

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JOSEPH PRATT,
Grievant,**

v.

Docket No. 2023-0201-DOA

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

DECISION

Grievant, Joseph Pratt, is employed by Respondent, General Services Division, as a Supervisor 1. On September 12, 2022, Grievant filed this grievance stating, “Grievant has not received pay increase for current certifications as approved.” For relief, Grievant seeks “[t]o be made whole in every way[,] including backpay with any and all statutory interest.”

A Level Three hearing was held on July 30, 2024, before the undersigned Administrative Law Judge at the Grievance Board’s Charleston, West Virginia, office. Grievant appeared in person and was self-represented. Respondent General Services Division appeared by Deputy Director Robert Kilpatrick and was represented by counsel, Mark S. Weiler, Assistant Attorney General. Respondent Division of Personnel appeared by Assistant Director of Classification and Compensation Wendy Mays and was represented by counsel, Katherine A. Campbell, Assistant Attorney General. This matter became mature for decision on September 4, 2024, upon final receipt of the parties’ written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed as a Supervisor I by Respondent General Services Division. Grievant filed this grievance asserting that he was wrongfully denied a discretionary salary adjustment following his completion of basic custodial training. At the Level Three hearing, Grievant failed to prove that Respondent acted arbitrarily or capriciously in failing to recommend that Grievant receive that discretionary salary adjustment for completing basic custodial training, which was not essential to the duties of his position. 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 has been employed by Respondent General Services Division's ("GSD") custodial department since July 25, 2018.
2. In or around November of 2019, Grievant, along with everyone else in his department, took a basic custodial certification training course. Because Grievant was a supervisor, the training was not essential to performing his job duties; however, his supervisor required him to undergo the training with everyone else nonetheless.
3. Per Respondent Division of Personnel's ("DOP") Pay Plan Policy, permanent employees who acquire certain training, education, certification, or licensure that is "not required to meet the minimum qualifications of the job classification" of those employees may, at the discretion of their employing agencies, be given an in-range salary adjustment up to 10% of their current salaries. However, the training must be approved by DOP prior to the employees' completion of the program. Furthermore, the training

“must demonstrate the acquisition of competencies which are used in the essential duties of the job class and/or position” of the employees.

4. DOP had not approved the basic custodial certification course in November 2019; so, none of the employees who took the course at that time were eligible for a discretionary pay increase for completing the course.

5. The basic custodial certification course was approved by DOP in 2021.

6. All custodians and lead custodians received the basic custodial training in 2021. GSD then submitted requests for a 7% salary adjustment for all employees who completed the course in 2021.

7. Grievant did not take the basic custodial certification course again in 2021. Instead, he took a “Train the Trainer” certification course in or around June of 2021. The “Train the Trainer” course included basic custodial training.

8. In an email exchange between December 3, 2021, and December 7, 2021, the Administrative Secretary for GSD, Brandon Perdue, requested “a list of all custodian employees who currently have the custodian basic certification” so that he could request a salary adjustment for those employees. Custodial Manager Jim Hawley provided Mr. Perdue a list of 13 employees, including Grievant.

9. From that list, GSD recommended to DOP that all custodians and lead custodians who had taken the basic custodial training course in 2021 be given a salary adjustment. GSD decided not to recommend a salary adjustment for supervisors for the basic custodial training certification. GSD did, however, recommend that Grievant be given a 7% salary adjustment for completing the “Train the Trainer” course.

10. Jim Hawley does not have the authority to approve a discretionary salary adjustment.

11. GSD does not have the authority to approve a discretionary salary adjustment.

12. DOP reviews all proposed discretionary salary adjustments against the Pay Plan Policy. If the proposed adjustment comports with law, rule, and/or policy, then DOP forwards the proposed adjustment to the Governor for final approval.

13. Ultimately, GSD received approval for the recommended salary adjustment for Grievant's completion of the "Train the Trainer" course, which became effective December 18, 2021.

14. There is no dispute that Grievant's salary falls within the appropriate pay grade for his classification.

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.*

West Virginia Code § 29-6-5(b) directs DOP to establish and apply a system of classification and compensation for all positions in the classified service. To that end, the State Personnel Board is authorized to promulgate rules to govern that classification and

compensation system. W. VA. CODE § 29-6-10. State agencies which utilize the classification and pay plan structure established by DOP adhere to the applicable classification and pay grade for each of their employees.

“DOP is primarily concerned with administering a classification and compensation plan that equitably compensates similarly situated employees while maintaining appropriate recruitment and retention, thereby assuring that each state agency has sufficient qualified personnel to perform its assigned governmental function.” *Travis v. Dep’t of Health & Human Res.*, Docket No. 96-HHR-518 (Jan. 12, 1998). The rules promulgated by the State Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Harvey-Gallup v. Dep’t of Health and Human Res.*, Docket No. 04-HHR-149(J) (Feb. 21, 2008); *Moore v. W. Va. Dep’t of Health & Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994); *see also* Syl. Pt. 4, *Callaghan v. W. Va. Civil Serv. Comm’n*, 273 S.E.2d 72 (W. Va. 1980). That is, while the State Personnel Board and DOP are given wide discretion in performing their duties, they cannot act in an arbitrary and capricious manner.

Agencies which follow DOP’s classification and pay plan structure, likewise, are granted wide latitude in recommending discretionary salary adjustments for their employees. “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).” *Paxton v. Dept. of Homeland Security and Div. of Personnel*, Docket No. 2021-2342-MAPS (Aug. 16, 2022).

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].” *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); *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).

In this case, Respondent GSD's decision to not recommend that Grievant receive a 7% salary adjustment for his 2019 basic custodial certification was neither arbitrary nor capricious. First and foremost, per DOP's Pay Plan Policy, a salary adjustment for completing training or certification that is not required to meet the minimum qualifications of the job classification is discretionary. An employee who completes such training has no entitlement to a salary adjustment at all. Second, to be eligible for a discretionary salary adjustment, the training must be approved by DOP prior to the employee's completion of the program. When Respondent took the basic custodial certification training in 2019, the course had not yet been approved by DOP. Therefore, Grievant was not eligible for a discretionary salary adjustment at that time. Third, the training "must demonstrate the acquisition of competencies which are used in the essential duties of the job class and/or position" of the employee undertaking the training. When Grievant took the basic custodial training in 2019, he was already a supervisor, and the training did not help him acquire skills that were essential to his duties as a supervisor. He had already surpassed that level of skill.

Furthermore, Grievant did receive a discretionary 7% salary adjustment in 2021 when he completed the "Train the Trainer" certification course, which included a review of basic custodial skills. It so happens that was the same year that DOP approved the basic custodial certification course. So, otherwise eligible employees of GSD (custodians and lead custodians but not supervisors) who completed the basic training course in 2021 were recommended for and did receive a 7% salary adjustment.

GSD's rationale in recommending that Grievant receive a discretionary salary adjustment for his 2021 completion of the "Train the Trainer" course but not for his 2019 completion of basic custodial certification is clearly supported by both the facts at hand and DOP's Pay Plan Policy. Moreover, it just makes sense from the standpoint of fiscal responsibility. What Grievant proposes is essentially double-dipping. He was rewarded with a discretionary 7% salary adjustment for achieving a trainer's certification, the coursework for which included basic custodial skills. Still, Grievant seeks an additional 7% adjustment for the stand-alone basic skills course. That is not required by law, policy, or even basic tenets of fairness.

Grievant has failed to prove by a preponderance of the evidence that Respondent acted arbitrarily or capriciously in failing to recommend that Grievant receive a discretionary 7% salary adjustment for completing basic custodial training. 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).

2. "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.*

3. The rules promulgated by the State Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Harvey-Gallup v. Dep't of Health and Human Res.*, Docket No. 04-HHR-149(J) (Feb. 21, 2008); *Moore v. W. Va. Dep't of Health & Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994); see also Syl. Pt. 4, *Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980).

4. “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).” *Paxton v. Dept. of Homeland Security and Div. of Personnel*, Docket No. 2021-2342-MAPS (Aug. 16, 2022).

5. 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)).

6. “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).

7. “[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*).

8. Respondent GSD’s decision to not recommend that Grievant receive a 7% salary adjustment for his 2019 basic custodial certification was neither arbitrary nor capricious.

9. GSD’s rationale in recommending that Grievant receive a discretionary salary adjustment for his 2021 completion of the “Train the Trainer” course but not for his 2019 completion of basic custodial certification is clearly supported by both the facts at hand and DOP’s Pay Plan Policy.

10. Grievant has failed to prove by a preponderance of the evidence that Respondent acted arbitrarily or capriciously in failing to recommend that Grievant receive a discretionary 7% salary adjustment for completing basic custodial training.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals in accordance with W. VA. CODE § 51-11-4(b)(4) and the Rules of Appellate Procedure. W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the

petition upon the Grievance Board by registered or certified mail. W. VA. CODE
§ 29A-5-4(b) (2024).

DATE: October 17, 2024

Lara K. Bissett
Administrative Law Judge