WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KRISTOPHER CHAPMAN, ET AL.,
Grievant,

v. **Docket No. 2010-1293-CONS**

WEST VIRGINIA LOTTERY COMMISSION,
Respondent.

D E C I S I O N

Grievants, Kristopher Chapman and Jeffrey Thompson, filed individual grievances against their employer the West Virginia Lottery Commission, Respondent, on February 25, 2010, protesting the amount of compensation each is receiving as a Lottery Video Technical Support Specialist I. Grievants contend that *discrimination has occurred in accordance with the Equal Pay/Compensation Discrimination Law set forth by the EEOC due to new employees being hired at a higher rate of pay.* Grievants seek the relief of a "15% increase in salary above the base salary of the last hired Lottery Video Technical Support Specialist 1 together with back pay to the point that other Lottery Video Technical Specialist 1 were hired at a higher rate of pay."

Grievants requested that their individual level one conferences be held jointly. A conference was held on March 5, 2010, and the grievances were denied at level one on March 11, 2010. The appointed Chief Administrator, John A. Myers, Assistant Lottery Director, denied the grievances based upon the long-held precedent that it is not discrimination for employees in the same classification to be paid different salaries. Grievants appealed to level two on March 24, 2010. The grievances were consolidated for further proceedings and a mediation session was held on May 17, 2010. Grievants appealed to level three on May 20, 2010. A level three hearing was held before the

undersigned Administrative Law Judge on November 8, 2010, in the Grievance Board's Charleston office. Grievants were present in person and represented by Robby N. Long, Esquire and the Law Office of Robby N. Long, L.C. Respondent was represented by Assistant Attorney Generals, Gretchen A. Murphy and Scott E. Johnson.

This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about December 13, 2010. Both parties submitted fact/law proposals.

Synopsis

An employee, hired as a Lottery Video Technical Support Specialist 1 by Respondent, was hired at a rate of pay higher than Grievants, more senior employees with the same classification. Grievants contend this is improper. Grievants allege entitlement to an increase in pay, and further contends Respondent's failure to grant merit increases pursuant to the Puccio Memorandum invalidates the current classification system. Respondent disagrees.

Applicable statutes, rules and regulations, coupled with relevant case law provide that classified employees are to be compensated within their pay grade. It is a well-discussed concept that state employees in the same classification need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Further, during the time period relevant to this grievance a moratorium on discretionary salary increases was in place, discretionary pay increases for state employees were restricted. Grievants are being paid within the pay range of the pay grade assigned by the Division of Personnel to their respective classification. The salary

of the newest hire in Grievants' classification is consistent with the pay grade of her job classification. Grievants did not establish by a preponderance of the evidence that they are mandated a pay increase. Nor did Grievants prove that Respondent, the employer, has violated any rule, regulation, policy or statute in the circumstances presented. This grievance is DENIED.

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

Findings of Fact

1. Grievants, Kristopher Chapman and Jeffrey Thompson, are at all times relevant to this grievance matter, employees of the West Virginia Lottery Commission, Respondent.

2. Respondent is at all times herein a West Virginia governmental agency operating throughout the State of West Virginia.

3. Grievants are employed by Respondent as Lottery Video Technical Support Specialist 1. Grievant, Kristopher Chapman, has worked at the Lottery for almost nine (9) years beginning January 2, 2002. Grievant, Jeffrey Thompson, has worked at the Lottery for almost six (6) years beginning January 3, 2005.

4. Grievants are male employees who work evening shift at the West Virginia Lottery Commission.

5. In May of 2009, Respondent went through a reclassification process administered by the Division of Personnel (DOP) to reclassify certain job classifications

utilized by Respondent.[1] Some Lottery specific classification titles were specifically established by DOP for Respondent.

6. The classification of "Computer Operator 1" underwent reclassification which altered the classification title and assigned pay grade of that classification. The classification of "Lottery Video Technical Support Specialist 1" was created.

7. The complex nature of the changes that were ongoing in Respondent's computer room facilitated an increase in assigned pay grade for the Lottery Video Technical Support Specialist 1 classification. The implementation of a different computer system that required different skill sets, assisted in Respondent's ability to convince DOP, with the assistance of an audit, that the more complex nature of the work justified an adjustment to the classification.

8. The pay grade of the Lottery Video Technical Support Specialist 1 classification was determined to be Pay Grade 12. The pay grade for the former classification, Computer Operator 1, was Pay Grade 8.

9. As established and set forth by the WV Division of Personnel Schedule of Salary Grades, effective as of February 1, 2009, the range of salary for Pay Grade 8 is $21,504 to $39,772 annually. The range of salary for Pay Grade 12 is $26,160 to $48,396 annually.

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[1] The State Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. VA. CODE § 29-6-10(2). The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner.

10. When DOP finalized and approved the reclassification in May 2009, there were limits to the amount Respondent could increase current employees' pay levels. The identified limit was 5% total as opposed to 5% per pay grade.[2] All of the employees relevant to the instant matter are now classified as Pay Grade 12.

11. Grievants were originally hired under the former classification title of "Computer Operator 1" with assigned Pay Grade 8. Upon reclassification, Grievants' job classification was reallocated and the pay grade of the new classification became the salary range to assess Grievants' annual compensation. The pay grade of the reclassified position was reallocated from Pay Grade 8 to Pay Grade 12.

12. In May of 2009, a reclassified position was posted for a Lottery Video Technical Support Specialist 1 and Respondent advertised and sought out individuals for that position. There were approximately 22 applicants. The position was ultimately filled by Meghan Salmon.

13. On or about December 1, 2009, Respondent hired Meghan Salmon as a Lottery Video Technical Support Specialist I. Meghan Salmon was a female applicant. Respondent was of the belief that she was a standout based on her work experience.[3]

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[2] Individuals whose salary were below pay grade minimum were also adjusted to meet the appropriate minimum pay range.

[3] Tacy Donovan, Deputy Director of Video Lottery, West Virginia Lottery testified;

> I would consider Megan [sic] as a star candidate. She was number two in the register, she had 12 years of experience, she had an associate's degree, she had worked for a health organization and had responded to a help desk with 12,000 customers on one phone, 4,000 in another. She had three previous salaries that were far above what we were able to offer her and we have since lost her because of salary.

14. One male applicant was deemed more highly qualified than Ms. Salmon, but he did not pass the background check, so he was rendered ineligible for the position.

15. Ms. Salmon was employed by Respondent from December 1, 2009 until approximately October 15, 2010 as a Lottery Video Technical Support Specialist 1, Pay Grade 12.

16. Ms. Salmon was paid an annual salary of $32,004 which was more than the amount of annual compensation being received by Grievants. The annual salary of $32,004 is within the salary range of Pay Grade 12.

17. Grievants, Kristopher Chapman and Jeffrey Thompson, have been paid within the accurate pay scale for their pay grades at all times. All salaries of individuals identified as relevant to this grievance are within the established salary range of a Video Technical Support Specialist 1 of Pay Grade 12.

18. During the Manchin administration, the Governor's office established a moratorium on discretionary salary increases 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.[4]

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[4] Commonly referenced as the Puccio Memorandum or the Governor's Office Directive, discretionary salary increases had effectively been removed from state agencies' purview. As of the date of this decision, the directive has been revised somewhat by a March 29, 2011 Memorandum issued from Governor Earl Ray Tomblin's Office signed by Chief of Staff, Rob Alsop. As relative to the instant matter the Puccio Memorandum was in effect, and recommendations for discretionary salary increases were not being approved.

19. A moratorium on discretionary salary increases was in place during the time period relevant to this grievance. Discretionary pay increases for state employees are restricted. The moratorium has been in place since approximately April of 2005.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

WEST VIRGINIA CODE § 29-6-10 authorizes the Division of Personnel (DOP) to establish and maintain a position classification plan for all positions in the classified service.[5] This includes pay plans for all the positions within the classified service. State agencies, such as the WV Lottery Commission, which utilize such positions, adhere to the

[5] Section 5.1 of DOP's Rules notes the purpose and intent of the classification plan is "[t]o attract qualified employees and retain them in the classified service" and the State Personnel Board "shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various agencies and on comparability to pay rates established in other public and private agencies and businesses."

applicable classification and pay grade. "DOP is primarily concerned with administering a classification and compensation plan that equitably compensates similarly situated employees while maintaining appropriate recruitment and retention, thereby assuring that each state agency has sufficient qualified personnel to perform its assigned governmental function." *Travis v. Dep't of Health & Human Res.*, Docket No. 96-HHR-518 (Jan. 12, 1998). Also, the rules promulgated by the State Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Moore v. W. Va. Dep't of Health & Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). *See Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980).

It is well established that employees in the same classification, who are performing the same duties, need not be paid the same salary, as long as they are paid within the pay range for the pay grade to which their classification is assigned. The analysis of the concept of equal pay for equal work for a state employee involves a limited inquiry. "The West Virginia Equal Pay Act, W. VA. CODE 21-5B-1 [1965], does not apply to the State or any municipal corporation so long as a valid civil service system based on merit is in effect." Syl. Pt. 2, *Largent v. W. Va. Div. of Health and Div. of Pers.*, 192 W. Va. 239, 452 S.E.2d 42 (1994). "'[E]mployees 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)." *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006).

