THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BOBBY JEAN MILLER,
Grievant,

v. **Docket No. 2012-0692-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Respondent.

DECISION

Grievant, Bobby Jean Miller, is employed by Respondent, Department of Health and Human Resources/Bureau for Children and Families. On January 3, 2012, Grievant filed this grievance against Respondent stating, "Equal pay requested for equal work performed. I am paid at least twenty percent less than similarly qualified and tenured employees in the same job class and organizational unit . . . Failure to comply with laws and rules pertaining to equal pay for equal work . . . ." For relief, grievant seeks at least a ten percent increase in salary, with back pay.

On January 12, 2012, the matter was waived to level two, as the level one grievance evaluator lacked authority to determine classification and compensation matters. Following the level two mediation, Grievant perfected the appeal to level three of the grievance process on June 11, 2012. A level three hearing was held on February 14, 2013, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared *pro se*, Respondent was represented by counsel, Anne B. Ellison, Assistant Attorney General. This matter became mature for decision on March 15, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was denied a discretionary pay increase for internal equity. Respondent denied Grievant's request because, although Grievant was paid at least twenty percent less than the highest paid person in her unit, she did not have comparable years of state/classified service. Grievant failed to prove by a preponderance of the evidence that Respondent's decision not to grant her a discretionary pay raise was unreasonable or arbitrary and capricious. Accordingly, the grievance is denied.

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

Findings of Fact

1. Grievant is employed by Respondent as a Health Resource Specialist, Senior.

2. On December 15, 2011, Grievant submitted calculations to her immediate supervisor requesting a pay increase due to the difference in salary between Grievant and a co-worker.

3. Requests for salary increase in this type of situation are governed by the Division of Personnel's Pay Plan Implementation policy ("PPI"), which states,

> In situations in which one or more employees are paid at least 20% less than other employees in an agency-defined organizational unit and the same job class who have comparable training and experience, duties and responsibilities, performance level, and years of State/classified service, the appointing authority may recommend an in-range salary adjustment of up to 10% of current salary to each employee in the organizational unit whose salary is at least 20% less than other employees in the unit.

4. Previously, former Governor Manchin had ordered a freeze on all discretionary pay increases[1]. This freeze was partially lifted by Governor Tomblin in March 2011,[2] opening the door to pay increases of the type sought by Grievant. Cabinet Secretaries were instructed to apply the policy uniformly within each agency. In order to ensure fair application of the policy within DHHR, Cabinet Secretary Lewis instructed the Office of Human Resource Management ("OHRM") to develop a policy for the DHHR's application of the PPI.

5. OHRM determined that its individual Bureaus should make the determination regarding what constitutes an organizational unit for purposes of the PPI.

6. BCF issued DHHR BCF Guidelines/Clarification for the Internal Equity Portion of the Pay Plan Implementation Policy ("Guidelines"), which states, in relevant part:

> Agency Defined Organizational Unit: shall be defined at the BCF Deputy Commissioner Level, with approval by the commissioner. If there are positions/job classifications where only 1 or 2 staff has similar job duties – we will look outside BCF to other DHHR Bureaus for similarly situated positions / job classifications
> Years of State/ classified service: shall be defined as "20% of tenure." Example: if the highest salary in an agency defined organizational unit had worked for the state for 40 years (State/classified service) an individual seeking a discretionary internal equity salary adjustment would need to have 32 years working for the state to qualify for a request to be submitted.

[1] 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.

[2] Grievant's Exhibit 1, memorandum from Governor Tomblin's Chief of Staff, Rob Alsop, reinstating the PPI with the exception of merit pay increases.

7. Sue Hage, BCF Deputy Commissioner, reviewed Grievant's salary and years of state/classified service under the PPI, along with the BCF Guidelines and determined Grievant was not eligible for a pay increase. The highest paid employee in Grievant's organizational unit made $42,882.00 and had eighteen years of state/classified service. Grievant made $32,120.00 and had ten years of state/classified service. Although the highest paid employee is paid at least twenty percent more than Grievant, Grievant did not have comparable years of state/classified service.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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).

"[T]he granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of the Respondent." *Harris v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007). 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). However, discretionary decisions must be made in a manner

that is reasonable and not arbitrary and capricious. *See Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998).

Grievant contends Respondent has violated W. VA. CODE ST. R. § 143-1-5.9, and misinterpreted statutes, policies, and rules regarding discretionary pay. Grievant contends that Respondent should have considered tenure within the organizational unit rather than total years of state/classified service. She asserts that another employee was granted a salary increase based on her tenure within her organizational unit rather than total years of state/classified service.

Grievant cites the administrative rule governing merit pay raises, which is not applicable to this situation as internal pay equity is governed by the PPI. The PPI states:

> In situations in which one or more employees are paid at least 20% less than other employees in an agency-defined organizational unit and the same job class who have comparable training and experience, duties and responsibilities, performance level, and years of State/classified service, the appointing authority may recommend an in-range salary adjustment of up to 10% of current salary to each employee in the organizational unit whose salary is at least 20% less than other employees in the unit.

While Grievant asserts that Respondent incorrectly classified her into a special unit, rather than comparing her to all HHR Specialist, Senior positions, this assertion appears moot. Reviewing Grievant's exhibit of those employees to which she believed she should have been compared, only one additional employee is paid twenty percent more than Grievant. That person has even more years of state/classified service than the employee to which Respondent compared Grievant.

Therefore, the heart of the grievance is whether Respondent properly considered tenure. Grievant contends Respondent improperly considered total years of state/classified service rather than service within the unit. Grievant is incorrect. The administrative rule is clear that it is years of state/classified service that is to be compared, and not tenure within the organizational unit. Further, Respondent's internal policy regarding how to determine comparableness by requiring twenty percent of tenure is not unreasonable. Grievant's ten years of service with the state is simply not comparable to the eighteen years of service with the state held by the highest paid employee in the unit.

Grievant's last contention, that another employee was granted a discretionary pay increase based upon tenure in her unit rather than total years of state/classified service, is not supported by the evidence. As evidence of her contention, Grievant provided only the docket number of a previous grievance. Review of the decision in that grievance provides no support for her contention, as the grievance actually involved the issue of back pay and made no mention of how the grievant had been awarded the discretionary pay increase.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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).

2. "[T]he granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of the Respondent." *Harris v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007). 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). However, discretionary decisions must be made in a manner that is reasonable and not arbitrary and capricious. *See Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998).

3. Grievant failed to prove by a preponderance of the evidence that Respondent's decision not to grant her a discretionary pay raise was unreasonable or 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 (2008).

DATE: June 21, 2013

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Billie Thacker Catlett
Administrative Law Judge