

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STACY L. RAUER,
Grievant,

v.

Docket No. 2019-1219-MAPS

**DEPARTMENT OF HOMELAND SECURITY/
DIVISION OF CORRECTIONS AND REHABILITATION, and
DIVISION OF PERSONNEL,
Respondents.**

DECISION

Grievant, Stacy Rauer, was employed by the Division of Corrections and Rehabilitation as a Corrections Program Manager 3/Regional Director prior to her resignation from this position. Grievant filed this action on or about March 8, 2019. The Statement of Grievance reads:

I was required to submit a Position Description form for my job duties and responsibilities. After review, DOP determined the position would be reclassified to a Corrections Program Manager 3. I was then required to submit my application. I received an email from Mike Coleman stating that my reclassification went through. Since that time, I have asked multiple people and agencies by following my chain of command if I was reallocated as I was told I would be and receiving a pay increase. Denny Dodson contacted me on Wednesday, February 27, 2019 stating William Marshall had directed him to contact me and tell me Division of Personnel has made their decision and I would not receive a pay increase.

I had significant increase in job duties and responsibilities and was told I would be reallocated and receive the 3 step pay increase.

This violates the rules and definitions on reallocation.

Grievant seeks the 3 step pay increase from a paygrade 18 to a paygrade 21 (16%) plus 5% for each six months of experience I have that exceeds the requirement making a 25% total increase in my salary with an effective date of July 1, 2018.

A level one hearing was conducted on April 1, 2019, at which the grievance was denied. A level two mediation was conducted on July 15, 2019. A level three hearing

was conducted via Zoom on October 28, 2022, before the undersigned. Grievant appeared in person and by her counsel, Christian J. Riddell. The Department of Homeland Security appeared by Denny Dotson, Chief of Juvenile Operations, and by Jonathan Calhoun, Assistant Attorney General. The Division of Personnel appeared by Wendy Mays, Assistant Director, and by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' Findings of Fact and Conclusions of Law on December 19, 2022.

Synopsis

During the 2018 regular session of the West Virginia Legislature a bill was passed to consolidate and reorganize several of the agencies that fell under the Department of Homeland Security. After the legislation was passed, the Department of Homeland Security worked with the Division of Personnel to standardize classifications within the Department. To address the organizational restructuring with the Department of Homeland Security, a new classification structure was proposed to the West Virginia State Personnel Board in a proposal that involved reclassifying positions into the new structure. The State Personnel Board approved the proposal at its June 21, 2018, Board meeting. The position occupied by Grievant was included in the proposal and was reclassified from the classification of Corrections Program Manager 2 to Corrections Program Manager 3 on December 8, 2018. Grievant seeks a salary increase that only occurs when a position is reallocated.

Grievant claims the duties of her position changed prior to the reclassification; however, she did not complete or submit a Position Description Form for reallocation consideration by the Division of Personnel at any point prior to the State Personnel Board

reclassification action. Grievant failed to prove she was entitled to receive additional money on the reclassification approved by the State Personnel Board and failed to prove that the position she occupied should have been reallocated. Grievant failed to demonstrate by a preponderance of the evidence that the Division of Corrections and Rehabilitation or the Division of Personnel violated any statute, administrative rule, or policy.

The following Findings of Fact are based on the record of this case.

Findings of Fact

1. Grievant was employed by the Bureau of Juvenile Services as a Corrections Program Manager II/Regional Director prior to the consolidation of the Department of Military Affairs and Public Safety and Regional Jail Authority in July 2018.

2. Grievant was reclassified as a Corrections Program Manager III/Regional Director following consolidation in December 2018. This reclassification did not result in a pay increase.

3. Grievant explained her new position, job duties, and the timeline for her being reclassified from a Program Manager 2 to a Program Manager 3.

4. Grievant acknowledged that she did not submit a written request for reallocation based upon what she perceived to be additional job duties. Grievant asserted that her additional job duties included reviewing use of force incidents and administrative segregation requests.

5. James Goddard is a similarly situated employee to the Grievant who was previously a Program Manager 2 and was reclassified as a Program Manager 3.

6. Mr. Goddard received a higher rate of pay than Grievant. However, the pay of Grievant and Mr. Goddard were both within the permissible range set forth in the pay scale.

7. Wendy Mays, Division of Personnel Assistant Director of Classification and Compensation, explained the process of reclassification, allocation, and the consolidation of the Department of Military Affairs and Public Safety with the Regional Jail Authority and how that impacted reclassifications.

8. Reallocation is defined as “[R]eassignment by the Director of a position from one class to a different class on the basis of significant change in the kind and/or level of duties and responsibilities assigned to the position or to address a misalignment of title and series.” W. VA. CODE R § 143-1-3.72.

9. Reclassification is defined as “[T]he revision by the Board of the specifications of a class or class series which results in a redefinition of the nature of the work performed and a reassignment of positions based on the new definition and may include a change in the title, compensation range, or minimum qualifications for the classes involved.” W. VA. CODE R § 143-1-3.74.

10. Pay on reallocation and reclassification are different. On reallocation an employee receives an increment increase for every pay grade the position moves up within the Salary Schedule. Whereas, on reclassification employees below the minimum of the pay grade assigned are brought to the new minimum, those already at or above the new minimum unless there is a special plan of implementation requested by the agency and approved by the State Personnel Board.

11. Ms. Mays explained that the Division of Personnel could not approve reallocation of Grievant without a written request, and that no such request for reallocation was received.

12. William Marshall, Bureau of Juvenile Services Assistant Commissioner, indicated that he had no recollection of Grievant ever being discouraged from requesting reallocation or such a written request for reallocation by Grievant being received by him.

13. Assistant Commissioner Marshall clarified that reviewing use of force incidents and administrative segregation requests were not additional job duties imposed on Grievant following consolidation and that these reviews were always part of her job duties. Assistant Commissioner Marshall indicated that Grievant and Mr. Goddard were given additional input in those processes rather than additional duties.

14. The record indicates that the job duties of Grievant did not significantly change following her reclassification to Corrections Program Manager 3/Regional Director.

15. Instructional meetings and instructional memoranda were sent out to the Department of Homeland Security staff impacted by the reclassification to notify them as to what would occur as a result of the State Personnel Board action. The Department of Homeland Security notified Grievant by email dated January 17, 2019, that the position she occupied would be reclassified, not reallocated, based the State Personnel Board proposal and would not be subject to a pay increase.

16. It is undisputed that Grievant was within the range of the paygrade assigned to the Corrections Program Manager 3 classification.

17. Grievant resigned from the position she occupied with the Department of Homeland Security effective November 12, 2021.

Discussion

This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

The Division of Personnel interpretations of the class specifications are entitled to be given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993); *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985). The Division of Personnel is responsible for the establishment and interpretation of the State's Classification Plan, which includes the class specifications and minimum qualifications. The undersigned is bound by legal precedent to the effect that the Division of Personnel's interpretation of the class specifications at issue should be given great weight unless clearly wrong. *Blankenship, supra*.

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); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

In *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994) the West Virginia Supreme Court of Appeals noted that W. VA. CODE § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. *Largent, supra.*, at Syl. Pts. 2, 3 & 4. Pay differences may be “based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer.” *Largent, supra* at 246. It is not discriminatory for employees in the same classification to be paid different salaries as long as they are paid within the appropriate pay grade. See *Thewes and Thompson v. Dep’t of Health & Human Res./Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009); *Buckland v. Div. of Natural Res.*, Docket No. 2008-0095-DOC (Oct. 6, 2008); *Boothe et al. v. W. Va. Dep’t of Transp./Div. of Highways*. Docket No. 2009-0800-CONS (Feb. 17, 2011).

Prior to her resignation in November of 2021, Grievant was employed by the Department of Homeland Security in position classified as a Corrections Program Manager 2. On June 21, 2018, the State Personnel Board approved a proposal that would implement a new Corrections Superintendent class series by reclassification effective November 10, 2018. Among other things, the proposal required all positions impacted to complete Position Description Forms for reclassification. This submission by Grievant was reviewed by the Division of Personnel and a determination was made that the position should be reclassified to the Corrections Program Manager 3 classification within the new classification structure.

Grievant first claims that the duties of her position changed prior to the reclassification and that her position should have been reallocated and that she should have received a salary increase. Reallocation is defined as “[R]eassignment by the Director of a position from one class to a different class on the basis of significant change in the kind and/or level of duties and responsibilities assigned to the position or to address a misalignment of title and series.” W. VA. CODE R § 143-1-3.72. In order for a position to be considered for reallocation, a Position Description Form must be submitted to the Division of Personnel for a classification determination. Grievant did not submit a Position Description Form at any time until the Position Description Form she completed for purposes of the State Personnel Board reclassification.

Grievant and the Division of Corrections and Rehabilitation disagree as to whether additional job duties were given to Grievant. Assistant Commissioner Marshall indicated that Grievant was not given additional job duties which would have warranted reallocation. In particular, evaluating and reviewing use of force and administrative segregation

incidents had always been part of her job duties as a Corrections Program Manager 2. While she was allowed more input in the process, her authority regarding those duties and the agency established process for both use of force and administrative segregation had not changed. In addition, the record supports a finding that the documents Grievant relied upon in support of her contention that she was given additional job duties were simply emails sent to numerous individuals to ensure that all employees involved in those processes understood them in a comprehensive fashion.

Grievant did offer evidence that James Goddard, a similarly situated employee, received a higher rate of pay than Grievant. While Grievant did offer this evidence, Grievant did not argue a discrimination claim at the level three hearing or in her proposals. In any event, the record established that both Grievant's pay and Mr. Goddard's pay were consistent with the applicable pay range for their position of Corrections Program Manager 3/Regional Director. The record also established that Grievant did not submit a written request for reallocation. Grievant failed to demonstrate by a preponderance of the evidence that the Division of Corrections and Rehabilitation or the Division of Personnel violated any statute, administrative rule, or policy.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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. The Division of Personnel interpretations of the class specifications are entitled to be given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993); *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985).

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); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

4. Employees who are doing the same work must be placed within the same classification, but within the classification there may be pay differences if these differences are based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other

specifically identifiable criteria that are reasonable and that advance the interest of the employer. *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

5. Grievant failed to prove by a preponderance of the evidence that the West Virginia Division of Corrections and Rehabilitation acted in any manner that was arbitrary and capricious by paying Grievant in accordance with her classification of Corrections Program Manager 3/Regional Director.

6. Grievant did not prove by a preponderance of the evidence that either Respondent acted in any manner that was arbitrary and capricious in not reallocating Grievant's position and increase her pay when no written request for reallocation was submitted by Grievant.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Intermediate Court of Appeals.¹ Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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

¹On 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 W. VA. 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.

appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: January 30, 2023

Ronald L. Reece
Administrative Law Judge