THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RANDALL R. HAZLEWOOD,

Grievant,

v. **Docket No. 2022-0667-CONS**

GENERAL SERVICES DIVISION AND DIVISION OF PERSONNEL,

Respondent.

DECISION

Grievant, Randall R. Hazlewood, is employed by Respondent, General Services Division ("GSD"). On November 12, 2021, Grievant, by representative, filed a grievance against Respondent protesting the denial of a pay raise, which was assigned docket number 2022-0395-DOA. Grievant sought "[t]o be made whole in everyway including 20% pay equity raise with back pay and interest." Grievant improperly filed the grievance directly to level three of the grievance process, so the grievance was transferred to level one of the grievance process on November 16, 2021. On December 29, 2021, Grievant filed a second grievance, assigned docket number 2022-0485-DOA, stating, "Received letter on Dec. 10 2021 stated that I do not have comparable experience relevant to the classification as stipulated in the pay plan policy (DOP-12)." For relief, Grievant sought "[t]o be brought up to $19.76 an hour and for back pay from Dec. 2020 with 5% interest and 10% pay discretionary increase and a 10% pay discretionary the following year and 5% pay discretionary increase the year after and for 5% shift differential."

On January 6, 2022, a level one hearing was held in docket number 2022-0485-DOA, and a level one decision was rendered on January 20, 2022, denying the grievance. Grievant appealed to level two on January 29, 2022. The Division of Personnel ("DOP")

was joined as an indispensable party by order entered February 23, 2022. The grievances were consolidated into the above docket number by order entered consolidated March 14, 2022. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on May 6, 2022.

A level three hearing was held on December 12, 2022, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person. Grievant's representative, Samantha Crockett, Field Organizer, UE Local 170, failed to appear. Although Grievant was given the opportunity to request a continuance of the hearing due to his representative's failure to appear, Grievant elected to proceed *pro se*[1]. Respondent GSD appeared by its Director, William Barry, and was represented by counsel, Mark S. Weiler, Assistant Attorney General. Respondent DOP appeared by it's Assistant Director, Wendy Mays, and was represented by counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on January 19, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by General Services Division as a Facilities/Equipment Maintenance Technician. Grievant grieves General Services Division's initial failure to seek a discretionary pay increase for Grievant for salary inequity when it did so for other employees. Grievant further grieves the Division of Personnel's later denial of a discretionary pay increase when Respondent General Services Division sought the same

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

for Grievant. Grievant failed to prove he was entitled to a discretionary increase or that Respondents' actions were 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 GSD as a Facilities/Equipment Maintenance Technician ("FEMT").

2. On September 2, 2020, Respondent GSD pursued a discretionary pay increase for a number of FEMTs under Respondent DOP's Pay Plan Policy[2] for salary inequity.

3. The Pay Plan Policy allows a pay increase for internal equity, in relevant part to this grievance, as follows:

> In situations in which one or more permanent, current employees are paid no less than 20% less than other permanent, current employees in the same job classification and within the same agency-defined organizational work unit, the appointing authority may submit the Request for Approval form recommending an in-range salary adjustment of up to 20% of current salary to all eligible employees in the organizational unit whose salary is at least 20% less than other employees in the agency-defined work unit.
>
> a. The following conditions must be met for an employee to qualify for an internal equity in-range salary adjustment:
>
> . . .
>
> 5) The employees must have comparable experience relevant to the classification unless

[2] The Pay Plan Policy was revised effective July 1, 2022. The policy governing this grievance is the Pay Plan Policy effective February 1, 2020, and entered as Respondent DOP Exhibit 1.

> the employee being paid 20% less has more relevant experience;
>
> . . .
>
> 7) The employees must have comparable performance levels based upon the EPA-3 for the agency's most current established performance review cycle for each employee, meaning both employees must be rated as Meets Expectations, or both employees must be rated as Exceeds Expectations, except where the employee being paid 20% less has a higher EPA-3 score, provided that the employee being paid 20% less has not had any disciplinary action taken in the last twelve (12) months;
>
> b. The purpose of internal equity adjustments is to facilitate more equitable pay among similarly situated employees and not to recognize superior performance. An internal equity in-range salary adjustment is not intended to ensure employees in the same job classification receive the same salary.
>
> c. For purposes of this policy, comparable years of experience shall be considered as follows:
>
> 1) Employees who have ten (10) years or less of experience may be compared to other employees who are within five (5) years of experience up to 20 years of classified service.
>
> 2) Employees who have more than ten (10) years or more of experience may be compared to other employees who are within ten (10) years of experience. . . .

4. Internal equity pay increases are discretionary pay increases.

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."

6. Respondent GSD did not include Grievant in its September 2, 2020 request because Grievant was ineligible under the policy because he had been disciplined within the preceding twelve months.

