

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICKY DELL ENDICOTT, JR.,
Grievant,

v.

Docket No. 2024-0132-DHS

DEPARTMENT OF HOMELAND SECURITY/
DIVISION OF CORRECTIONS AND REHABILITATION,
Respondent.

DECISION

Grievant, Micky Dell Endicott, Jr., is employed by Respondent Department of Homeland Security/Division of Corrections and Rehabilitation ("DCR") as a Correctional Officer III. On September 6, 2023, Grievant filed this grievance stating,

I feel I am being discriminated against in the pay raise because we are being forced to go [to] other jails but were [sic] being paid less. We have more inmates than a couple places that are getting raises. Just because we're staffed more is not a reason to get paid less. I did the same training with PTs then [sic] they do now.

For relief, Grievant seeks to be paid "the \$53,000 base pay for a Correctional Officer III. If it is good enough for one[,] it should be good enough for all."

The matter was waived to level two per Division of Personnel Administrative Rule, 143 C.S.R. 1, § 5.1 *et seq.*, because it implicated questions of compensation, and the Division of Personnel ("DOP") was joined as a party by Order entered October 6, 2023. On January 4, 2024, this matter was consolidated with multiple other grievances.¹ A level two mediation was held on January 18, 2024, before Chief Administrative Law Judge Billie Thacker Catlett, following which an Order of Unsuccessful Mediation was entered

¹ Docket Numbers 2024-0132-DHS, 2024-0160-CONS, and 2024-0180-CONS were all consolidated under Docket Number 2024-0180-CONS.

on January 25, 2024. DOP moved to be dismissed as a party on January 18, 2024. An Order granting that motion was entered on February 16, 2024.

Grievant was the only party to appeal to level three, which he did on February 5, 2024. Because he was the only party to appeal, his grievance was severed from the consolidated grievance on July 12, 2024. His appeal to level three proceeded under the original Docket Number of 2024-0132-DHS. In it, Grievant stated, "Other facilities with my rank are making \$5,000 more than I am. Division of Personnel [*sic*] has stated it is unjust to pay one group of individuals with rank more then [*sic*] the others." For relief, Grievant stated, "I want \$53,000 base salary."

A Level Three hearing was held on January 8, 2025, before the undersigned Administrative Law Judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and was self-represented. Respondent DCR appeared by Lori Lynch, Director of Staffing Services for DCR, and was represented by counsel, Jodi B. Tyler, Assistant Attorney General. This matter became mature for decision on February 6, 2025, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.²

Synopsis

Grievant, a Correctional Officer III, is challenging the fairness of a recruitment and retention pay differential which allows for others with the rank of Correctional Officer III to be paid at a higher salary if they work in certain facilities with a recognized staffing crisis.

² Respondent submitted Proposed Findings of Fact and Conclusions of Law on February 6, 2025, which was the deadline for submissions. Grievant did not submit Proposed Findings of Fact and Conclusions of Law, nor did he request an extension of the deadline.

At the level three hearing, Grievant failed to prove that Respondent acted arbitrarily or capriciously in establishing its recruitment and retention pay differential and in declining to provide the same incentive to Grievant. 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 is a Correctional Officer III at Southwestern Regional Jail ("SWRJ") in Logan County, West Virginia.
2. DCR employees, such as correctional officers ("COs") are part of the classified service system under DOP.
3. Upon his employment as a Correctional Officer, Grievant signed a document agreeing to certain "Conditions of Employment." Condition 14 states, "Subject to mandatory overtime requirements and must be available for assignment to any location in the State of West Virginia." Condition 15 states, "Required to work various shifts and schedules are subject to change at any time." Grievant does not dispute that he agreed to the "Conditions of Employment."
4. The job description for Correctional Officer III places the position in Pay Grade 11 with an annual salary range of \$34,247.00 to \$58,936.00.
5. At the time of the level three hearing, Grievant's annual salary was \$51,151.32, excluding any overtime he might accrue.
6. In August 2023, in response to a staffing crisis at its correctional facilities, Respondent worked with the West Virginia Legislature, DOP, and the State Personnel

Board to “enhance the current hiring rates for Correctional Officers,” especially in designated “critical need facilities.”

