THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEPHEN BRETT WILLIAMS,

Grievant,

v. **Docket No. 2008-1458-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ BUREAU FOR PUBLIC HEALTH,

Respondent.

DECISION

Stephen Brett Williams ("Grievant") is employed by the West Virginia Department of Health and Human Resources/Bureau for Public Health and assigned to the West Virginia Cancer Registry. Grievant is a Cancer Data Specialist[1] at the Cancer Registry and has worked in that position since mid-September, 2005. On April 1, 2008, Shelley Cogar was employed at the Cancer Registry in a position identical to Grievants but at a significantly higher salary. Mr. Williams filed a grievance on April 14, 2008. For his Statement of Grievance he wrote:

> Selection of and determination of salary for newly hired Health and Human Resources Specialist (Shelley Cogar) was arbitrary and capricious, an abuse of discretion, and/or the result of unlawful discrimination or favoritism resulting in internal inequity in salary.[2]

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[1] Grievant is classified as a Health and Human Resources Specialist in the Division of Personnel classification system. His title at the Cancer Registry reflects his assignment within that agency.

[2] Grievant attached a two page, detailed explanation of this statement.

For Relief, Grievant seeks:

> To have my base annual salary adjusted so that it is equal to or greater than Shelley Cogar's base annual salary. This salary adjustment should be retroactive to April 1, 2008, which was Shelley Cogar's start date of employment.

The grievance was denied at level one on April 16, 2008. An Order of Unsuccessful Mediation was entered at level two on August 14, 2008. A level three hearing was conducted at the Charleston office of the Public Employees Grievance Board on June 22, 2009. Grievant appeared *pro se* and the Department of Health and Human Resources ("DHHR") was represented by Jennifer K. Akers, Assistant Attorney General. At the close of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law. Both parties submitted written proposals and the last one was received by the Grievance Board on July 14, 2009. This matter became mature for decision on that date.

Synopsis

Grievant, who is employed in the classification of Health and Human Resources Specialist ("HHRS"), filed a grievance because another person was hired by the same agency, in the same classification, two and a half years after he was, at a significantly higher rate of pay. Grievant seeks to have his pay increased to the same or higher annual salary as the new employee, retroactively to the date the new employee was hired. The annual salaries received by Grievant and the new employee are both within pay grade thirteen which is the appropriate pay grade for their classification. Grievant has failed to prove that the difference between his salary and the salary of the new employee constituted unlawful discrimination or was arbitrary and capricious. The grievance is denied.

The following Findings of Facts are based upon a thorough review of the entire record.

Findings of Fact

1. Grievant began working for the State of West Virginia in the Department of Health and Human Resources/Bureau for Children and Families on March 3, 2003. He was classified as an Economic Service Worker.

2. On or about September 15, 2005, Grievant was employed by the Bureau for Public Health, in the Cancer Registry, as a Cancer Data Specialist and classified as a HHRS. The pay grade for that classification is thirteen and Grievant has been paid within that pay grade the entire time he has been employed at the Cancer Registry.

3. Grievant's starting salary as a HHRS was $23,700 per year. He has received across the board raises. When the minimum salary for pay grade thirteen was raised to $27,732 per year, Grievant's salary was raised to that amount.

4. Grievant has a bachelors degree in Political Science.

5. The new employee, Shelley Cogar, was hired at the Cancer Registry on April 1, 2008, with a starting salary of $33,000 per year.

6. Shelley Cogar holds an LPN certificate, is a Certified Coding Specialist[3] and had abstracted surgical records at Charleston Area Medical Center ("CAMC") before she was employed at the Cancer Registry.

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[3] Coding medical records involves reading the records and converting the names for specific procedures and subjects to nationally recognized codes so that everyone reviewing the records is using the same terms. According to the testimony of the Director of the Cancer Registry, Patricia Colsher, a Certificate as a Coding Specialist recognizes a level of proficiency in the procedure.

7. The Cancer Registrar Association sets standards for the Cancer Tumor Registrar ("CTR") credential. The CTR credential is earned by passing an examination developed and given by the Cancer Registrar Association. An individual must meet certain qualifying criteria before he or she is eligible to take the examination.[4] The Cancer Registry has recently made eligibility to take the CTR examination a minimum qualification for employment as a Cancer Data Specialist. Ultimately, the Cancer Registry would like for all of the Cancer Data Specialists to hold the CTR credential.

8. When Grievant was initially hired, he was eligible to take the CTR examination but he did not take it. Because the Cancer Registrar Association has regularly raised the eligibility standards, Grievant is no longer eligible to take the examination.

9. Shelley Cogar is eligible to take the CTR examination.[5]

10. The Cancer Registry found it very difficult to attract applicants who met the qualifications to take the CTR examination who would consider taking a Cancer Data Specialist position at the rate of pay in the lower ranges of pay grade thirteen.

11. During the first part of Ms. Cogar's employment, Grievant was performing nearly twice as many case abstracts as she was. Grievant's Exhibit 1.

12. During the first months of her employment, Ms. Cogar was assigned fewer case abstracts than Grievant because she was taking required training and was learning

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[4] While there was discussion about this credential and the CTR examination, no one provided any evidence regarding the minimum qualifications for eligibility for taking the CTR examination.

[5] Since becoming employed by the Cancer Registry, Ms. Cogar has taken the CTR examination once and failed to pass it. She remains eligible to take the examination again.

to perform her new duties. It is not unusual for a new Cancer Data Specialist to be assigned and complete fewer case abstracts than experienced Specialists.

