

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

AMY L. HYMES,

Grievant,

v.

Docket No. 2022-0617-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES
and DIVISION OF PERSONNEL,**

Respondents.

DECISION

Grievant, Amy Hymes, was employed by the Department of Health and Human Resources (DHHR), Respondent, as a Deputy Commissioner with the Bureau of Social Services, a division of the Bureau of Children and Families (BCF). On February 16, 2022, Grievant filed this grievance protesting unfair compensation.¹ The grievance alleges:

I ... was not treated in the same manner as my peers during the reorganization of BCF. Other ... Deputy Commissioners were given choice of assignment during the reorganization. ... I am performing the same job as Deputy of Field South and am seeking equal compensation. ...I should have ... [been] given consideration and credit for prior experience. I am required to perform current role at an expectation level of high demand- not the same job as I accepted in 2016.

As relief, Grievant requests “compensation equal to the Field Deputy South,” compensation equal to Deputy Commission Melanie Urquhart, or to be transferred to another Deputy Commissioner position of Grievant’s choosing.

¹Grievant was dismissed after filing this grievance and grieved the dismissal in the matter of *Hymes v. DHHR*, Docket No. 2023-0611-DHHR, currently pending at level three of the grievance process.

A level one notice of agreed waiver to level two was issued on February 28, 2022. An Order of Joinder joining the Division of Personnel (DOP) as a necessary party was entered on March 1, 2022. A level two mediation occurred on June 10, 2022. Grievant appealed to level three on June 21, 2022. On November 8, 2023, a level three hearing was held via videoconference before the undersigned. Grievant appeared and was represented by Wayne King, Esquire. Respondent DHHR appeared by Angela Ferris, Director of the Office of Human Resource Management (OHRM), and was represented by Steven R. Compton, Deputy Attorney General. Respondent DOP appeared by Wendy Mays, Assistant Director of the Classification and Compensation Section, and was represented by Karen O'Sullivan Thornton, Assistant Attorney General.

This matter became mature for decision on December 4, 2023, after Respondent DHHR submitted Proposed Findings of Fact and Conclusions of Law (PFFCL). Respondent DOP declined to submit PFFCL. Grievant submitted PFFCL on December 6, 2023, to which Respondent DHHR filed a motion to exclude. The motion was denied. However, Respondent DHHR was given the opportunity to respond to Grievant's PFFCL and did so on December 13, 2023.

Synopsis

Grievant was employed by DHHR as a Deputy Commissioner when she transferred to another Deputy Commissioner position with different duties. Grievant requested a pay raise after learning that new Deputy Commissioners made more than her. DHHR treated this as a request for an internal equity pay raise and denied it, citing Grievant's lack of the requisite 20% pay disparity with a comparable employee in the

position for one year. Grievant argues that she had a right to a raise due to an increase in her duties even though properly paid within her paygrade. She contends that DHHR was obligated to give her a raise as promised and should have kept her informed of her status on criteria for a discretionary pay raise. Grievant did not prove she was entitled to a pay raise or that DHHR acted 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 was employed by Respondent DHHR as a Deputy Commissioner, pay grade 24.
2. The salary range for a pay grade 24 is between \$54,228 and \$100,332.
3. Grievant's salary was over \$70,000 for the period at issue. (Grievant's testimony).
4. When Grievant became a Deputy Commissioner in 2016, she performed finance duties for DHHR's Bureau of Children and Families (BCF). Since then, Grievant's duties have changed. Yet, her classification remained Deputy Commissioner.
5. In 2021, BCF was split into the Bureau of Family Assistance (BFA) and the Bureau of Social Services (BSS). This resulted in two BSS vacancies for Deputy Commissioner, one covering the northern counties and the other the southern counties.
6. Grievant accepted a lateral move to the Deputy Commissioner position for the northern counties for BSS and received the associated change in duties. Grievant

was not given a pay increase. Melanie Urquhart was promoted to the Deputy Commissioner position for the southern counties and given a pay raise.

7. Consequently, Deputy Commissioner Urquhart's pay exceeded Grievant's pay by up to 19 %. (Grievant's testimony).

8. Among other conditions, DOP's Pay Plan Policy requires that, in order to qualify for an internal equity pay raise, an employee must have at least a 20% pay disparity with another employee who has been in a comparable position for at least one year. Regardless, even if an employee qualifies, DOP's Pay Plan Policy gives the employer sole discretion to request an internal equity pay increase.

9. In December 2021, Grievant requested a pay raise from Respondent DHHR. Respondent DHHR determined that Grievant did not have a pay disparity of at least 20 % with any Deputy Commissioner. (Respondent DHHR's Exhibit 1).

10. There is no evidence of a pay disparity of at least 20 % between Grievant and a comparable Deputy Commissioner that was in the position for at least one year.

11. At no time did Grievant work outside of her classification of Deputy Commissioner. (Grievant's testimony).

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 argues she was entitled to pay comparable to the Deputy Commissioner for the southern counties of the Bureau of Social Service Deputy Commissioner since she was doing the same work for the agency in its northern counties. This amounts to a request of “equal pay for equal work.” 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 her classification. Pursuant *Largent*, this meets the requirement of “equal work for equal pay” as contemplated by WEST VIRGINIA CODE § 29-6-10.

Grievant implies there exists a pay inequity which would justify a pay raise yet provides no evidence that an inequity exists. Respondent DHHR reviewed Grievant’s request and determined that no pay inequity exists under DOP’s Pay Plan Policy that would allow DHHR to even request an internal equity raise from DOP. Grievant presented

no evidence under this policy of a pay disparity of at least 20% between herself and a comparable Deputy Commissioner, let alone a Deputy Commissioner who was also in the position for at least one year. Even if Grievant had met the criteria for an internal equity pay raise, DOP's Pay Plan Policy leaves it to the employer's discretion to make the request of DOP. *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). 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982). "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 his or her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.*, Docket No.

01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

Grievant claims entitlement to a pay raise because she was given additional duties, promised consideration for a raise, not given her options by the OHRM Director, not told she only needed to wait 30 more days before the comparable employee met the one-year requirement for comparison purposes, and that the OHRM Director had a duty to get her a pay raise. Grievant did not show that the OHRM Director was obligated to get her a raise. Nor did she offer any authority to support the proposition that any of these claims entitled her to a pay raise. As for the one-year requirement, it is irrelevant since Grievant failed to properly compare herself to an employee with whom she had a pay disparity of at least 20%. Only then would the length of employment for the comparable employee have mattered. Grievant failed to prove that she met the criteria to be nominated by Respondent DHHR for an internal equity pay raise, that Respondent DHHR's failure to recommend her for an internal equity raise was arbitrary and capricious, or that she was otherwise entitled to a pay raise.

Accordingly, this grievance is DENIED.

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. Grievant did not prove by a preponderance of the evidence that she met the criteria to even be nominated by Respondent DHHR for an internal equity pay raise, that

Respondent DHHR's failure to recommend her for an internal equity pay raise was arbitrary and capricious, or that she was otherwise entitled to a pay raise.

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: January 3, 2024

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.