THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ARNOLD BALDWIN II, et al.,
Grievant,

v. **Docket No. 2011-1486-CONS**

LOTTERY COMMISSION and
DIVISION OF PERSONNEL,
Respondent.

DECISION

Arnold Baldwin and fifteen other Employees[1] ("Grievants") of the Lottery Commission ("Lottery") filed level one grievance forms between April 13, 2011 and April 21, 2011. On April 25, 2011, the grievances were consolidated and given the docket number set out above. Although the wording of the grievances vary slightly, all grievances alleged that the grievant was reclassified to a position at least two pay grades higher than his previous position, but that he only received a 5% pay increase. [2] As relief Grievants seek either an additional 5% or 10% increase relative to the number of pay grades changed, retroactive to the date of the reclassification.

On April 26, 2011, the grievances were waived to level three by the level one Chief Administrator. By order entered May 2, 2011, the Division of Personnel ("DOP") was joined as an indispensable party.

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[1] The names of the additional grievants are: Steve M. Abbott, Kristopher S. Chapman, Richard T. Holleron, Jr., Timothy R. Koch, Dustin R. Lamar, John W. Long, Jr., Jeremy L. Neff, Archie E. Quigley, Jr., Brian K. Rankin, Byron E. Salisbury, Jeffrey L. Thompson, William H. Trainer, John F. Turley, Terry L. Westfall, and Buddy F. Whitley, II.

[2] Several grievants actually received slightly higher increases, but all the grievance forms stated that the increase was 5%.

On September 12, 2011, a level three hearing was convened before Administrative Law Judge Landon R. Brown. DOP and Lottery objected to the level three hearing going forward on the basis that numerous Grievants were represented by their supervisors in violation of W. VA. CODE § 6C-2-2(n). The objections were sustained and the hearing was continued.

Subsequent to the September 12, 2011 hearing, ALJ Brown issued an Order to Show Cause against Grievants Kristopher Chapman, Jeffrey Thompson, and Dustin LaMar for their failure to appear at the hearing. Grievants were directed to respond in writing by October 13, 2011. Grievants failed to respond in writing to the Order to Show Cause.

The level three hearing was reconvened on December 16, 2011, before ALJ Brown[3] at the Public Employees Grievance Board in Charleston, West Virginia. All Grievants appeared in person. Grievant Abbott designated John W. Long, Jr. as his representative. Grievants Quigley, Westfall, Trainer, Koch, Rankin, Salisbury, Neff, Chapman, Turley, and Thompson, designated Richard T. Holleran as their representative. Grievants Baldwin, LaMar, Long, Holleran, and Whitley represented themselves. Respondent DOP appeared by counsel, Karen O'Sullivan Thornton. Respondent Lottery appeared by counsel, L. Wayne Williams.

As a preliminary matter, ALJ Brown allowed Grievants Chapman, Thompson and LaMar to orally answer the previously issued Order to Show Cause for their failure to appear at the September hearing. Over Respondent DOP's objections, ALJ Brown allowed Grievants Chapman, Thompson, and LaMar to proceed despite their failure to

[3] For administrative purposes, this case was assigned to the undersigned Administrative Law Judge on July 12, 2012.

comply with the express terms of the Order to Show Cause, due to their unfamiliarity with grievance procedures. The hearing then proceeded on the merits.

Following the hearing, Grievant John W. Long, Jr. requested withdrawal of his appeal to level three, and he was dismissed by order entered January 20, 2012.

This matter became mature for decision on January 31, 2012, upon final receipt of Respondents' Proposed Findings of Fact and Conclusions of Law. None of the Grievants submitted Proposed Findings of Fact and Conclusions of Law for consideration.

Synopsis

Grievants protest the amount of the pay increase they received upon reclassification. Grievants believed they did not receive a greater pay increase because of a "pay freeze", which they assert was either not in effect or was illegal.[4] Grievants argued they were entitled to receive an additional pay increase of up to 15% according to the number of pay grades raised from their previous reclassified positions. Grievants were reclassified, not promoted or reallocated, so, under DOP rule they are not entitled to the increase they seek. Grievants provided no evidence that the DOP rule is unreasonable or nonconforming to law. Grievants' arguments regarding the "pay freeze" are not relevant because all Grievants did receive a discretionary pay raise. DOP did not abuse its discretion in recommending a 5% pay increase rather than the increase requested by the agency.

Accordingly, the consolidated grievance is denied.

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[4] In April 2005, former Governor Manchin's Chief of Staff, Larry Puccio, issued a memorandum informing all Cabinet Secretaries they were not to grant any discretionary merit or salary increases. It is to this memo Grievants refer when speaking of a "pay freeze."

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievants are employed by Respondent, Lottery Commission, in positions classified as noted below. [5]

2. Arnold R. Baldwin, III is employed as a Lottery Video Technical Support Manager at pay grade 20. Buddy F. Whitley, II is employed as a Lottery Video Technical Support Supervisor 2 at pay grade 18. Steve M. Abbott is employed as a Lottery Video Technical Support Supervisor 1 at pay grade 16. Richard T. Holleron, Jr., Timothy R. Koch, Byron E. Salisbury, and William H. Trainer are each employed as a Lottery Video Technical Support Specialist 2 at pay grade 14. Dustin R. Lamar is employed as a Lottery Games Test Analyst 2 at pay grade 14. Terry L. Westfall is employed as Lottery Technical Support at pay grade 14. Kristopher S. Chapman, Jeremy L. Neff, Archie E. Quigley, Jr., Brian K. Rankin, Jeffrey L. Thompson, and John F. Turley are each employed as a Lottery Video Technical Support Specialist 1 at pay grade 12.

3. In November 2008, Lottery officials began meetings with DOP staff to address on-going recruitment and retention problems and internal pay equity issues within the agency.[6]

4. Lottery and DOP staff met numerous times to review the specific position requirements, job duties, turnover, and salary data.

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[5] DOP Exhibits 9-23 and clarification in Respondent Lottery's Proposed Findings of Fact and Conclusions of Law.

[6] Respondent DOP Exhibit 4.

5. As a result, DOP performed a classification study. DOP reviewed Position Description Forms for all jobs and performed job audits and analysis, including a salary survey.

6. At the conclusion of their study, DOP recommended extensive reclassification of Lottery positions.

7. Lottery requested the State Personnel Board ("Board") approve the recommended reclassifications and further requested a special implementation plan for any salary adjustments to follow the rule on promotion rather than reclassification.

8. DOP staff did not recommend the special implementation plan for pay and instead recommended the standard plan, which provides for salary increase only if the new position minimum salary was above the current salary of the incumbent employee.

9. Following DOP's recommendation to the Board, Lottery officials again met with DOP and requested a special implementation plan for salary adjustments. Lottery and DOP were able to compromise on a special implementation plan of a pay increase of either 5% or the minimum of the pay grade for the new classification, whichever was greater.[7]

10. The special implementation plan was approved by both the Governor's Office and the Board.

11. Special plans of implementation are not typically adopted when positions are reclassified.

12. Grievants were reclassified into the above positions effective May 1, 2009.

13. Grievants were not promoted or reallocated into their positions.

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[7] Respondent DOP Exhibit 25.

14. The reclassified positions were between two and five pay grades higher than the previous positions held by Grievants.

15. All Grievants, except Grievants Neff and Trainer, received a 5% increase in his salary upon reclassification.[8]

16. Grievant Neff and Grievant Trainer received salary increases of greater than 5%, which acted to raise them to the minimum salary range of their reclassified positions.[9]

17. All Grievants are paid within the pay ranges for their reclassified positions.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. §156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *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 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).

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[8] While the undersigned notes there may be some slight discrepancies in the mathematical calculations of the pay increases, this was the evidence presented by Respondents at hearing that was not disputed by Grievants. Further, Grievants were not disputing the mathematical calculation of the pay increases, but rather that the increases were not 10% or 15%.

[9] See footnote 8.

Grievants assert they were entitled to pay raises in accordance with the number of pay grades moved after reclassification. This is simply not the case. Pay raises of that nature are mandated only in the instance of reallocation or promotion. *See* W. VA. CODE ST. R. §§ 143-1-5.5 and 5.4(f)(3). Clearly, Grievants were not promoted nor reallocated. "Reallocation" is defined as "[r]eassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." W. VA. CODE ST. R. § 143-1-3.75. "Promotion" is defined as "[a] change in the status of an employee from a position in one class to a vacant position in another class of higher rank as measured by salary range and increased level of duties and/or responsibilities." W. VA. CODE ST. R. § 143-1-3.73. "Reclassification" is defined as "[t]he revision by the State Personnel Board of the specifications of a class or class series which results in a redefinition of the nature of the work performed and a reassignment of positions based on the new definition and may include a change in the title, pay grade, or minimum qualifications for the classes involved." W. VA. CODE ST. R. § 143-1-3.76. By definition, Grievants were reclassified, and the rule regarding pay increases upon reclassification is clear: "When a class is reassigned by the Board to a salary range having a higher minimum, the salaries of those incumbents below the new minimum shall be adjusted to the new minimum. Where the salary of the incumbent coincides with a pay rate in the new range, the salary shall remain unchanged." W. VA. CODE ST. R. § 143-1-5.4(f)(2)(a). Grievants' current pay is in accordance with the above rule.

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). "[T]he rules promulgated by the 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 and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). (citing as support *Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980)). There was no evidence presented to show that DOP's regulation regarding pay on reclassification is unreasonable or nonconforming. Therefore, under DOP's valid rule, only Grievants Neff and Trainer were entitled to a pay increase up to the new minimum for their classification, which they received. The remaining Grievants were entitled to no pay increase at all.

Although Grievants seem to assert they were denied pay increases because of a "pay freeze" that was either not in effect or illegal, they did not prove this assertion. As evidence on this issue, Grievants only submitted several news articles[10]. While it is true that the Governor's Office had forbidden Cabinet Secretaries from approving discretionary pay increases during this time, Lottery was given permission to implement a discretionary pay increase during this particular reclassification. Questions regarding the effect or legality of the memo forbidding discretionary pay raises are not relevant in this case as all Grievants, except Neff and Trainer, actually did receive a discretionary pay raise.

Grievants appear to believe it was incorrect for DOP to reject the proposed plan for pay increases submitted by Lottery. If that plan had been approved, Grievants would have received the pay increases they request in relief. However, the Board and

[10] Grievants' Exhibits 4, 5 and 9. Such news articles are not probative on this issue and were afforded no weight by the undersigned.

the Director of DOP have wide discretion in performing their duties provided they do not exercise their discretion in an arbitrary or capricious manner. *See Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), *aff'd* Kan. Co. Cir. Ct. Docket No. 99-AA-151 (Mar. 1, 2001). The role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. *See Kyle v. W. Va. State Bd. of Rehab*., Docket No. VR-88-006 (Mar. 28, 1989). Grievants have provided no evidence by which the undersigned could find DOP or the Board acted in an arbitrary or capricious manner. The evidence in this case rather shows DOP worked closely with Lottery and changed its initial position that no discretionary raise should be given so that Grievants did receive at least a 5% discretionary increase.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *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 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. "Reallocation" is defined as "[r]eassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." W. VA. CODE ST. R. § 143-1-3.75.

3. "Promotion" is defined as "[a] change in the status of an employee from a position in one class to a vacant position in another class of higher rank as measured by salary range and increased level of duties and/or responsibilities." W. VA. CODE ST. R. § 143-1-3.73.

4. "Reclassification" is defined as "[t]he revision by the State Personnel Board of the specifications of a class or class series which results in a redefinition of the nature of the work performed and a reassignment of positions based on the new definition and may include a change in the title, pay grade, or minimum qualifications for the classes involved." W. VA. CODE ST. R. § 143-1-3.76.

5. Grievants were reclassified, not promoted or reallocated.

6. "When a class is reassigned by the Board to a salary range having a higher minimum, the salaries of those incumbents below the new minimum shall be adjusted to the new minimum. Where the salary of the incumbent coincides with a pay rate in the new range, the salary shall remain unchanged." W. VA. CODE ST. R. § 143-1-5.4(f)(2)(a).

7. Grievants Neff and Trainer received the pay increase to which they were entitled under the rule. The remaining Grievants received pay raises greater than that to which they were entitled under the rule.

8. 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).

9. "[T]he rules promulgated by the 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 and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). (citing as support *Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980)).

10. Grievants failed to prove that DOP's rule regarding pay on reclassification is unreasonable or nonconforming.

11. The Board and the Director of DOP have wide discretion in performing their duties provided they do not exercise their discretion in an arbitrary or capricious manner. *See Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), *aff'd* Kan. Co. Cir. Ct., Docket No. 99-AA-151 (Mar. 1, 2001).

12. The role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. *See Kyle v. W. Va. State Bd. of Rehab*., Docket No. VR-88-006 (Mar. 28, 1989). Grievants have failed to prove by a preponderance of the evidence that DOP's salary determination 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* W. VA. CODE ST. R. § 156-1-6.20 (2007).

DATE: August 6, 2012

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Billie Thacker Catlett
Administrative Law Judge