

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ROBERT SCOTT RODES, II et al.,
Grievants,**

v.

Docket No. 2022-0913-CONS

**FIRE COMMISSION AND
DIVISION OF PERSONNEL,
Respondents.**

DECISION

Grievants¹ are employed by Respondent, the Fire Commission. On June 21, 2022, and various dates thereafter, Grievants filed separate grievances against Respondent Fire Commission grieving the implementation of special hiring rates and use of law enforcement certification. For relief, Grievants seek to be paid at the minimum salary rate for certified Assistant Fire Marshals.

On July 5, 2022, Grievants and Respondent Fire Commission waived level one proceedings. By order entered July 14, 2022, the Division of Personnel was joined as a necessary party. By order entered July 22, 2022, the grievances were consolidated into the instant action. Following mediation, Grievants appealed to level three of the grievance process on November 23, 2022 and December 1, 2022. A level three hearing was held over two days on August 14, 2023 and August 15, 2023, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievants were represented by counsel, Joseph L. Amos, Jr., Miller & Amos, except Grievant Armentrout, who appeared

¹ Robert Scott Rodes, II, Jeffrey Marshall Armentrout, Everett Allen Chapman, Lonnie Ray Cogar, Richard Eugene Hacker, John Glen Holben, Jr., , Nevin Leon Kilmer, James Lacy Lewis, Dee Lamarr Maynard, James Allen Owens, Bobby C. Palmer, and Joseph John Vacchio,. Additional Grievants filed but withdrew or were dismissed from the action prior to the level three hearing.

*pro se*². Respondent Fire Commission appeared by State Fire Marshal Kenneth E. Tyree and was represented by counsel, Jodi B. Tyler, Assistant Attorney General. Respondent Division of Personnel appeared by Assistant Director Wendy Mays and was represented by counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on October 26, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL") and Grievant's objection to Respondents PFFCL .

Synopsis

Grievants are employed as Assistant Fire Marshals by Respondent Fire Commission within the Department of Homeland Security. Grievants protest the special hiring rates that were approved for Assistant Fire Marshals who hold law enforcement certification. Grievants, who do not hold law enforcement certification, are paid less than Assistant Fire Marshals who hold law enforcement certification. Grievants assert that Respondents acted arbitrarily and capriciously in seeking, approving, and implementing the special hiring rates. Grievant's assert that the special hiring rates constitute discrimination and/or favoritism. Grievants failed to prove that Respondents' actions were arbitrary and capricious. Grievants failed to prove discrimination or favoritism as they are not similarly situated to the compared employees. 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:

² For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

Findings of Fact

1. Grievants are Assistant Fire Marshals employed by Respondent Fire Commission within the Department of Homeland Security.

2. The Assistant Fire Marshal classification is a classification series that includes four levels. Grievants hold positions classified as either Assistant Fire Marshal 1, 2 or 3. The initial level of the classification is the Assistant Fire Marshal in Training.

3. Assistant Fire Marshals perform complex work that requires extensive training and certifications relating directly to fire inspection and investigation. Assistant Fire Marshals' scope of authority for law enforcement is limited to fire and explosion. Assistant Fire Marshals do not have law enforcement authority for other crimes. When an incident involves both fire/explosion and other crimes, Assistant Fire Marshals must work with law enforcement agencies and the Assistant Fire Marshals' scope of authority can be questioned.

4. Fire Marshal Kenneth Tyree and then Department of Homeland Security Cabinet Secretary Sandy wanted to expand the Assistant Fire Marshals scope of law enforcement authority and to become a full-complement law enforcement agency. The expansion of law enforcement authority was a part of the long-term strategic plan for the agency.

5. On March 25, 2020, Senate Bill 586 was enacted which required that all new hires to certain sworn positions, including Assistant Fire Marshal, comply with law enforcement certification. The legislation did not require existing Assistant Fire Marshals

to comply with the new law enforcement certification requirement. The law became effective on May 28, 2020.

