THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LARRY BOOTHE, et al.,

Grievants,

v. **Docket No. 2009-0800-CONS**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION / DIVISION OF HIGHWAYS,

Respondent.

DECISION

Seven employees of the Division of Highways ("DOH") filed level one grievances dated December 8, 2008. At the time their grievances were filed, all Grievants were classified as Transportation Workers 2 ("TW 2"**).** Grievant's names are Larry H. Boothe**,** Richard S. White**,** Jimmy King, Barry Weitzel, John Halcomb, Donny White and Jerry Lane. Grievants claim that their rate of pay is inequitable and as relief they wish to be made whole.[1] The grievances were consolidated and a level one hearing was held on April 16, 2009. A transcript of that hearing is part of this record. A level one decision denying the consolidated grievances was rendered on April 30, 2009.

A level two mediation was held in Beckley, West Virginia, on October 6, 2009, and an Order related to the mediation was entered on October 23, 2009. Grievants made a timely appeal to level three and a hearing was held in Beckley, West Virginia on August 10, 2010. Grievants Jerry Lane, Larry H. Boothe, Barry Weitzel and Jimmy King appeared in

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[1] As their statement of grievance all Grievants wrote, "Pay inequity" and as their request for relief all Grievants wrote, "to be made whole."

person at the hearing and Grievants were represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent DOH was represented by Barbara Baxter, Esquire, DOH Legal Division. The parties agreed that the testimony offered at the level three hearing was to supplement the factual record made at level one.

Following the level three 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 at the West Virginia Public Employees Grievance Board on September 24, 2010. This matter became mature for decision on that date.

Synopsis

Grievants claim that after they had been employed for some time, the starting pay for their classification was increased by Respondent. As a result, new employees were brought in at the same rate of pay that Grievants are receiving even though Grievants have more experience. Grievants argue that this practice violates the Division of Personnel pay equity plan because no consideration was given to their seniority when the entry pay for their classification was increased. They also argue that Respondent's action constituted discrimination.

Respondent counters that it could not fill many vacant positions in the TR 2 classification because the entry level pay was too low. To attract new employees, Respondent increased the entry level pay for the classification without altering the pay of Grievants. Respondent opines that this action was necessary and legal as long as all the employees in the classification were paid within the same pay grade.

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. All seven Grievants are employed by the DOH as Equipment Operators in the Transportation Worker 2 ("TW 2") classification.

2. Grievant Larry Boothe has been working for DOH as a TW 2 for eight years. He is 59 years old and had operated heavy equipment for various employers before he was hired by DOH.

3. Grievant Jerry Lane has been employed by the DOH in his current position as an Equipment Operator for four years. He is 61 years old and operated heavy equipment for the federal government before starting with DOH.

4. Grievant Jimmy King has been employed by the DOH in his current position for nearly three years. He is 47 years old and performed road work for a municipality before being employed by the DOH.

5. Grievant Barry Weitzel has been a TW 2 Equipment Operator with the DOH for two years. He is 31 years old and operated heavy commercial vehicles for seven years before he was employed by the DOH.

6. The remaining three Grievants had been working for the DOH for more than a year as Equipment Operators in the TW 2 classification.

7. The monthly pay for the seven Grievants at the time of the level one hearing was as follows:

- Larry Boothe $1,743.73
- Richard White $1,667.47
- James King $1,667.47
- Barry Weitzel $1,667.47
- John Halcomb $1,667.47
- Donald White $1,667.47
- Jerry Lane $1,667.47

8. All seven Grievants were hired at a lower salary and received pay increases after completing a six-month probationary period to reach their present rate of pay.

9. The DOH is experiencing difficulty hiring employees to fill vacancies for TR 2 positions in many of their districts. To make the positions more attractive, Respondent raised the starting monthly pay for applicants hired into TR 2 positions to $1,667.47. Thus the new hires were paid the same wage as Grievants before completing their six-month probationary period.[2]

10. Respondent hired three new employees into the TR 2 Equipment Operation classification at the same monthly rate of pay as Grievants. These new employees were young and had little prior experience operating heavy machinery.

11. Respondent is also experiencing difficulty retaining employees in the TR 2 positions. That problem is expected to continue over the next five years as many of those employees reach retirement eligibility. Respondent did not implement a pay increase program for experienced TR 2 employees in an effort to address the retention problem at the same time that they increased the starting salary to attract new applicants.[3]

12. There are three ways for existing employees to receive salary increases by the Respondent DOH. An employee must either be promoted, reallocated or awarded a merit increase. Grievants remain in the TR 2 classification and are performing duties appropriate to that classification so they are not eligible for a reallocation and cannot

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[2] Level one testimony of Steve Cole, Manager of DOH District 9.

