is similarly situated to the four men who received ten percent increases for the same promotion for which she only received a five percent salary

increase. That is not the case. All of those employees received their promotions during or before 2004. Grievant received her increase after the issuance of the Puccio Memo in 2005. DOH quit giving the additional five percent discretionary increase after that date. Grievant is similarly situated to all employees who received a promotion after the issuance of the Puccio Memo. The evidence demonstrated that one male employee was promoted from a TW 2 to a TW 3 after the Puccio Memo and he received the same mandatory five percent increase as was given to Grievant. Neither he nor Grievant were given the additional discretionary five percent that was given to all such employees prior to April 29, 2005.

Grievant also argues that the DOH was not required to change its policy of granting an additional five percent salary increase with a promotion by the issuance of the Puccio Memo. Grievant notes that the Governor's Chief of Staff is an employee and not a public official with authority to require the various agencies to abstain from granting discretionary raises. Grievant contends that such action would have to be made through an Executive Order by the Governor to be binding on the agency.[6]

Whether the Chief of Staff's Memorandum was legally binding on the DOH is not controlling in this matter. The Chief of Staff expressed the position of the Governor regarding the issuance of discretionary wage increases and the DOH decided to abide by

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[6]As authority for this proposition Grievant cites an *Opinion of the Attorney General* dated July 16, 2008, which states in part:

> Because the Governor's freeze policy was contained only in a memorandum authored and signed by an employee, without the issuance of an Executive Order by the Governor, it is of questionable authority and effect.

that position.[7] Since the additional salary increase is discretionary, the DOH can decide not to grant that increase at any time, as long as its decision is not arbitrary or capricious. 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 is 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). 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))." 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 his judgment for that of DOH . *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

The DOH decided that it would honor the directive from the Governor communicated through his Chief of Staff in the Puccio Memo. This decision was based upon the concern for the finances of the State. While the agency may not have been legally obliged to follow the directive, its choice to do so was not arbitrary or capricious. Since all employees were

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[7] To be clear, a determination regarding the issue of whether the Puccio Memo is legally binding upon state agencies is not necessary to the outcome of this case and therefore it is not addressed herein.

denied the discretionary five percent increase as a result of this change in practice, the decision was not discriminatory either. Accordingly the grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

2. The Public Employees Grievance Board is authorized by statute to provide relief to employees for discrimination, favoritism, and harassment, as those terms are defined in W. VA. CODE § 6C-2-2, even though such discrimination would also violate the Human Rights Act. Accordingly, the Grievance Board does have subject matter jurisdiction over gender-based discrimination claims. *English v. Logan County Bd. of Educ.*, Docket No. 2009-0365-LogED (May 28, 2009); *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

3. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted

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Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

4. Grievant was not subjected to unlawful discrimination since she was not treated differently from other similarly situated employees after DOH changed their practice regarding discretionary pay increases for promotions.

5. 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 is 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982).

6. Respondent's decision to stop granting discretionary salary increases after receiving a directive from the Governor through a memorandum from his Chief of Staff was not arbitrary and capricious.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: DECEMBER 31, 2009

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE