

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ROBERT ROCKIE DELORENZO, JR. AND
LEO D. SKARZINSKI,**

Grievant,

v.

Docket No. 2023-0052-CONS

MARION COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, Robert DeLorenze, Jr. and Leo Skarzinski, are employed by Respondent, Marion County Board of Education, as Administrative Assistants. On July 19, 2022, each Grievant filed a grievance, assigned Docket Nos. 2023-0050-MrnED & 2023-0051-MrnED, respectively, identically alleging:

Marion County Board of Education employs five Administrative Assistants and 1 Administrative Assistant/Treasurer in the Central Office. Each of these positions are similarly situated according to the definition of "Central Office Administrator" in §18A-1-1(4), the numbers of days employed and the responsibilities and duties of each position. Three of the Administrative Assistants and the Treasurer receive a \$5000.00 supplement to their salary. This is a violation of §18A-4-5a "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county"¹ and §6C-2-2(d) "Discrimination."

As relief, Grievants seek, "Uniformity and equity in pay."

The grievances were consolidated under the current action on July 20, 2022. A level one conference was held on July 27, 2022, and a denial was issued on August 30,

¹This is language is actually from §18A-4-5B which is applicable to service personnel.

2022. Grievants appealed to level two on September 7, 2022. A level two mediation occurred on December 1, 2022. Grievants appealed to level three on December 14, 2022. On March 1, 2023, a level three hearing was held before the undersigned at the Grievance Board's Westover office. Grievants appeared in person and were self-represented. Respondent appeared by Superintendent Donna Hage and was represented by Rick Boothby, Esq., Bowles Rice LLP. This matter matured for decision on May 2, 2023, after each party submitted written proposed findings of fact and conclusions of law.

Synopsis

Grievants have been employed for less than five years as Administrative Assistants by Respondent, Marion County Board of Education. Respondent pays an extra \$5,000 in supplemental "position pay" to Administrative Assistants who have been in the position in-house for at least five years. While Respondent does not pay the \$5,000 to Grievants, it does pay the \$5,000 to its four other Administrative Assistants with five years of in-house experience. Grievants claim this violates Code mandating uniformity in pay and constitutes discrimination. Grievants contend Respondent did not properly implement the \$5,000 supplemental "position pay" and that, nine years ago, Respondent paid this supplement for one year to an Administrative Assistant who had been in the position only four years. Grievants did not prove that Respondent was obligated to pay them the \$5,000 supplement or that Respondent's actions constituted discrimination. Accordingly, this 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. Grievants, Robert DeLorenze, Jr. and Leo Skarzinski, are employed as Administrative Assistants by Respondent, Marion County Board of Education (“Board”).
2. Grievant Skarzinski has been employed with Respondent as an Administrative Assistant for one year, starting in 2021-2022. (Grievants’ Exhibit 1).
3. Grievant DeLorenzo has been employed with Respondent as an Administrative Assistant for three years, starting in 2019-2020. (Grievant’s Exhibit 1).
4. Respondent currently employs four other Administrative Assistants, namely Andy Neptune, Chad Norman, Gia Deasy, and Scott Reider.
5. Each Administrative Assistant has significant administrative duties and supervisory authority over one or more county-wide programs.
6. Administrative Assistants receive “position pay” to supplement their base salaries.
7. Respondent has no published supplemental pay policy or schedule explaining which employees are to receive salary supplements or covering the amount of the supplements. (Grievants’ Exhibit 3).
8. However, Respondent has a standard practice to supplement pay for Administrative Assistants based on their in-house experience in that position, including a \$5,000 increase to their supplemental “position pay” after five years.
9. Salary schedules for Administrative Assistants are accounted for in Respondent’s annual budget voted on by the Board.

10. By the end of May each year, the Board must vote to approve its budget for the coming school year and must submit the approved budget to the State Superintendent of Schools for approval. (Mr. Reider's testimony & West Virginia Code §§ 18-9B-5; 18-9B-6).

11. The budget for 2022-2023 shows that the supplemental "position pay" for Administrative Assistants Andy Neptune, Chad Norman, Gia Deasy, and Scott Reider is \$17,500.

12. The budget for 2022-2023 shows that the supplemental "position pay" for Grievants is \$12,500, which is \$5,000 less than the other Administrative Assistants.

