

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ERIN KIRK,**  
**Grievant,**

**v.**

**Docket No. 2016-1512-DHHR**

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

## **DECISION**

Erin Kirk, Grievant, is employed by Respondent, Department of Health and Human Resources (“DHHR”), as an Adult Protective Service Worker (“APS Worker”). Ms. Kirk filed a grievance form at level three dated April 8, 2016, alleging:

On 2/17/16, I was reallocated from Adult Protective Server Trainee to Adult Protective Service Worker. There was supposed to be a pay increase from \$2,076 per month to \$2,311, which has not been applied yet.

As relief, Ms. Kirk seeks back pay representing the difference between her salary as an APS Trainee and her salary as an APS Worker for the period of February 17, 2016 and April 16, 2016, plus interest. Because this grievance did not meet the statutory requirements for expedited processing,<sup>1</sup> an Order was entered on April 15, 2016, dismissing the matter from level three and transferring it to level one for further proceedings. A level one hearing was convened on May 4, 2016. However, the matter was waived to level two before the hearing was concluded.

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<sup>1</sup> See W. VA. CODE § 6C-2-4(a)(4).

A mediation session was conducted on June 30, 2016. On July 1, 2016 an Order regarding the mediation was entered, as well as an Order of Joinder joining the Division of Personnel (“DOP”) as a party respondent. Grievant filed an appeal to level three dated July 8, 2016.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on August 25, 2016. Grievant appeared at the hearing *pro se*.<sup>2</sup> Respondent DHHR was represented by James “Jake” Wegman, Assistant Attorney General, and Respondent DOP was represented by Karen O’Sullivan Thornton, Senior Assistant Attorney General. This matter became mature for decision on October 3, 2016, with receipt of the Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant had served her probationary period as an Adult Protective Service Worker Trainee (“ASP Worker Trainee”) by mid-February 2016, and expected her salary to increase with the reallocation of her position to an Adult Protective Service Worker (“ASP Worker”) at that time. However, the reallocation of Grievant’s position was delayed until mid-April 2016. Grievant argues that the delay was unreasonable and seeks back pay representing the difference between her salary as an APS Trainee and her salary as an APS Worker for the two-month period.

Respondent DHHR had made all reasonable efforts to cause Grievant’s position to be reallocated by the mid-February date and would likely have succeeded had it not been for Grievant’s need to take unpaid leave while the personnel actions were being

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<sup>2</sup> “*Pro se*” is translated from Latin as “for oneself” and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black’s Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

processed. Grievant did not prove that the delay was caused by unreasonable, arbitrary or capricious action of Respondent.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Erin Kirk, Grievant, is employed by Respondent, DHHR, as an Adult Protective Service Worker in the agency's Parkersburg office.

2. Grievant was originally employed by the DHHR in the Bureau for Children and Families in the Adult Protective Service Worker Trainee classification on February 17, 2015. That classification is paid in pay grade 11, and her monthly salary was \$2,076.

3. "The nature of work" for the APS Worker Trainee classification is described in pertinent part as:

Under close supervision, performs in a training capacity for approximately one year learning the techniques of social casework in the area of Adult Protective Services. The primary function of the class is to apply the training received in the specialized techniques of protective service casework . . .

(DOP Classification Specifications.)

4. "The nature of work" for the APS Worker classification is described in pertinent part as:

Under general supervision, performs advanced and complex social casework in the area of Adult Protective Services. Work is characterized by cases involving abuse/neglect/exploitation of adults. The nature of the situations requires expertise and judgment to deal with problems that are potentially dangerous to the client and the worker . . .

(DOP Classification Specifications.) Successfully serving one year as a probationary employee is one of the requirements for being promoted to the Adult Protective Service Worker classification.<sup>3</sup>

5. For purposes of use in the public employee classification plan, the DOP Administrative Rule defined “promotion” as:

Promotion. -- A change in the status of an employee from a position in one class to a vacant position in another class of higher rank as measured by salary range and increased level of duties and/or responsibilities.

142 W. VA. CODE ST. R. § 142.1.3.70. The same rule defines a “reallocation” as:

Reallocation. -- Reassignment by the Director of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position.

142 W. VA. CODE ST. R. § 142.1.3.72.

6. When an APS Worker Trainee has successfully completed a year of training and experience while working under close supervision, it is anticipated that “the kind and levels of his or her predominate duties” will change significantly. The employee is then expected to perform advanced and complex services for the clients with only general supervision. Based upon these significant changes, the DHHR seeks a reallocation of the Trainees position into the APS Worker classification.<sup>4</sup> This reallocation is anticipated to occur after one year but may take longer depending upon the Trainee’s progress

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<sup>3</sup> The DOP Classification Specification for APS Worker in the “Requirements” section states: **“Promotion Only:** In addition to the Special Requirement, one year of full-time or equivalent part-time paid experience as a Protective Service Worker Trainee. . .”

<sup>4</sup> This action does not meet the definition of a promotion because the employee is not moving to a vacant position. Rather the position the employee holds is changing due to the higher expectations.

toward adapting to the more complex situations and ability to perform casework independently.

7. Grievant has successfully served her full year probationary period as a APS Worker Trainee on February 17, 2016, and DHHR sought reallocation of her position to an APS Worker.

8. As an APS Worker Trainee, Grievant took on more responsibility for her case load as she gained experience and training. Additionally, the amount of close supervision Grievant received was reduced. While no one identified a specific date when her responsibilities and independent actions became sufficient to meet the APS Worker classification, it is undisputed that Grievant was performing such duties on and after February 18, 2016.

9. Approximately thirty days before the employee's anniversary of hire date, the DHHR Parkersburg office begins to process the paperwork to recommend for reallocations to an APS Worker, any APS Worker Trainee who has successfully completed his or her probationary appointment.<sup>5</sup> This was done for Grievant's position. The initial paperwork was prepared by the secretary for Interim Regional Director, Delbert Casto, and sent to the regional office. From there the paperwork was sent to the DHHR's Office of Human Resource Management (OHRM) for further review before it was forwarded to the DOP. This is the standard procedure for all reallocation requests within DHHR.

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<sup>5</sup> This is done in an effort to minimize the effect that processing the reallocation paperwork by the various agencies has upon the employee receiving their classification and pay upgrade.

10. The Classification and Compensation section of the DOP is charged with ensuring that all positions in the classified service are properly classified. That section reviews the Position Description Form (“PDF”) required to be submitted with requests for reallocations as a tool for determining the classification which is the “best fit” for the position.

11. Grievant’s paperwork for reallocation of her position, including the PDF, was received by the DOP on January 14, 2016. On the same day, Wendy Campbell, Assistant Director for the DOP Classification and Compensation section made a determination that the position should be reallocated to the APS Worker classification. (Respondent DOP Exhibit 1).

12. A number of personnel transactions need to be completed for a reallocation of a position to be effective. Between the initial determination of the Classification and Compensation section that the reallocation was appropriate, and the effective date of the reallocation, certain personnel events occurred which caused the effective date of the reallocation to be delayed until April, 16, 2016. Respondent DOP Exhibit 3 provides a list of those specific transactions and the dates they occurred. Each personnel transactions is recorded on a form WV-11.<sup>6</sup> Grievant took one hour of unauthorized leave on January 25, 2016, which was after the reallocation of her position was initially approved by the DOP, and before the effective date of the reallocation.

13. To qualify for a reallocation of her position, Grievant had to be certified as a permanent employee, by having successfully completed her probationary period.

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<sup>6</sup> An explanation of the codes used on the employment transaction forms can be found in the *WEST VIRGINIA HUMAN RESOURCE INFORMATION SYSTEM USERS’ MANUAL*, on the DOP website.

Grievant was certified as permanent with an effective date of February 17, 2016, after five hours.<sup>7</sup> (Respondent DOP Exhibit 3).

14. Grievant took unauthorized leave on January 25, 2016, which was after the reallocation of her position was initially approved by the DOP, and before the effective date she was certified as permanent. This required several personnel transactions to be processed and approved before the certification and reallocation could become effective.

15. DHHR processed seven different personnel transaction for Grievant between December 23, 2015, and March 14, 2016. Each one of these transactions was reviewed and acted upon by at least ten agency levels and two of the transaction went through fourteen approval levels. The three agencies involved were DHHR, DOP and the State Budget Office. Each transaction was reviewed by DHHR Bureau for Children and Families (“BCF”) Region 1, the BCF Commission Office, the DHHR Budget Review Section and the DHHR O.P.S. Section. Some were also approved by the DHHR Cabinet Secretary Office. Within the DOP, the number of reviews by staff and managers varied from three to five and the State Budget had two reviews. (Respondent DOP Exhibits 4 through 10).<sup>8</sup>

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<sup>7</sup> The additional five hours represent time Grievant was absent without accumulated leave. These hours did not count toward completing her one year probationary period.

<sup>8</sup> Angela Bee, Administrative Secretary in the DHHR Office of Deputy Commissioner, explained the bureaucratic machinations brought on by this short period of leave as follows:

In Ms. Kirk’s instance, after her Certify Permanent was approved, she had her unauthorized leave incident. Well the unauthorized leave happened before her certified permanent date. Her unpaid time off extends the certified permanent date. So I had to do a carbon WV-11 for the unauthorized leave. Then I had to do a WV-11 to return her from the unauthorized leave. Then I could do the WV-11 to reallocate her. A wv11 has to be fully approved (takes about 3 weeks for each one) before I can enter another one.

16. DHHR initiated the first WV-11 transaction on December 23, 2015, to certify Grievant as permanent effective February 18, 2016, but requested the Budget office to reject it. (Respondent DOP Exhibit 4).

17. DHHR initiated a second WV-11 transaction on December 23, 2015, certifying Grievant as permanent effective February 17, 2016, after three hours and thirty minutes to adjust for leave without pay Grievant had previously taken. This transaction completed the approval process on January 11, 2016. This transaction was completed in time for Grievant to begin receiving pay at the APS Worker pay grade by her employment anniversary date. (Respondent DOP Exhibit 5).

18. Subsequently, Grievant needed to take time off without pay and DHHR initiated a WV-11 transaction for that unpaid time effective January 25, 2016, after six and one half hours. That transaction was initiated on February 9, 2016, and completed on February 18, 2016. (Respondent DOP Exhibit 6).

19. Because this unpaid leave could not be counted toward meeting Grievant's requirement of a year as a probationary employee, the DHHR had to submit an amended WV-11 transaction to recertify the specific time Grievant would become a permanent employee. This WV-11 had to be submitted on a paper form, rather than electronically, because the original certification of permanency had already been processed, approved and completed in the system database. This transaction was initiated on February 11, 2016. The transaction was approved through the DOP on March 14, 2016. (Respondent DOP Exhibit 7).

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Respondent DHHR Exhibit 1.

20. A separate WV-11 transaction form had to be submitted by DHHR to document Grievant's return from the unauthorized leave of absence occurring on January 25, 2016. This transaction was initiated on March 1, 2016, and the final approval was entered by the State Budget Office on March 11, 2016. (Respondent DOP Exhibit 8).

21. As a result of the need to change the date Grievant was certified as permanent, DHHR submitted a new request for reallocation of Grievant's position by initiating a new WV-11 transaction form on March 14, 2016. That form was rejected by the State Budget Office at the request of the DHHR so a mistake could be corrected. (Respondent DOP Exhibit 9). Had the transaction been completed and approved it could only be amended through the paper process further delaying this process. The final WV-11 transaction which resulted in Grievant's reallocation, was initiated by the DHHR on March 14, 2016, and completed through the process of receiving six separate approvals in DHHR, six more in DOP, and two by the Budget Office, on March 22, 2016. (Respondent DOP Exhibit 10).

22. Grievant's position was reallocated effective April 16, 2016, which corresponded with the next available pay period.

### **Discussion**

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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. W. Va. Dep't of Health & Human*

*Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant alleges that her position was eligible for reallocation on the one year anniversary date of her employment as an APS Worker Trainee, February 17, 2016. She had completed all required training, and was carrying an adequate caseload under general supervision on that date. Grievant argues that the reallocation of her position should have occurred on that date resulting in her receiving a pay increase. However, the reallocation of the position did not become effective until April 16, 2016, and Grievant believes this to be an unreasonable, arbitrary and capricious delay. Grievant seeks back pay representing the difference between her salary as an APS Trainee and her salary as an APS Worker for the period of February 17, 2016 and April 16, 2016, plus interest.

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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). 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)).

Respondent DHHR notes that management did everything they could to cause Grievant's salary to be reallocated by her anniversary date, but was thwarted from

accomplishing that goal when Grievant took unpaid leave in January 2016, causing the process to be delayed. Additionally, DOP notes that it held consultation with Human Relations representative from various agencies and researching the time it normally takes for reallocation requests to be processed through DOP and the employing agency. At the conclusion of that process then DOP Director, Sarah Walker issued a memorandum dated December 10, 2015, stating the following:

Retroactive wages will not be authorized for reallocation if a classification determination is communicated to the appointing authority by the DOP Classification and Compensation Section within sixty (60) calendar days of receipt of the signed position description form (PDF) and the agency processes the corresponding personnel transaction within the following thirty (30) calendar days. Retroactive wages may only be authorized for the period of time the process was delayed beyond this ninety (90) calendar day period.

(Respondent DOP Exhibit 15.) DOP opines that if the reallocation becomes effective within this specified time period which has been determined as a reasonable time for completion of all the reallocation documents, it was processed in a timely fashion and back pay is not appropriate.

Under this unique set of circumstances it is not necessary to reach the issue of the effect of Director Walker's memorandum. The DHHR Interim Regional Director, anticipating that Grievant would meet the requirements on her anniversary date, commenced the reallocation process roughly a month prior to that date. The personnel transactions to have Grievant certified as a permanent employee effective February 17, 2016, were submitted and approved, and a classification determination approving the reallocation of Grievant's position was approved by the DOP Assistant Director for Class and Comp on January 14, 2016. Respondent had taken all reasonable steps to

accomplish reallocation by her anniversary date and it have come about if not for intervening action by Grievant.

Unfortunately, Grievant's need to take leave without pay necessitated starting the process anew. Respondent had no control over this event. Had it not been for the personal leave time taken by Grievant, it is more likely that not that the reallocation of her position would have taken place at the same time she was certified as a permanent employee in mid-February 2016. Since Respondent took all reasonable action to reallocate Grievant's position at the earliest time possible, Grievant did not prove that the delay was unreasonable or arbitrary or capricious.<sup>9</sup> Accordingly, the grievance is DENIED.

### **Conclusions of Law**

1. Grievant bears the burden of proof in this grievance which does not challenge a disciplinary action. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. 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

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<sup>9</sup> The personnel transaction and approval procedures which take up to three weeks for each of two WV-11s, to account for one person taking less than a single day of unpaid leave appear to be arcane at best. However, no evidence was presented that the procedure itself was unreasonable so that issue is not addressed herein.

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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). 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)).

3. Grievant did not prove by a preponderance of the evidence that the delay in the reallocation of her position was the result of unreasonable, arbitrary or capricious action by the Respondent.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See 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 so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 § 6.20 (2008).

**DATE: December 16, 2016.**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**