

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JEFFREY SWISHER,

Grievant,

v.

Docket No. 2022-0270-DOA

**GENERAL SERVICES DIVISION
and DIVISION OF PERSONNEL,**

Respondents.

DECISION

Grievant, Jeffrey Swisher, is employed by Respondent General Services Division (GSD) as a Trade Specialist. Respondent GSD pursued a discretionary pay increase for Grievant from the Division of Personnel (DOP) under the “Internal Equity” provision of DOP’s Pay Plan Policy (PPP). Respondent DOP denied the request. On September 29, 2021, Grievant filed a grievance alleging that DOP failed to attribute him the relevant experience in denying him a discretionary Internal Equity pay raise. As relief, he requests said pay raise retroactively; more specifically, “an equal or greater raise than those with equal or lesser amount of time and experience and credentials.”

On October 8, 2021, a level one hearing occurred. A level one decision denying the grievance was issued on October 21, 2021. Grievant appealed to level two on October 28, 2021. An order joining Respondent DOP as a necessary party was entered on December 22, 2021. Mediation occurred on June 27, 2022. Grievant appealed to level three on July 12, 2022. On February 1, 2023, a level three Grievant Board hearing was held online before the undersigned. Grievant was represented by Craig Erhard Esq. Respondent GSD appeared by Director William “Bill” Barry and was represented by Mark

S. Weiler, Assistant Attorney General. Respondent DOP appeared by Assistant Director Wendy Mays and was represented by Karen O'Sullivan Thornton, Assistant Attorney General. This matter matured for decision on March 17, 2023. Each party submitted Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by the General Services Division (GSD) as a Trade Specialist. GSD submitted to the Division of Personnel (DOP) a request for a discretionary Internal Equity pay raise on behalf of Grievant. DOP denied the requested raise. Grievant grieved the denial. Grievant contends there is a 25% pay differential between him and another Trade Specialist and that DOP erred in failing to attribute him experience it credited his coworker. Meanwhile, GSD obtained for Grievant a 10% Merit raise from the Governor. Grievant did not prove he was entitled to a discretionary Internal Equity raise or that DOP acted unlawfully or unreasonably. 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. Grievant is employed by Respondent General Services Division (GSD) in a position classified as a Trade Specialist, pay grade 10.
2. The salary range for a pay grade 10 is between \$25,147 and \$46,521. (GSD Exhibit 1 & 3)
3. Mr. Daniel Ball is Grievant's coworker and a Trade Specialist.

4. In August 2021, Respondent GSD submitted to Respondent Division of Personnel (DOP) a request for Grievant to receive a discretionary “Internal Equity” pay raise. This request compared Grievant’s salary of \$33,234.24 to Mr. Ball’s salary of \$43,100.72. This translated into a pay differential of 25.85%. (GSD Exhibit 1).

5. Included in the request was an application completed by Grievant. The application prompts the applicant to provide for each job a “detailed description of your job duties” and to “list all work experience.” Grievant provided a detailed description of his job duties and responsibilities.

6. On September 15, 2021, DOP issued a letter denying the requested discretionary Internal Equity pay raise, stating: “This request does not meet the requirements of the Pay Plan Policy (DOP-P12) for Internal Equity.” (GSD Exhibit 2).

7. The letter cites the DOP Pay Plan Policy (“PPP”)¹ as follows:

Section III.F.2. Internal Equity of the Division of Personnel’s Pay Plan Policy states, in part: “The employees must have comparable experience relevant to the classification unless the employee being paid 20% less has more relevant experience.”

8. Regarding the employee comparison, the letter states:

Our review found that the employees do not have comparable experience relevant to the classification. The employee for whom the increase is requested has 16 years and 10 months of experience relevant to the classification, while the comparison employee has 34 years and 8 months of experience relevant to the classification, which is not “within ten (10) years of experience.”

¹The relevant version is from February 1, 2020.

9. On September 30, 2021, GSD Deputy Director Bill Barry submitted to DOP a request for reconsideration of a discretionary Internal Equity pay raise, stating in part:

I believe that Mr. Ball's (comparator) 34 years and 2 months of private sector experience as a hardware store manager is comparable to Mr. Swisher's 18 years and 6 months of private sector experience as a construction worker and retail store manager. On a sidenote but of no less importance to the comparison, Mr. Swisher has an Associates Degree in Civil Engineering and also a completed Certification in Building Trades through Vocational and Technical School. Mr. Ball has no postsecondary education that we have been made aware of.

(GSD Exhibit 2).

10. On October 6, 2021, DOP denied the request for reconsideration, providing the same rationale it had previously provided for its denial, but adding:

The review includes comparing the duties of previous and current positions rather than the titles of those positions to the class specification. The duties must be relevant to the classification to be included in the review. ... The difference between the two employees is beyond the 10-year range as described in the policy.

(GSD Exhibit 2).

11. The Internal Equity provision of the PPP is found in the Discretionary Pay Differential section. Employees are required to meet each element of the criteria established in the policy to be considered eligible for the increase. (DOP Exhibit 1 and Ms. Mays' testimony)

12. DOP worked with GSD to find a way to allow GSD to provide Grievant the pay increase, in compliance with law, rule, and policy. (Ms. Mays' testimony)

13. Subsequently, GSD successfully advocated with the Governor for approval of an unrelated 10% discretionary “Merit” pay raise, also known as a salary advancement, for Grievant.

14. Grievant’s 10% Merit increase took effect on March 26, 2022.

15. There is no provision in the PPP which requires an agency to provide an employee with a discretionary pay increase. (DOP Exhibit 1 & testimony of Barry and Mays)

16. Further, Section III.J.2. of the PPP provides that “[r]etroactive wages pertaining to discretionary increases will not be granted under this policy.” (DOP Exhibit 1)

17. The Purpose section of the PPP states:

To establish a uniform policy for the use and application of the salary schedule for the classified service consistent with merit principles. 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.

18. The Internal Equity provision of the PPP, Section III.F., states:

2. Internal Equity. 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:

- 1) The employee must be paid at least 20% less than the employee to whom he or she is being compared (no rounding);
- 2) The employees must be in the same agency-defined organizational unit;
- 3) The employees must be in the same classification for at least twelve (12) consecutive months at the time of the request;
- 4) The employees must have comparable education/training, unless the employee being paid 20% less has more education/training;
- 5) The employees must have comparable experience relevant to the classification unless the employee being paid 20% less has more relevant experience;
- 6) The employees must have comparable duties and responsibilities; and
- 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.

3) Employees with greater years of experience may be compared to employees with lesser experience who are paid at a minimum 20% more than the employee with greater years of experience.

d. The employee(s) used for comparison cannot have received a discretionary increase in the last twelve (12) months that caused the inequity, cannot be in a temporary classification upgrade status, cannot be receiving a salary adjustment for additional temporary duties, cannot be receiving a project based incentive salary adjustment and must have been in the classification a minimum of twelve (12) months.

e. When the appointing authority requests an internal equity in-range salary adjustment for all eligible employees, it shall provide a request for and documentation to the Division for all employees in the same job classification within the agency-defined work unit, including their tenure and salary, who may also be eligible for an internal equity in-range salary adjustment.

f. The appointing authority shall provide any additional supporting documentation as required by the Division.

19. While Grievant received credit for his education, he did not receive any experience credit for the four years he expended in obtaining his Building Trades Certification and his Associate Degree in Civil Engineering. (Ms. Mays' testimony)

20. Mr. Ball received credit for his experience working at a lumber store and a hardware store.

21. At no time prior to the level three hearing did Grievant suggest that he failed to include significant job duties and responsibilities on his application or that his application was in some manner incomplete.

22. DOP reviewed the experience of Grievant and the comparator based on the information that it was provided.

23. Grievant did not point to any law, rule, or policy that Respondents violated.

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 seeks an Internal Equity discretionary pay increase, plus back wages, presumably retroactive to the time his application was rejected. He contends there is a 25% pay differential between him and another coworker who is a Trade Specialist. He

argues that Respondent DOP erred in failing to attribute him experience it credited the coworker. DOP counters that an Internal Equity pay raise is discretionary but that it nevertheless complied with the PPP in determining that Grievant did not meet all of the criteria established in the policy. DOP contends that it went above and beyond protocol in working with GSD to find another way to provide Grievant with a pay increase.

The principle of “equal pay for equal work” is embraced by W. Va. Code § 29-6-10. See *AFSCME v. Civil Serv. Comm’n.*, 181 W. Va. 8, 380 S.E.2d 43 (1989). 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 West Virginia 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. “It is not discriminatory for employees in the same classification to be paid different salaries.” *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).

Grievant is paid within the appropriate pay grade for his classification. Pursuant to *Largent*, this meets the requirement of “equal work for equal pay” as contemplated by West Virginia Code § 29-6-10. It should also be pointed out that the granting of an Internal Equity pay increase pursuant to the PPP is a decision that is within DOP’s discretion and is not mandatory. *Green v. Dep’t of Health & Human Res./Bureau for Children & Families and Div. of Pers.*, Docket No. 2011-1577-DHHR (Oct. 1, 2012); *Harris v. Dep’t of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007). Additionally, discretionary

actions of a public agency are consistently upheld unless they are found to be arbitrary and capricious. *McComas v. Public Service Commission*, Docket No. 2012-0240-PSC (Apr. 24, 2013); *See generally, Dillon v. Bd. of Educ.*, 177 W.Va. 145, 51 S E.2d 58 (1986); *Christian v. Logan County Bd. of Educ.*, Docket No. 94-23-173 (Mar. 31, 1995). Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

GSD attempted to provide Grievant with a pay increase under the Internal Equity provision of the PPP. GSD was so committed to getting Grievant a pay raise that it ultimately took an alternate route in requesting the Governor to provide Grievant a 10% discretionary Salary Advancement, also known as a Merit raise. The Governor approved this Merit raise, which took effect on March 26, 2022. While GSD was in no way obligated to seek this Merit raise for Grievant, it exercised its discretion to pursue the raise. GSD was not required by law, rule or policy to seek any type of discretionary pay increase for Grievant. Regardless, the PPP explicitly prohibits the payment of back wages in circumstances of discretionary increases. Further, an agency's actions with regard to granting discretionary pay raises is within the discretion of the agency. This policy does not confer upon Grievant an entitlement to a salary increase. *See Green, supra., citing Morgan, supra.; See also Journell, et al. v. Dep't of Environmental*

Protection/Division of Mining and Reclamation, Docket No. 2008-0609-CONS (Dec. 22, 2008).

Respondent GSD submitted a request for a 10% Internal Equity discretionary increase for the Grievant in August of 2021. Respondent DOP considered Grievant's education under the fourth criteria in the PPP. This requires that "employees must have comparable education/training unless the employee being paid 20% less has more education/training". As Grievant had more education than his comparator, the PPP permitted use of the comparator for comparison purposes even though the two employees would not have otherwise had comparable education/training. Experience is listed as the fifth criteria in the PPP. This requires that "[e]mployees must have comparable experience relevant to the classification unless the employee being paid 20% less has more relevant experience." Experience is separate and distinct from the education/training requirement. DOP appropriately considered the work experience of both Grievant and his comparator based on the application each completed. DOP determined that Grievant had considerably less experience than the comparator. DOP determined that Grievant had 16 years and 10 months of experience relevant to the Trades Specialist classification and that his comparator had 34 years and 8 months of experience.

Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *Blankenship, supra*; *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985);

Dillon v. Bd. of Ed. of County of Mingo, 171 W. Va. 631, 301 S.E.2d 588 (1983). The State Personnel Board and the Director of DOP have wide discretion in performing their duties but cannot exercise their discretion in an arbitrary or capricious manner. See *Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), Aff'd Kan. Co. C. Ct. Docket No. 99-AA-151 (Mar. 1, 2001). An action is arbitrary and capricious if the agency making the decision 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 is 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).

Furthermore, the 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. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007). Moreover, under the arbitrary and capricious standard of review of personnel decisions, the scope of review is narrow and an administrative law judge may not simply substitute his judgment for that of the agency decision maker. *Bradley v. Bd. of Directors*, Docket No., 96-BOD-030 (Dec. 28, 1997), *Harper v. Mingo County Bd. of Educ.*, Docket No. 93-29-064 (Sept. 27, 1993); See generally, *Bedford Co. Memorial Hosp. v. Health & Human*

Serv., 769 F. 2d 1017 (4th Cir. 1985), *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

DOP determined that Grievant did not meet criteria for an Internal Equity raise set forth in the PPP. DOP made this determination after a thorough review of Grievant's application. This application was reviewed by multiple individuals at DOP, including DOP Director Sheryl Webb. Grievant claims that he did not understand or fully appreciate the application process and that he left out duties he performed that were more specifically related to the Trades Specialist class specification. The application completed by Grievant prompts the applicant to provide for each job a "detailed description of your job duties" and to "list all work experience."

At no time prior to the level three hearing did Grievant suggest that he had failed to include significant job duties and responsibilities or that his application was incomplete. DOP appropriately reviewed the experience provided by Grievant on his application. Even so, the additional duties first raised by Grievant at the level three hearing were only occasional and intermittent. Grievant did not prove that Respondent was obligated to credit him for experience in this area or in the years he expended in obtaining his related degrees, or that its failure to do so was arbitrary and capricious. 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 § 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 v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

3. “It is not discriminatory for employees in the same classification to be paid different salaries.” *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).

4. “Internal Equity” pay increases pursuant to the DOP’s PPP is a decision that is within the discretion of the agency to make, and such increases are not mandatory on the part of the Respondent. *Green v. Dep’t of Health & Human Res./Bureau for Children & Families and Div. of Pers.*, Docket No. 2011-1577-DHHR (Oct. 1, 2012); *Harris v. Dep’t of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007).

5. Discretionary actions of a public agency are consistently upheld unless they are found to be arbitrary and capricious. *McComas v. Public Service Commission*, Docket No. 2012-0240-PSC (Apr. 24, 2013); *See generally, Dillon v. Bd. of Educ.*, 177 W.Va.

145, 51 S E.2d 58 (1986); *Christian v. Logan County Bd. of Educ.*, Docket No. 94-23-173 (Mar. 31, 1995).

6. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *Blankenship, supra*; *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Dillon v. Bd. of Ed. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983).

7. The State Personnel Board and the Director of DOP have wide discretion in performing their duties although they cannot exercise their discretion in an arbitrary or capricious manner. See *Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), Aff'd Kan. Co. C. Ct. Docket No. 99-AA-151 (Mar. 1, 2001).

8. An action is arbitrary and capricious if the agency making the decision 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 is 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).

9. Grievant did not prove by a preponderance of the evidence that he was entitled to an Internal Equity pay raise or that Respondent DOP violated any law, rule, or policy in denying him an Internal Equity pay raise.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.ⁱ 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: April 12, 2023

Joshua S. Fraenkel
Administrative Law Judge

ⁱOn 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.