13. Respondent explains in its 2022-2023 budget spreadsheet that Administrative Assistants with five years of experience in their position receive an additional \$5,000. (Grievants' Exhibit 1 & Respondent's Exhibit 1).

14. The current Administrative Assistants, except for Grievants, have been in their positions for at least five years.

15. Like Grievant Skarzinski, Mr. Reider worked in a similar upper-level administrative position prior to working for the Board and was the director of finance for the Regional Education Service Agency (RESA), which served Marion County Schools. Mr. Reider's years of experience with RESA did not count towards the five years of experience needed to receive the additional \$5,000 supplement.

16. Respondent does not count any outside experience towards an Administrative Assistant's experience credit for pay purposes.

17. Randy Farley did, upon reaching four years of employment with Respondent as an Administrative Assistant, receive the additional \$5,000 in “position pay.” (Grievants’ Exhibit 4).

18. Mr. Farley became an Administrative Assistant entitled to a base position pay of \$12,500 on June 15, 2009. (Grievants’ Exhibit 4 at pages 2, 3, & 20).

19. Starting with the 2013-2014 school year, Mr. Farley received an additional \$5,000 in “position pay.” That same school year, former Administrative Assistant/Treasurer Kim Wade received the \$5,000 supplemental pay. (Grievants’ Exhibit 4 at pages 2, 3, 8, & 20).

20. Mr. Wade did have more than five years’ experience as an Administrative Assistant at the start of the 2013-2014 school year. (Grievants’ Exhibit 5).

21. At the start of the 2013-2014 school year, Mr. Farley only had four years of experience as an Administrative Assistant. (Grievants’ Exhibit 4 at pages 2, 3, & 17).

22. The practice of paying Administrative Assistants an additional \$5,000 based on their experience apparently began with the 2013-2014 school year. (Grievants’ Exhibit 4 at pages 2, 3, 8, & 20).

23. While the Board generally signs off on pay decisions, the board minutes do not reflect that the Board enacted the \$5,000 “position pay” increase for those with five years of in-house experience as Administrative Assistants. Although it was not on the Board Agenda for approval, it was approved by the Board.

24. There was no explanation as to why Mr. Farley received the additional \$5,000 in position pay starting with the 2013-2014 school year.

25. Mr. Farley has not worked for the Board as an Administrative Assistant since June 30, 2019.

26. Mr. Farley became the Board's Superintendent on July 1, 2019, but has not worked for the Board since June 30, 2021.

27. Grievants filed this action on July 19, 2022, more than a year after Mr. Farley retired as Superintendent, more than two years since he worked as an Administrative Assistant, and nine years after Respondent paid him a supplement of \$5,000 when he had less than five years of experience as an Administrative Assistant.

28. No Administrative Assistant currently working for the Board received the additional \$5,000 in "position pay" before attaining five years' experience with Respondent in that position. (Grievants' Exhibits 1 & 4).

29. No Administrative Assistant employed by the Board fifteen working days prior to July 19, 2022, the date the Level One grievance form was filed, received the additional \$5,000 in "position pay" before attaining five years' experience with Marion County Schools in that position. (Grievants' Exhibits 1 & 4 and Mr. Reider's testimony).

30. The purpose of the Administrative Assistant "position pay," and the extra \$5,000 provided only after five years as an Administrative Assistant with the Board, is to incentivize experienced administrators to work for and stay with Marion County Schools. (Testimony of former Marion County Schools Superintendent Gary Price).

31. Neither Grievant claimed to have five years of experience working as an Administrative Assistant for Marion County Schools.

32. Grievant Skarzinski worked in a similar central office position with the Lewis County Board of Education just prior to working for Marion County Schools. His combined

experience in this type of central office position is at least five years. However, he does not have five years of experience working as an Administrative Assistant for Marion County Schools.

33. Grievant DeLorenzo had worked in another central office administrative position with Respondent prior to becoming an Administrative Assistant.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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.*

Respondent pays an extra \$5,000 in supplemental “position pay” to its Administrative Assistants who have been in the position in-house for at least five years. Respondent did not pay the \$5,000 to Grievants but did pay this to its four other Administrative Assistants with five years of in-house experience. Grievants claim this violates the law mandating uniformity in pay and constitutes discrimination. Grievants contend that Respondent did not properly implement the \$5,000 supplemental “position pay” and that, nine years ago, Respondent paid this supplement for one year to an Administrative Assistant who had been in the position only four years.