7. On November 18, 2021, Respondent GSD again sought an internal equity pay increase for several FEMTs, including Grievant. The packet of information Respondent GSD submitted to Respondent DOP included an application completed by Grievant listing his work experience.

8. By letter dated November 24, 2021, Respondent DOP denied Respondent GSD's request regarding Grievant. Respondent DOP determined Grievant did not meet the requirements for the increase under the policy because his experience was not comparable to the compared employee.

9. The compared employee had 7 years of classified service and 25 years of construction/maintenance experience.

10. Grievant had 9 years of classified service but only 8 years of construction experience as reflected in the application he submitted November 10, 2021.

11. On December 10, 2021, Respondent GSD notified Grievant the request had been denied.

12. On March 9, 2022, Respondent GSD again submitted a request to Respondent DOP for an internal equity pay increase for Grievant of 15%, using a different employee for comparison.

13. On March 29, 2022, Respondent DOP approved the request to increase Grievant's pay. The pay increase was effective April 23, 2022.

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*.

Grievant asserts he was entitled to a pay increase due to pay inequity. Grievant asserts Respondent GSD improperly excluded him when it requested internal equity pay increases for other employees in September 2020. Grievant further asserts that Respondent DOP improperly denied him an internal equity pay increase when Respondent GSD requested the same for him in November 2021.[3] Respondents assert their actions were proper and that Grievant failed to prove any violation of law, rule, or policy.

Salary inequity pay increases are discretionary pay increases subject to Respondent DOP's Pay Plan Policy. As discussed above, relevant to this greivance, employees who have been disciplined within the preceeding twelve months are ineligible and compared employees must have comparable experience.

"[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 Respondent." *Harris v. Dept. of Transp*., Docket No. 2008-1594-DOT (Dec. 15, 2008); *Fallon v. Div. of Corr. And Rehab*., Docket No. 2021-2469-MAPS (May 16,

[3] Grievant's PFFCL only discusses his allegations that the written reprimand that caused him to be excluded from the first round of pay increases was improper. Grievant's assertions regarding the other issues are assumed from his initial grievance filings and his statements and testimony during the level three hearing in this matter. As Grievant did not grieve his internal equity salary adjustment received April 23, 2022, Grievant has not alleged an entitlement to back pay from that salary adjustment.

2022). 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).

In this case, Grievant was initially ineligible for the internal equity pay increase because he had been disciplined within the preceding twelve months when Respondent GSD sought the increase for other employees. Respondent GSD properly excluded Grievant in compliance with the Pay Plan Policy. Grievant argues he was entitled to the pay increase because he was improperly disciplined. Grievant received a written reprimand in January 2020. Grievant did not grieve the written reprimand. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff'd*, Mon. Co. Cir Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App.

Docket No. 001096 (July 6, 2000). Grievant cannot now challenge the discipline he received to retroactively cure his ineligibility for the pay increase.

Grievant was next denied the internal equity pay increase when Respondent GSD submitted a second request on November 19, 2021, which Respondent DOP denied. In submitting the request, Respondent GSD compared Grievant to another FEMT who had 7 years of classified service but who had a total of 25 years of construction/maintenance experience. Respondent DOP found Grievant did not have comparable experience because, although Grievant had slightly greater classified experience, he had only 8 years of construction experience. Respondent DOP's determination was based on the packet of information submitted by Respondent GSD with their request, including the application completed by Grievant on November 10, 2021, which listed his experience.

During the level three hearing, Grievant testified that the application Respondent DOP reviewed was not the application he had submitted to Respondent GSD. Grievant entered into evidence the document he asserts he completed and submitted to Respondent GSD, which included three pages of additional previous employers for a total of 9 additional years of relevant experience. It is clear from the record that the application Respondent DOP reviewed was the application Respondent GSD submitted. Respondent GSD's packet of information included a sheet comparing the experience of the submitted employees, which listed Grievant's experience as 8 years and 2 months. This is the total of the experience listed Grievant's application as submitted to Respondent DOP. Respondent DOP properly reviewed the application submitted by Respondent

GDS[4]. That was the evidence before Respondent DOP in making its decision and Respondent DOP's decision was consistent with the evidence before it because the compared employee had more than twice as many years of experience as Grievant as submitted in the packet. Respondent DOP's decision was consistent with the evidence before it at the time so cannot be found to be arbitrary and capricious.

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. 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*

[4] Most likely Respondent GSD submitted the application Grievant completed at the time. The additional pages Grievant submitted at level three do not match the rest of the application. The pages are darker, the font is larger, and the pages are missing the footer present on the rest of the application.

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 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

3. 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).

4. "'[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).

5. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff'd*, Mon. Co. Cir Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000).

6. Grievant failed to prove he was entitled to a discretionary pay increase or that Respondents' actions were arbitrary and capricious.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals.[5] Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

[5] 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 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

§ 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: March 3, 2023

Billie Thacker Catlett
Chief Administrative Law Judge

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.