Further, while agencies have in the past had some discretion to grant confined increases in employees salaries, in limited circumstances, such option was not fully available to the instant Respondent. Discretionary pay increases must be approved through the Governor's Office and during the time period relevant to this grievance such authorization was not being granted.[6] *See* Findings of Fact 18 and 19.

Grievants concede that they have been paid within the pay grade required for their classification at all times. Grievants further concede that Respondent has no obligation generally to pay employees within the same classification the same salary as long as they are all paid within the pay grade required for their classification. Nevertheless, Grievants allege, *inter alia*: (a) that Respondent violated the West Virginia Equal Pay Act; (b) that Respondent is in violation of the Federal Equal Pay Act;[7] and (c) that Respondent

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[6] The Puccio Memorandum or the Governor's Office Directive effectively removed discretionary salary increases from state agencies' purview. Theoretically, this moratorium on discretionary salary increases has been in place since April of 2005.

[7] The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow public employees and their employers to reach solutions to problems which arise within the scope of their respective employment relationships. W. VA. CODE § 6C-2-1(a); *See Fraley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D

committed acts of discrimination and favoritism pursuant to W. VA. CODE § 6C-2-2. Grievants argue that the directives of the *Larry Puccio's Memorandum to Cabinet Secretaries dated April 29, 2005* are contrary to the spirit and rationale of the current classification system.[8] As long as Respondent (or any other state agency) operates under the restrictions of *the Puccio Memorandum,* state employees are denied the protections and safeguards of a civil service system as contemplated by the West Virginia Supreme Court of Appeals in *Largent v. West Virginia Division of Health,* 192 *W.Va*. 239 (1994). Grievants contend that so long as Respondent operates under the guidance and direction of *the Puccio Memorandum,* a valid merit system is not in effect and the West Virginia Equal Pay Act applies to the West Virginia Lottery Commissions' actions. This was a thought provoking and unique spin on a much maligned issue (equitable compensation for state employees).

The Puccio Memorandum issued by Governor Manchin's Office created a quandary throughout state government. The true weight of this document is much debated.[9]

(April 30, 2002). "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Envtl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002), (citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, the jurisdiction of the Public Employees Grievance Board is limited to the grant of authority provided in WEST VIRGINIA CODE §§ 6C-2-1 *et seq*. *Clutter v. Dep't of Agric.,* Docket No. 2009-1372-AGR (May 28, 2009). The undersigned is not empowered to adjudicate Federal statutes thus the issue will not be addressed by this decision. The issue as identified is beyond the jurisdiction of this administrative body.

[8] Grievants cannot receive or be rewarded within their classification because all such awards are based on merit, and the *Puccio Memorandum* requests no merit advancements. *See* Grievants' PFOF/COL document.

[9] It is noted 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.

However, as this Grievance Board has previously noted, the former Governor's Office moratorium on discretionary salary increases effectively removed merit salary advancement from state agencies' purview. *Sayre v. Dep't of Health & Human Res.*, 2010-731-DHHR (Jan. 13, 2011); *Milam v. Div. of Highways*, Docket No. 2009-0478-DOT (Dec. 31, 2009); *Celestine v. W.Va. State Police*, Docket No. 2009-0256-MAPS (May 4, 2009); *Kelly v. Dep't of Health & Human Res.,* 07-HHR-109 (Nov. 14, 2008). "[U]nfortunate as it may be, the provisions of the Governor's office edict are clear, and discretionary salary increases are prohibited." *Saas v. Dep't of Transp.*, Docket No. 07-DOH-005 (July 25, 2007).

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

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It has been observed that such action would have to be made through an Executive Order by the Governor to be binding on State agencies. As authority for this proposition an *Opinion of the Attorney General* dated July 16, 2008, 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.

Whether the Chief of Staff's Memorandum was legally binding on Respondent is debatable. Nevertheless, the Puccio Memorandum expressed the position of the Governor's Office regarding the issuance of discretionary wage increases and the vast majority of state agencies have adhered to the directive of the Memorandum. A determination regarding the issue of whether the Puccio Memorandum is legally binding upon state agencies is not being declared by the instant decision, however, the issuance and moratorium effect is being recognized herein.

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).

Respondent cites the directive from the Governor's Office as additional justification for it actions, **not** the sole rationale (prohibiting factor). While the agency may not have been legally obliged to follow the directive, its choice to do so was not arbitrary or capricious.