[3] One could conclude that increasing the starting salary does address the retention problem by enabling the DOH to attract replacements for the experienced workers as they retire. This argument was not explored by the parties.

receive a promotion without applying for a new position. DOH has stopped granting merit raises after receiving a memorandum from Governor Manchin's Chief of Staff indicating that there was a freeze on merit increases.[4]

Grievants and all other DOH employees who are Equipment Operators in the TR 2 classification are paid in the same pay grade; hourly pay grade 11H.[5]

Discussion

Grievants argue that Respondent was arbitrary and capricious by addressing their difficulty in filling vacant positions by raising the minimum starting rate of pay for new applicants. Grievants note that Respondent also has difficulty retaining existing employees due to low salaries and Respondent's failure to address the retention problem by rewarding existing employees is not consistent with pay equity considerations nor the Respondent's seniority policy. Grievants also believe that Respondent's actions constitute aged-based discrimination.

Respondent counters that they had to take action to attract applicants into their vacant positions. They raised the starting salaries for those positions in an effort to accomplish that goal. The starting salary did not exceed the salary earned by Grievants.

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[4] This memorandum is generally referred to as the Puccio Memo and has been discussed extensively in prior Grievance Board decisions. Mr. Puccio is no longer the Governor's Chief of Staff and Mr. Manchin is no longer Governor, but it appears the freeze on merit raises is still in effect.

[5] The "H" in pay grade 11H designates that the pay grade is based upon an hourly wage.

Respondent notes that there are impediments to raising the salaries of existing employees and felt that under the circumstances, raising the starting salaries for TR 2 classified employees was a reasonable strategy.

As this grievance does not involve a disciplinary matter, Grievants bear the burden of proving their 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).

Grievants point to W. VA. CODE § 29-6-10 (4) as authority that Respondent should have given preference to experience employees in giving a salary increase. That subsection provides in part:

> . . . When any benefit such as a promotion, wage increase or transfer is to be awarded, . . . **and a choice is required between two or more employees in the classified service as to who will receive the benefit** . . . and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit. . .

Id., (Emphasis added). Grievants argue that Respondent's decision to raise the starting salary for new hires is arbitrary and capricious because it fails to address the preference for rewarding senior employees established in this provision.

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." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982))."

W. VA. CODE § 29-6-10 (4) has no application to the matter at hand. As indicated by the emphasized language therein, the provision relates exclusively to the distribution of increases in salary or benefits among employees who are already employed by an agency. In this case, the starting salary for vacant positions was raised. No promotion, transfer salary increase nor benefit increase was being considered for existing employees which would be necessary for this subsection to apply.

Respondent considered how to best address the need to fill vacancies for which they were not receiving applicants. They raised the starting salary to meet the minimum salary paid to existing employees. This was a reasonable strategy. Respondent acknowledged that there was also a problem with retaining existing employees that was not going to improve with the anticipated retirement of many Equipment Operators over the next five years. Respondent noted that the only way to increase Grievants' wages while they remained in their classification was through merit raises. Respondent has placed a freeze on merit raises at the request of the Governor's office and does not feel authorized to rescind that freeze. While this practice is frustrating to many state employees, it is not arbitrary or capricious. *See Saas v. Dep't of Transp.*, Docket No. 07-DOH-005 (July 25,

2007); and *Sayre v. Dep't of Health & Human Res.,* Docket No. 2010-0731-DHHR (Jan. 31, 2011). Respondent's decision to address one issue relating to vacancies without addressing the other is likewise not arbitrary and capricious.

Grievants also argue that Respondent's decision to increase the starting salary offer to new employees discriminated against Grievants based upon their age. 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).

The ages of the four Grievants who testified in this action vary by as much as thirty years.[6] Given that fact alone it cannot be said that they constitute a group of employees who are similarly situated. Additionally, there is no evidence that all applicants who accept the new starting salary will be in a given age bracket. Grievants point to three new

[6] Grievant Lane is 61 years old and Grievant Weitzel is 31 years of age.

employees who were very young.[7] However, that does not prove that all applicants, or even the majority, will also be young. Grievant Lane did not become employed by the Respondent until he was approximately 57 years old. Grievant Boothe started with DOH when he was 51, Grievant King was 44 and Grievant Weitzel was 29. There is no reason to believe that new applicants will not also vary widely in age. Grievants failed to prove that the action of Respondent was related to their ages.

Finally, 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. 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).

Grievants and any new employees hired under the new starting salary are all working in the same classification and they are all being paid within the same pay grade. Pursuant to *Largent supra*., the fact that the new employees will receive a higher starting

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[7] One Grievant testified that these three applicants were just out of high school.

wage than Grievants received when they were initially hired does not constitute discrimination. In fact, the difference in pay was shown to be based upon prevailing market forces.

Under the circumstances, Respondent's decision to raise the starting salary for new applicants into the TR 2 classification was not arbitrary or capricious nor did it constitute unlawful discrimination. The Grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants bear the burden of proving their 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. 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." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982))."

3. Grievants failed to prove that Respondent's decision to increase the starting salary for new applicants hired into the TR 2 classification was arbitrary and capricious.

4. 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).

5. 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. 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).

6. Grievants failed to prove that Respondent's decision to increase the starting salary for new applicants hired into the TR 2 classification constituted discrimination pursuant to W. VA. CODE § 6C-2-2(d).

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: FEBRUARY 17, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE