THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

VICKIE E. NICHOLS, et al.,
Grievants,

v. **Docket No. 2011-1890-CONS**

DIVISION OF REHABILITATION SERVICES,
Respondent.

DECISION

Grievants, Vickie Nichols and Debra Hullderman, filed their grievances on April 18, 2011, and April 29, 2011, alleging a 20% difference in pay for the same work as other employees, and a lack of pay equity within the agency. Their relief sought is a comparable wage, back pay, and interest. This grievance was denied at level one by correspondence dated May 25, 2011. Grievants appealed to the next level. A level two mediation session was conducted on October 14, 2011. Grievants perfected their appeal to level three on October 20, 2011. A level three hearing was conducted before the undersigned Administrative Law Judge on May 3, 2012, at the Grievance Board's Westover office. Grievants appeared in person and by their representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Katherine A. Campbell, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 5, 2012.

Synopsis

Grievants assert that their tenure, experience, and years of service are comparable to other employees. Given that some of their fellow employees are paid more than 20% of the Grievants' salary, they assert this justifies a pay raise under the principles of internal equity. The record established that Respondent used policy information provided by the Division of Personnel in making the determination that the Grievants' training and experience, as well as their years of service are not comparable to the higher paid employees. Accordingly, Respondent did not recommend a discretionary pay increase for Grievants to the Division of Personnel. This action was not arbitrary or capricious or an abuse of discretion.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievants are employed by the West Virginia Division of Rehabilitation Services in the Clarksburg office of the Disability Determination Section as Rehabilitation Services Associates.

2. Grievants perform the same work as the Rehabilitation Services Associates in the Clarksburg office, yet they are not paid the same as the others. In particular, Grievants assert that a 20% difference in pay exists among employees who perform the same work.

3. The West Virginia Division of Personnel has in place a Pay Plan Implementation Policy. Respondent's Exhibit 1, level three. Effective March 2011, this

policy was placed back in effect to allow state agencies to recommend discretionary raises for employees except for merit raises.

4. This Pay Plan Policy outlines the implementation of pay regulations and salary schedule for those in the classified service. Discretionary pay raises can be based upon the principles of Internal Equity.

5. Internal Equity permits a state agency to grant a discretionary raise to an employee who is working within the same organization unit with comparable experience, training, duties and responsibilities, performance and years of service of another employee who is making at least 20% more in salary.

6. In order to be eligible for an internal equity pay adjustment, the Division of Personnel's guidelines list seven questions which the applying agency must be able to answer in the affirmative in order to make an employee eligible for a pay adjustment under the policy.

7. The Request for Approval must be completed by the agency requesting the discretionary raise for the employee. It is then submitted to the Classification and Compensation section of the Division of Personnel. The Assistant Director, Barbara Jarrell, would review and make a recommendation to the Division of Personnel Director, and, if approved, it would ultimately go to the Governor for approval.

8. The Division of Personnel did not receive any Requests for Approval for a discretionary pay raise based on the principle of Internal Equity for Grievants.

9. The questions in the guidelines are:

Do you have employee(s) who are paid at least 20% less than others? (To calculate 20%- take the employee's monthly salary and subtract from the

other higher paid employee's monthly salary, then take the difference and divide by the monthly salary of the employee who is the subject of this request.)

Are the employees in the same agency-defined organizational unit?

Are the employees of the same classification?

Do the employees have comparable training and experience?

Do the employees have comparable duties and responsibilities?

Do the employees have comparable performance level?

Do the employees have comparable years of State/classified service?

10. Respondent made the determination that the Grievants' experience, training, and years of service were not comparable to the higher paid Rehabilitative Services Associates. This was reflected in Respondent's spreadsheet outlining the criteria for such a discretionary pay increase. Respondent's Exhibit 3, level three.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board 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). *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).

Grievants assert that Respondent's procedure in determining eligibility for pay increases to address internal equity was not in compliance with Division of Personnel policy with respect to determining who is to be compared. Pay increases, including those based upon Internal Equity, are discretionary ones by the Respondent. The record established that Respondent conducted a review of all Rehabilitative Service Associate's positions and determined that Grievants did not possess comparable training and experience, and did not possess comparable years of service. Therefore, Respondent determined that the Grievants were not eligible for a pay increase and chose not to recommend them for a discretionary pay increase. The record also established that Respondent did not violate the Pay Plan Implementation Policy and followed the guidelines when reviewing the Grievants comparable to fellow employees of the same classification.

Grievants are essentially challenging a pay plan policy that the Division of Personnel has adopted, which all state agencies in the classified service are required to follow. The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by 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 and 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). The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment

in place of Division of Personnel. *Moore, supra*. Rather, 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).

The record established that Respondent used policy information provided by the Division of Personnel in making the determination that the Grievants' training and experience, as well as their years of service were not comparable to the higher paid Rehabilitative Services Associates at the Clarksburg office. The record revealed that Respondent used the 20% calculation as provided by the Division of Personnel. In addition, the record established that an agency defines what is considered comparable. It is understandable that Grievants' are troubled by the presence of a 20% pay disparity with fellow employees, but the record made clear that Respondent's decision in not making an internal equity recommendation to the Division of Personnel was based on criteria other than the 20% pay difference. This was reflected in Respondent's spreadsheet outlining the criteria for such a discretionary pay increase. Respondent's use of this information in compiling a listing of Rehabilitative Services Associates for the purpose of internal equity cannot be viewed as arbitrary and capricious or an abuse of discretion.

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 grievances by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board 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). *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).

2. The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of the Division of Personnel. *Moore v. W.Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). Rather, 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).

3. Grievants failed to meet their burden of proof to demonstrate that Respondent's decision to not recommend a discretionary pay raise to the Division of Personnel was arbitrary and capricious or an abuse of discretion.

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: August 21, 2012

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Ronald L. Reece
Administrative Law Judge