7. The resulting Proposal Number 3088 included “special hiring rates for the Correctional Officer series.”³ Of interest in this grievance, per the proposal, the base salary of a Correctional Officer III increased from \$39,956.00 to \$48,000.00.

8. Proposal Number 3088 further noted that Respondent had identified certain facilities with “critical vacancies” based on the total position vacancy rate and turnover rate within those facilities. Respondent also considered the location of those facilities, their proximity to state border lines, and pay rates in neighboring states.

9. The facilities identified as having critical vacancies were Eastern Regional Jail and Corrections Facility/Martinsburg Correctional Center, Potomac Highlands Regional Jail and Corrections Facility, Vicki Douglas Juvenile Center, Chick Buckbee Juvenile Center, Northern Regional Jail and Correctional Facility, Northern Correctional Facility/Ohio County Correctional Center, Western Regional Jail and Corrections Facility, Mount Olive Correctional Complex and Jail, and Huttonsville Correctional Center and Jail.

10. Under Proposal Number 3088, full-time correctional officers at those facilities would be paid a “special hiring rate” with a pay differential of \$5,000.00 above the salary of commensurate positions at facilities without critical vacancies. In the case of the position of Correctional Officer III, that special hiring rate is \$53,000.00.

11. The purpose of the proposal was to fill positions, enhance recruitment, and increase retention.

³ The proposal also included non-uniformed staff, but those pay increases are not relevant to this decision.

12. The proposal was approved by the State Personnel Board on August 24, 2023, and became effective on October 7, 2023.

13. In the meantime, staff shortages in facilities with critical vacancies were managed by sending COs from non-critical facilities to the critical facilities on a temporary basis.

14. Per state policy, COs who were directed to cover staff shortages at critical facilities were paid overtime, were paid for their travel and hotels, and/or were provided a *per diem* stipend.

15. SWRJ has never been designated as a critical vacancy facility.

16. SWRJ regularly sent employees, including Grievant, to Western Regional Jail ("WRJ") to help staff the facility for a period of 18 months to two years; however, SWRJ is no longer sending any staff to WRJ.

17. Grievant was sent to other critical vacancy facilities around the state as well, spending up to a week at a time at those temporary assignments.

18. If COs at non-critical facilities wish to be paid at the higher base rate of \$53,000.00, they may apply for vacancies at critical vacancy facilities. If COs leave a critical vacancy facility to work in a non-critical facility, they will be paid at the lower base rate of \$48,000.00.

19. Proposal Number 3088 has seemingly been successful because Respondent has moved from "recruitment mode" to "retention mode" now. Nonetheless, Respondent has not re-evaluated the critical vacancy status of facilities since 2023.

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)(2010) 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 (1999). 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 (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.

In this case, Grievant argues that the pay differential offered to his peers at critical vacancy facilities is “unjust” and discriminatory. His burden, then, is to show that Respondent’s (and, thus, the State Personnel Board’s) actions in establishing the pay differential were arbitrary and capricious. Respondent, on the other hand, argues that it did not act arbitrarily or capriciously and that it complied with DOP rule and policy when it implemented the pay differential to boost recruiting and retention rates at critical vacancy facilities.

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).

Here, Respondent created Proposal Number 3088 in response to a staffing crisis throughout the Division of Corrections and Rehabilitation. Respondent sought to enhance recruitment, fill vacant positions, and retain existing employees through a more competitive pay structure. To that end, Respondent proposed increasing base salaries for both uniformed and non-uniformed personnel. Respondent recognized, though, that certain facilities faced even greater staffing challenges than other facilities. Some of those facilities—Mount Olive Correctional Complex and Huttonsville Correctional Center, for instance—are in more remote locations where people often do not wish to relocate themselves and their families. Other facilities are in locations that border neighboring states, forcing Respondent to compete with out-of-state facilities that can offer greater pay or a better cost of living.

Accordingly, Respondent—and, ultimately, the State Personnel Board—determined that the best way to combat attrition in those facilities facing critical staffing vacancies was to incentivize full-time employment there through a higher base salary structure than at other facilities that did not face the same staffing challenges. Even if the undersigned was empowered to substitute her judgment for that of Respondent, she cannot say that Proposal Number 3088 is unreasonable, is without consideration, or disregards the facts and circumstances of the situation. Indeed, Proposal Number 3088 is well thought out and rooted in necessity. Therefore, the policy is neither arbitrary nor capricious.

Grievant argues, however, that the differential base salary rate at critical need facilities is inherently unfair—discriminatory, is the word he uses—because COs at non-critical need facilities perform the same duties and have the same responsibilities as those at critical need facilities. That is, he argues that they are similarly situated and, thus, must be treated the same. Moreover, he argues, he and his peers worked in those critical need facilities on a temporary basis during the staffing shortages without receiving a higher rate of pay for their time there.

While Grievant's frustration is certainly understandable, he has failed to show that Respondent has discriminated against him. Broadly speaking, "[d]iscrimination' 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)(2023). It is well established, though, that employees in the same classification who are performing the same duties need not be paid the same salary, as long as they are paid within the pay range for the pay grade to

which their classification is assigned. See *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); *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006), *Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26, 1997); *Brutto v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-076 (July 24, 1996); *Salmons v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-435 (Feb. 28, 1995); *Tennant v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health & Human Res.*, Docket No. 91-H-177 (May 29, 1992). Simply put, “[i]t is not discriminatory for employees in the same classification to be paid different salaries.” *Hymes v. Dep't of Health & Human Res.*, Docket No. 2022-0617-DHHR (Jan. 3, 2024); *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).

In short, employees 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).

In the instant case, Respondent has specifically identified reasonable criteria—based on market forces and other specifically identifiable criteria (high vacancy and turnover rates)—for creating this incentivized pay differential to advance its interest in recruiting and retaining full-time COs at critical vacancy facilities. At the same time, Grievant is paid within the appropriate pay grade for his classification. Moreover, Grievant

specifically agreed to “be available for assignment to any location in the State of West Virginia” when he accepted the conditions of his employment. That included his temporary assignments at facilities with critical vacancies, and he was not entitled to additional compensation for those assignments beyond the overtime pay, travel pay, and *per diem* stipends required by statute and policy. Therefore, Respondent has not discriminated against Grievant, nor has it violated law or policy.

Grievant has failed to prove by a preponderance of the evidence that Respondent acted arbitrarily or capriciously in establishing a higher base rate of pay for employees in facilities that face critical vacancies. Accordingly, the grievance must be 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. 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)).

5. “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).

6. “[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*).

7. It is well established that employees in the same classification who are performing the same duties need not be paid the same salary, as long as they are paid within the pay range for the pay grade to which their classification is assigned. See *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); *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006), *Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26, 1997); *Brutto v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-076 (July 24, 1996); *Salmons v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-435 (Feb. 28, 1995); *Tennant v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health & Human Res.*, Docket No. 91-H-177 (May 29, 1992).

8. "It is not discriminatory for employees in the same classification to be paid different salaries." *Hymes v. Dep't of Health & Human Res.*, Docket No. 2022-0617-DHHR (Jan. 3, 2024); *Thewes and Thompson v. Dep't of Health & Human Res./Pincrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009).

9. "[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).

10. Grievant's salary falls within the appropriate pay grade for his classification, and Respondent has specifically identified reasonable criteria for creating a pay

differential to advance its interests in recruiting and retaining COs at critical vacancy facilities. Thus, Proposal Number 3088 does not violate the law.

11. Grievant has failed to prove by a preponderance of the evidence that Respondent acted arbitrarily or capriciously in establishing a higher base rate of pay for employees in facilities that face critical vacancies.

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: February 28, 2025

Lara K. Bissett
Administrative Law Judge