Grievants are desirous of an increase in their respective salary. Nevertheless, salaries may be affected by numerous factors not exclusively limited to experience and training. 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.* The undersigned is not persuaded that a much debated moratorium on discretionary salary increases invalidates the entire classification plan for the State of West Virginia. Respondent's actions in this matter are in compliance with prevailing authority. It is not established that Respondent is legally obligated to raise Grievants' salary, equal to or greater than new hires, regardless of the state-wide

prohibition on discretionary pay increases. [E]mployees 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 v. W. Va. Div. of Health and Div. of Pers.*, 192 W. Va. 239, 452 S. E.2d 42 (1994); *Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26, 1997). *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006). Further, the undersigned is not persuaded or prepared to rule that the extensive body of law supporting this concept has been invalidated by the directive in discussion. It is believed that the Puccio Memorandum was issued in an attempt to shore up the financial well-being of the State. The guidance, directives and restrictions of the Memorandum are stop gap measures, not policy, regulations or even an Executive Order.

Lastly, Grievants assert violations of discrimination and/or favoritism. 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. "Discrimination" is defined by statute 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). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism 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., 655 S.E.2d 52 (2007); *Harris v. Dep't of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008); also 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).

Grievants and Ms. Salmon were not hired into the same job classification. The identified employees were in the same classification at the filing of the instant grievance, a crucial fact that is prevalent in analysis of this allegation of discrimination or favoritism is not current classification. Grievants and Ms. Salmon were NOT similarly situated employees in regard to the circumstances that determined their individual rate of compensation. Grievants were originally hired under the former classification title of "Computer Operator 1" with the assigned salary range of Pay Grade 8. The classification of Computer Operator 1 underwent reclassification which altered the classification title and assigned pay grade of that classification. Respondent advertised and sought out individuals for the newly classified Lottery Video Technical Support Specialist 1 position, Pay Grade 12. There were male and female applicants. It is not established that Respondent targeted female applicants. The position was ultimately filled by the female applicant Meghan Salmon. The salary range for Pay Grade 8 is not synonymous with the range of salary for Pay Grade 12. *See* Finding of Fact 9.

It is not established that the salary of an individual hired in a job classification, Pay Grade 8 is being unlawfully discriminated against by the hiring of an applicant at a later time in a job classification, Pay Grade 12, with a higher initial salary. Nor is there any credible evidence of record that gender had any bearing on Respondent's decisions in the fact pattern of this matter. Grievants did not establish that Ms. Salmon's gender had any bearing on her selection for the position or the determination of her starting salary. Grievants are males and the amounts of their individual salaries were determined in conjunction with reclassification of their job duties and the associated authorization granted to increase their annual salary. See Findings of Fact 8-11. In other words, Grievants were not subjected to unlawful discrimination or favoritism, in that identified employee(s) were not similarly situated. It is not discriminatory for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dept. of Health and Human Resources/Pinecrest Hospital*, Docket No. 02-HHR-366 (Sept. 18, 2003).

Grievants, bearing the burden of proof in this non-disciplinary grievance, have been unable to introduce any evidence that establishes wrongdoing or illegality by Respondent. The salary of Grievants are lawful. This grievance must be denied in accordance with the facts, applicable law, and circumstances as discussed above. Grievants have not established that their salaries are in violation of any applicable and controlling statute, rule or regulation. Grievants are being paid in accordance with the pay scale for their classification. A mandatory duty to grant Grievants a salary increase, to the level comparable to that of a new hire, was not established.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In a non-disciplinary case, Grievants bear the burden of proving their 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). "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 State Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. VA. CODE § 29-6-10(2). The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner.

3. "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).

4. "The West Virginia Equal Pay Act, W. VA. CODE 21-5B-1 [1965], does not apply to the State or any municipal corporation so long as a valid civil service system based on merit is in effect." Syl. Pt. 2, *Largent v. W. Va. Div. of Health and Div. of Pers.*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

5. "W. VA. CODE § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but that CODE Section does not require these employees to be paid exactly the same. Syl. Pts. 3 and 4, *Largent v. W. Va. Div. of Health and Div. of Pers.*, 192 W. Va. 239, 452 S. E.2d 42 (1994); *Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26, 1997)." *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006).

6. An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't of Health and Human Res.*, Docket No. 07-HHR-141 (May 14, 2008). Grievants are paid within the salary range applicable to their classification.

7. Pursuant to the preponderance of the evidence established in this grievance, Respondent is not required to grant Grievants a pay increase to the level comparable to that of the identified new hire.

8. Grievants have failed to establish by a preponderance of the evidence that their salary is in violation of any mandatory rule, regulation or law.

Accordingly, this 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 27, 2011

Landon R. Brown
Administrative Law Judge