6. The new requirement of law enforcement certification increased the minimum qualifications for the impacted job classifications.

7. Respondent Fire Commission was concerned that with the increase in minimum qualifications and competition for law enforcement certified individuals, it would be unable to retain employees without increasing compensation.

8. Respondent Division of Personnel's Pay Plan Policy controls the use and application of the state salary schedule. Discretionary pay increases are subject to approval by the Governor's Office and the State Personnel Board, which has responsibility for the establishment and oversight of the civil service merit system.

9. The Pay Plan Policy does not permit retroactive wages pertaining to discretionary pay increases.

10. Prior to review by the State Personnel Board, any proposal by an agency must be reviewed and approved by the Cabinet Secretary of the agency's Department and the Governor's office. It must then be presented to the Division of Personnel, which reviews and presents the final proposal to the State Personnel Board.

11. To address the increase in minimum qualifications and retention concerns, Respondent Fire Commission sought the approval of pay grade increases for the Assistant Fire Marshal classification series, which was approved by the State Personnel Board as proposal SPB 2922 and was effective January 16, 2021.

12. Despite the pay increases from SPB 2922, Respondent Fire Commission faced continued recruitment and retention issues for the Assistant Fire Marshal

classification series. Particularly, as of January 2022, all eight Assistant Fire Marshal in Training positions were vacant and Respondent Fire Commission had been unable to hire an Assistant Fire Marshal in Training since March 2020. Respondent Fire Commission prepared a second proposal to implement a pay differential in the form of special hiring rates to address this concern.

13. Respondent Fire Commission's proposal, SPB 3004, was presented to the State Personnel Board in April 2022, and was approved with a slight modification to the rates of pay to accommodate the wvOasis system. The special hiring rates included an increased minimum salary and additional compensation for employees who hold the law enforcement certification. The proposal also allowed existing employees to receive the additional compensation upon completion of the certification. The proposal became effective May 21, 2022.

14. Under SPB 3004, Grievants were paid less than the certified minimum hiring rate for their classification.

15. Fire Marshal Tyree was aware that the special hiring rates would create salary compression, which occurs when the salary of newly-hired employees is close to the pay of existing tenured employees. Fire Marshal Tyree had intended to address that salary compression through a pay differential, but the pay differential was ultimately not included in the proposal approved by the Cabinet Secretary, the Governor, and the State Personnel Board.

16. To provide additional compensation to the non-certified Assistant Fire Marshals, Respondent Fire Commission prepared a third proposal, SPB 3025, which would provide a pay differential for current employees up to \$4,000. SBP 3025 was

approved by the State Personnel Board at its July 2022 meeting and became effective on August 13, 2022.

17. The law enforcement certification at issue requires the completion of an “approved law-enforcement training academy.” The only law-enforcement training academy available to Grievants is that offered by the West Virginia State Police Academy, which is a sixteen-week residential program. Trainees are required to live at the Academy and can only return home on the weekends. The program is physically rigorous and requires trainees to pass a physical agility test.

18. Grievants declined to seek the law enforcement certification due to the onerous requirements of the long residential program.

19. Grievants are all paid within the salary range of the pay grade assigned to the classification of the position they occupy.

20. There is currently no difference in the performed job duties of certified Assistant Fire Marshals versus non-certified Assistant Fire Marshals. Newly-hired Assistant Fire Marshals require extensive on-the-job training, which is provided by non-certified Assistant Fire Marshals.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.*

Grievants assert that Respondents acted arbitrarily and capriciously in seeking, approving, and implementing special hiring rates for certified Assistant Fire Marshals. Grievants assert that Respondent Fire Commission has subjected them to discrimination and favoritism in implementing the special hiring rates. Respondent asserts that it properly implemented the special hiring rates and that Grievants are not similarly situated to the compared employees for purposes of discrimination or favoritism.

The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of DOP. *Moore v. W. Va. Dep't of Health & Human Resources*, Docket No. 94-HHR-126 (Aug. 26, 1994); *Celestine v. State Police*, Docket No. 2009-0256-MAPS (May 4, 2009); *Logdson v. Div. of Highways*, Docket No. 2008-1159-DOT (Feb. 23, 2009). Rather, 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); *Logdson, supra*. 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, W. Va. Dept. of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *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).

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).

Grievants assert Respondents acted in an arbitrary and capricious manner in seeking, approving, and implementing the special hiring rates for certified Assistant Fire

Marshals. The Legislature required newly-hired Assistant Fire Marshals to obtain law enforcement certification. This action complimented former Cabinet Secretary Sandy and Fire Marshal Tyree's long term strategic plan for the agency to expand their scope of law enforcement authority and become a full-complement law enforcement agency. Due to the recruitment and retention concerns raised by the new certification requirement, Respondent Fire Commission sought and obtained approval to increase the pay grades for the Assistant Fire Marshal classification series.

Following the increase in pay grade, Respondent Fire Commission continued to experience a severe recruitment issue with the Assistant Fire Marshal in Training position. As of January 2022, all eight of those positions were vacant and Respondent Fire Commission had been unable to hire an Assistant Fire Marshal in Training since March 2020. With the requirement of law enforcement certification, Respondent Fire Commission was competing not only against other states for candidates but also against other law enforcement agencies. To address this concern, Respondent Fire Commission sought special hiring rates for the classification series, which provided higher starting salaries to certified candidates and raised the salaries of incumbents to the new hiring rate of the classification.

Although there was some confusion regarding terminology in both Respondent Fire Commission's original request and in some of the level three testimony, what actually occurred was a pay differential in the nature of a recruitment and retention incentive. Respondent Fire Commission initially referenced a "special plan of implementation," which was the incorrect term as a "special plan of implementation" is only authorized by the Pay Plan Policy when there is a statewide reclassification of a class of positions.

Instead, the special hiring rate was a pay differential, which is defined as “[a] type of salary adjustment specifically approved by the [State Personnel] Board to address circumstances including, but not limited to, class-wide recruitment and/or retention problems, regionally specific geographic pay disparities, apprenticeship program requirements, shift differentials for specified work periods, and temporary upgrade programs.” W. VA. CODE ST. R. § 143-1-3.60 (2016). Pursuant to Respondent Division of Personnel’s administrative rules, “[t]he [State Personnel] Board may approve the establishment of pay differentials to address circumstances which apply to reasonably defined groups of employees.” W. VA. CODE ST. R. § 143-1-5.4.f.4 (2016). Under Respondent Division of Personnel’s Pay Plan Policy, a state agency may seek a “recruitment and retention incentive” as follows:

An appointing authority may recommend an in-range salary adjustment to all employees in a job classification, within the agency-defined organizational work unit, for which documented salary non-competitiveness has been established. The appointing authority shall provide documentation to include, but not be limited to, turnover rates for the last twelve (12) months, reasons for separation from employment, the number of filled and vacant positions in the job classification, any recruitment initiatives, the number of internal applicants and eligibles on the register(s) and contact results for the most recent vacancy, and tenure in class for the employees in the job classification. This request must be presented to and approved by the Board.

Respondent Fire Commission complied with Respondent Division of Personnel’s rule and policy. The required documentation was provided to the State Personnel Board in support of its proposal. Grievants incorrectly assert that employee performance appraisals were required in the proposal as that is a requirement of a separate type of pay differential not at issue here. Respondent Fire Commission recommended the

special hiring rate based on documented salary non-competitiveness for certified Assistant Fire Marshals. As the requirement to complete a sixteen-week residential program is onerous and the recruitment issue was severe, it was a reasonable response to increase the hiring salary for certified Assistant Fire Marshals to attract candidates. Grievants argue that the special hiring rate for certified Assistant Fire Marshals goes against the legislative intent of excluding incumbents from the certification requirement. On the contrary, the legislation does not address compensation and Respondent Fire Commission has not attempted to require the incumbent Assistant Fire Marshals to obtain the certification. Implementing a special hiring rate to address the recruitment issue is not contrary to the legislative intent. Rather, such complies with the legislative intent to hire certified Assistant Fire Marshals, which the agency had been unable to do with the prior pay rates. Grievants failed to prove Respondents acted arbitrarily or capriciously in seeking, approving, and implementing the special hiring rates for certified Assistant Fire Marshals.

Grievants also assert that the special hiring rate constituted discrimination and/or favoritism. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). “‘Favoritism’ means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h).

Previous decisions of the West Virginia Supreme Court of Appeals and this Board have established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994); *Salmons v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Conrad v. Div. of Motor Vehicles and Div. of Pers.*, Docket No. 2012-0369-DOT (Mar. 18, 2013), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 13-AA-58 (Mar. 13, 2014). “[E]mployees who are doing the same work must be placed within the same classification, but within that classification there may be pay differences if those 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 interests of the employer.” *Largent v. State Div. of Health*, 192 W. Va. 239, 246, 452 S.E.2d 42, 49 (1994). It is not discriminatory for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dept. of Health and Human Resources/Pinecrest Hospital*, Docket No. 02-HHR-366 (Sept. 18, 2003); *Wise v. Div. of Highways*, Docket No. 2018-1482-CONS (Aug. 15, 2019) *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 19-AA-109 (May 18, 2020).

Grievants assert it is discrimination and/or favoritism to pay the certified Assistant Fire Marshals and non-certified Assistant Fire Marshals differently because they perform the same job duties. However, to prove discrimination or favoritism, the compared employees must be similarly situated. Although Grievants and the certified Assistant Fire Marshals are similarly classified as Assistant Fire Marshals, they are not similarly situated because one group holds the law enforcement certification and one does not. The

difference in pay is based on the certification now mandated by the Legislature, so is clearly a reasonable criterion for a pay difference under *Largent*. Therefore, Grievants failed to prove they are similarly situated to the certified Assistant Fire Marshals or that the special hiring rate constitutes discrimination or favoritism.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of DOP. *Moore v. W. Va. Dep’t of Health & Human Resources*, Docket No. 94-HHR-126 (Aug. 26, 1994); *Celestine v. State Police*, Docket No. 2009-0256-MAPS (May 4, 2009); *Logdson v. Div. of Highways*, Docket No. 2008-1159-DOT (Feb. 23, 2009). Rather, 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); *Logdson, supra*.

3. 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, W. Va. Dept. of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *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).

4. 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).

5. “[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).

6. “The [State Personnel] Board may approve the establishment of pay differentials to address circumstances which apply to reasonably defined groups of employees.” W. VA. CODE ST. R. § 143-1-5.4.f.4 (2016).

7. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

8. “‘Favoritism’ means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h).

9. Previous decisions of the West Virginia Supreme Court of Appeals and this Board have established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994); *Salmons v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Conrad v. Div. of Motor Vehicles and Div. of Pers.*, Docket No. 2012-0369-DOT (Mar. 18, 2013), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 13-AA-58 (Mar. 13, 2014).

10. “[E]mployees who are doing the same work must be placed within the same classification, but within that classification there may be pay differences if those 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 interests of the employer.” *Largent v. State Div. of Health*, 192 W. Va. 239, 246, 452 S.E.2d 42, 49 (1994).

11. It is not discriminatory for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dept. of Health and Human Resources/Pinecrest Hospital*, Docket No. 02-HHR-366 (Sept. 18, 2003); *Wise v. Div. of Highways*, Docket No. 2018-1482-CONS (Aug. 15, 2019) *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 19-AA-109 (May 18, 2020).

12. Grievants failed to prove that Respondents’ actions were arbitrary and capricious.

13. Grievants failed to prove discrimination or favoritism as they are not similarly situated to the compared employees.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.³ Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

³ 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 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. 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: December 13, 2023

Billie Thacker Catlett
Chief Administrative Law Judge

§ 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.