Regarding uniformity in pay, West Virginia Code §18A-4-5A(a) states, in pertinent part, as follows:

(a) County boards of education in fixing the salaries of teachers shall use at least the state minimum salaries established under the provisions of this article. The board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements .,,

West Virginia Code §18A-1-1 provides the following relevant definitions:

(c) "Professional educator" has the same meaning as "teacher" as defined in section one, article one, chapter eighteen of this code. Professional educators are classified as follows:

(1) "Classroom teacher" means a professional educator who has a direct instructional or counseling relationship with students and who spends the majority of his or her time in this capacity; ...

(4) "Central office administrator" means a superintendent, associate superintendent, assistant superintendent and other professional educators who are charged with administering and supervising the whole or some assigned part of the total program of the countywide school system. This category includes other appropriate titles or positions with duties that fit within this definition;

An Administrative Assistant falls under the definition of Central Office Administrator. Therefore, §18A-4-5A(a) applies, rather than the uniformity language Grievants quoted from §18A-4-5B for service personnel. Respondent complied with §18A-4-5A(a) in the uniform classification of training, experience, responsibility, and other requirements. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Longevity incentive pay is a reasonable and acceptable means of

retaining upper-level employees. The fact that former employee Randy Farley was provided this additional pay one year early nine years ago, possibly by mistake, does not make this incentive program unreasonable.

Respondent has a standard practice of supplementing the pay of Administrative Assistants based on their in-house experience in that position, including \$5,000 in supplemental “position pay” after five years. Respondent has no published supplemental pay policy or schedule explaining which employees are to receive salary supplements or stating the amount of the supplements. While the Board generally signs off on pay decisions, the Board minutes do not reflect that the Board enacted the \$5,000 “position pay” increase for those with five years of in-house experience as Administrative Assistants. Although it was not on the Board Agenda for approval, it was approved by the Board. Grievants contend that Respondent did not properly implement the \$5,000 supplemental “position pay” because there is no evidence the Board specifically voted on it and it did not appear in any minutes, which violates The Open Governmental Meetings Act.

Grievants rely on West Virginia Code § 6-9A-5, which states:

Each governing body shall provide for the preparation of written minutes of all of its meetings. Subject to the exceptions set forth in section four of this article, minutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:

- (1) The date, time and place of the meeting;
- (2) The name of each member of the governing body present and absent;

(3) All motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition; and

(4) The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member, by name.

Grievants did not prove that Respondent violated this or any other law or protocol. However, even if Respondent had improperly enacted the \$5,000 supplemental “position pay,” Grievants did not prove that such an error would entitle them to extra pay. Ultimately, the \$5,000 additional supplemental pay to those with five or more years of experience as an Administrative Assistant was reasonable and not arbitrary and capricious.

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).

Grievants further claim the grieved difference in pay constitutes 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). Grievants are not similarly situated to the other Administrative Assistants with whom they compare themselves. Unlike the other Administrative Assistants, Grievants do not have at least five years of experience with Respondent as Administrative Assistants. Grievants also compare themselves to Randy Farley, a former Administrative Assistant who retired before the relevant period and was given the \$5,000 pay bump for one year when he was short of the requisite five years of experience. This occurred nine years ago and is therefore not relevant for comparison purposes. Grievants did not cite any authority for the proposition that Respondent is permanently obligated to continue practices from years

prior that conflict with current policies or are one-time mistakes. Grievants failed to prove discrimination. Accordingly, the grievance is DENIED.

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 his 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. West Virginia Code §18A-4-5A(a) states, in pertinent part, the following:

(a) County boards of education in fixing the salaries of teachers shall use at least the state minimum salaries established under the provisions of this article. The board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements...

3. Grievants did not prove by a preponderance of the evidence that the disparity between their supplemental pay and that of other Administrative Assistants employed by Respondent violates the law.

4. “‘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).

5. Grievants did not prove discrimination by a preponderance of the evidence.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Intermediate Court of Appeals.² Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 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: June 13, 2023

Joshua S. Fraenkel
Administrative Law Judge

²On 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 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.