Discussion

Motion to Dismiss:

Prior to the level three hearing, DHHR filed a motion to dismiss the portion of the grievance that was related to the selection of Ms. Cogar. The basis of the motion was that Grievant was not an applicant for the position for which Shelley Cogar was selected. DHHR argued that under these circumstances Grievant had no standing to contest the selection of Ms. Cogar for the vacant position.

The Grievance Board has previously addressed the issue of standing and stated, "[s]tanding, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). Where a grievant does not apply for a vacant position he does not have a sufficient personal stake in the selection to hold standing to file a grievance contesting the selection. *Barber v. Mercer County Bd. of Educ.,* Docket No. 2008-0001-MerED (Aug. 26, 2008); *Perris v. Div. of Highways*, Docket No. 2009-0903-DOT (May 26, 2009). Consequently, Grievant did not have standing to contest Ms. Cogar's selection. However, Grievant also raised the issue of pay equity in his grievance for which he did have standing. Accordingly, the motion to dismiss the grievance was denied because there is a claim upon which Grievant may proceed. However, the grievance was limited to the issue of disparity

in pay between Grievant and Ms. Cogar. Evidence related to the selection of Ms. Cogar was not admitted because Grievant lacked standing to bring that claim.

MERITS:

This grievance does not involve a disciplinary matter, so Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State 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's basic claim is that Shelley Cogar should not be paid more for performing the same job he does. In fact, Grievant believes he should be paid more than Ms. Cogar for the following reasons:

- Grievant had five years experience working for the State when Ms. Cogar was hired and Ms. Cogar had none.
- Grievant had two and a half years of experience in the position of Cancer Data Specialist when Ms. Cogar was hired and Ms. Cogar had never held that position.
- Grievant held a four year Bachelors Degree and Ms. Cogar had an LPN Certificate and no four year degree.
- Grievant alleges that he does twice as much work as Ms. Cogar.

Respondent claims that it does not have to pay Grievant and Ms. Cogar the same annual salary as long as they are both being paid within their required pay grade. Respondent avers that it was required to offer Ms. Cogar a higher salary than Grievant because the requirements for qualifying for the CTR examination have increased and Respondent could not attract qualified applicants for the Cancer Data Specialist position

at the salary available at the bottom of pay grade thirteen. Director Colsher stated that many applicants actually laughed at her when she told them what the job paid. Generally, applicants with their qualifications were able to earn much higher salaries in the private sector.

In addition to the need to attract qualified applicants, Director Colsher gave the following reasons for paying Ms. Cogar $33,000 per year:

- Ms. Cogar was a certified LPN and qualified to take the CTR examination.
- Ms. Cogar had experience abstracting medical records including experience with surgical records at CAMC.[6]
- Ms. Cogar is a Certified Coding Specialist which indicates that she is proficient in coding medical records in the format necessary for national comparison and data collection.
- The person who previously held the position filled by Ms. Cogar was paid a similar salary, so there were sufficient funds budgeted to pay Ms. Cogar at that rate.

Grievant claims that paying Ms. Cogar a higher salary to perform the same job constitutes discrimination. For purposes of the Public Employees Grievance Procedure, discrimination means 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) (2008). To establish a claim of discrimination under this statute a Grievant must prove:

> (a) that he 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;

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[6] While no explanation was given as to what was involved in abstracting medical records, it was clear that this procedure is one of the predominant duties of a Cancer Data Specialist.

(c) that he did not agree in writing to the difference in treatment.

Frymier v. Higher Educ. Policy Comm'n, 221 W. Va. 306, 655 S. E. 2d 52 (2007); *See Bd. of Educ. v. White,* 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005).

In *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994), the West Virginia Supreme Court of Appeals noted that WEST VIRGINIA CODE § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. *Largent, supra*., at Syl. Pts. 2, 3 & 4. 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). Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Largent, supra* at 246. "It is not discriminatory for employees in the same classification to be paid different salaries." *Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.,* Docket No. 02-HHR-366

(Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009).

Since both Grievant and Ms. Cogar are paid within the parameters of pay grade thirteen, the fact that Ms. Cogar is paid a significantly higher salary does not constitute discrimination pursuant to the grievance statute. As anticipated by the Supreme Court in *Largent,* Respondent was able to demonstrate that market forces required them to offer a higher salary to attract candidates to the Cancer Data Specialist position.

Additionally, Respondent's decision to pay a higher salary to Ms. Cogar was not arbitrary and 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))."

Respondent articulated rational reasons for offering Ms. Cogar a higher starting salary than they were paying Grievant. The qualifications for taking the CTR examination have risen since Grievant was hired to the extent that Grievant is no longer qualified to take the examination. Ms. Cogar had significant experience related to the position and

Respondent was forced to offer a higher salary to attract qualified applicants. Grievant's frustration in the difference between his salary and Ms. Cogar's is understandable but he failed to prove that the salary difference was arbitrary and capricious or the result of unlawful discrimination. Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State 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. For purposes of the Public Employees Grievance Procedure, discrimination means 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) (2008). To establish a claim of discrimination under this statute a Grievant must prove:

> (a) that 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 she did not agree in writing to the difference in treatment.

Frymier v. Higher Educ. Policy Comm'n, 221 W. Va. 306, 655 S. E. 2d 52 (2007).

3. WEST VIRGINIA CODE § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. *Largent v. W. Va. Div. of Health and Div. of Pers.*, 192 W. Va. 239, 452 S.E.2d 42 (1994). "It is not discriminatory for employees in the same classification to be paid different salaries." *Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.,* Docket No. 02-HHR-366 (Sept. 18, 2003); *See Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009).

4. Grievant did not prove that the difference in his pay and that of Ms. Cogar was the result of unlawful discrimination.

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).

6. Grievant did not prove that Respondent's decision to pay a new employee a significantly higher salary, but was still within the same pay grade as his, was 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: September 9, 2009.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE