

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**KENYA BURTON,
Grievant,**

v.

Docket No. 2022-0812-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR PUBLIC HEALTH AND DIVISION OF PERSONNEL,
Respondents.**

DECISION

Grievant, Kenya Burton, is employed by Respondent, Department of Health and Human Resources ("DHHR"), within the Bureau for Public Health. On May 31, 2022, Grievant filed this grievance against Respondent DHHR stating, "I accepted additional supervisory duties on Dec[ember] 6th 2021 and began Jan[uary] 1st to perform those duties; however, I was not paid for this work with a 5% increase until check dated 6/30/2022. Which would have been for pay period ending 5/20/2022. In addition, I know back pay has been granted to others in my division for work completed." For relief, Grievant seeks as follows: "I would like pay for my previous work in one lump sum to my vendor account and not on my paycheck."

Following the June 22, 2022 level one hearing, a level one decision was rendered on July 13, 2022, denying the grievance. Grievant appealed to level two on July 13, 2022. The Division of Personnel ("DOP") was joined as a necessary party by order entered August 26, 2022. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on October 4, 2022. A level three hearing was held on February 21, 2023, before the undersigned at the Grievance Board's

Charleston, West Virginia office via videoconference. Grievant appeared *pro se*.¹ Respondent DHHR appeared by Bunny Harper and was represented by counsel, Steven R. Compton, Deputy Attorney General. Respondent DOP appeared by Assistant Director Wendy Mays and was represented by counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on March 21, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.²

Synopsis

Grievant is employed by Respondent Department of Health and Human Resources in a position classified as a Disease Intervention Specialist 2. Grievant asserts she is entitled to retroactive wages for additional duties she performed. Such pay is discretionary, and employees are not entitled to retroactive wages under Respondent Division of Personnel's policy. Grievant failed to prove Respondents discriminated against her. Grievant failed to prove she was entitled to retroactive pay or that Respondents violated any law, rule, or policy. 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 DHHR in a position classified as a Disease Intervention Specialist ("DIS") 2.

¹ For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

² Respondent DHHR elected not to file Proposed Findings of Fact and Conclusions of Law.

2. Beginning January 1, 2021, Grievant assumed additional duties upon the vacancy of a DIS Supervisor position and sought a pay increase for the same.

3. Pay increases are governed by Respondent Division of Personnel's ("DOP") *Pay Plan Policy*.

4. Under the policy, pay increases for temporary additional duties are discretionary.

5. The *Pay Plan Policy* states, "When increases are discretionary, appointing authorities have no obligation to pursue and employees have no entitlement to receive them. Such increases are subject to authorization or limitation by the Governor's Office, appointing authority, and/or the State Personnel Board." *Pay Plan Policy* § I.

6. On March 23, 2022, Respondent's cabinet secretary approved the request for a 5% temporary additional duties discretionary pay increase for grievant.

7. Respondent DOP reviewed the request and approved the same on April 19, 2022. The request was then sent to the governor's office for final approval, which was granted on April 20, 2022.

8. The personnel transaction for the pay increase in this matter was made effective May 7, 2022, the first pay period following final approval of the pay increase.

9. Personal transactions cannot be made effective until all approvals have been obtained and retroactive wages for discretionary increases are not granted. *Pay Plan Policy* § III.J. 2.

10. As State employees are paid one month in arrears, Grievant's paycheck did not reflect the increase until June 30, 2022.

11. DIS Supervisor Nathan Kirk also requested a pay increase for additional duties, which was denied by Respondent DOP. Mr. Kirk filed a grievance and received a confidential settlement.

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 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant asserts she is entitled to retroactive wages for the additional duties she performed from January 1, 2022, until she began receiving the additional duty pay on June 30, 2022. Grievant asserts she is entitled to retroactive pay because another employee had received retroactive pay in a similar situation. Respondent DOP asserts Grievant is not entitled to back pay under its policy and that Grievant failed to prove Respondents violated any law, rule, or policy in refusing to provide retroactive pay.

“A grievant is not entitled to a retroactive discretionary pay increase when there is no law, rule, or policy requiring the agency, DOP, or the Governor’s Office to act within a certain timeframe on a request for a discretionary pay increase.” *Hapney v. Pub. Emp. Ins. Agency, Dep’t of Admin., and Div. of Pers.*, Docket No. 2013-0861-DOA (Feb. 24, 2014) (citing *Green v. Dep’t of Health and Human Res. and Div. of Pers.*, Docket No. 2011-1577-DHHR (Oct. 1, 2012)); *Hart v. Div. of Highways and Div. of*

Pers., Docket No. 2015-1717-DOT (May 23, 2016). “[T]here is simply no applicable legal basis for authorizing back pay in these circumstances.” *Boggess v. Pub. Serv. Comm’n*, Docket No. 2015-0079-PSC (Mar. 25, 2015).

The Division of Personnel has discretion in performing its duties provided it does not exercise its discretion in an arbitrary or capricious manner. See *Bonnett v. West Virginia Dep’t of Tax and Revenue and Div. of Pers.*, 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).

An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “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); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

“[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “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 her judgment for that of [the employer].” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Discretionary pay increases are governed by Respondent DOP's policy, which does not provide for retroactive wages for a discretionary pay increase. Respondent DHHR was not required to seek an increase under these circumstances, much less within a particular timeframe. Respondent DOP was likewise not required to act on the request within a particular timeframe but, nonetheless, reviewed the request within a reasonable time. Grievant failed to prove she was entitled to retroactive pay or that Respondents violated any law, rule, or policy.

Grievant asserts that there is “a precedence” to award retroactive pay as she asserts another employee, Nathan Kirk, received the same. This is essentially an argument of discrimination. “Discrimination’ means 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). Grievant and Mr. Kirk are not similarly situated. Grievant and Mr. Kirk do not hold the same job classification and Respondent DHHR’s request for a discretionary pay increase for Mr. Kirk was denied. Mr. Kirk filed a grievance and received a confidential settlement. As Grievant and Mr. Kirk are not similarly situated, Grievant failed to prove discrimination.

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 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. “A grievant is not entitled to a retroactive discretionary pay increase when there is no law, rule, or policy requiring the agency, DOP, or the Governor’s Office to act within a certain timeframe on a request for a discretionary pay increase.” *Hapney v. Pub. Emp. Ins. Agency, Dep’t of Admin., and Div. of Pers.*, Docket No. 2013-0861-DOA (Feb. 24, 2014) (citing *Green v. Dep’t of Health and Human Res. and Div. of Pers.*, Docket No. 2011-1577-DHHR (Oct. 1, 2012)); *Hart v. Div. of Highways and Div. of Pers.*, Docket No. 2015-1717-DOT (May 23, 2016). “[T]here is simply no applicable

legal basis for authorizing back pay in these circumstances.” *Boggess v. Pub. Serv. Comm’n*, Docket No. 2015-0079-PSC (Mar. 25, 2015).

3. The Division of Personnel has discretion in performing its duties provided it does not exercise its discretion in an arbitrary or capricious manner. See *Bonnett v. West Virginia Dep’t of Tax and Revenue and Div. of Pers.*, 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).

4. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “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); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

5. “[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency’s actions are valid as long as the

decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “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 her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

6. Grievant failed to prove she was entitled to retroactive pay or that Respondents violated any law, rule, or policy.

7. “‘Discrimination’ means 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).

8. Grievant failed to prove Respondents discriminated against her.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.³ Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

³ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge

§ 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: May 4, 2023

Billie Thacker Catlett
Chief Administrative Law Judge

entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.