

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID K. PARSONS,
Grievant,

v.

Docket No. 2016-1812-DOA

GENERAL SERVICES DIVISION AND
DIVISION OF PERSONNEL,
Respondents.

DECISION

Grievant, David K. Parsons, is employed by Respondent, General Services Division. On June 24, 2016, Grievant filed this grievance against Respondent stating, "Failure to comply with DOP policy concerning PPI Section 4, in both substance and timely." For relief, Grievant seeks "[i]mmediate change to pay rate retroactive to April 10, 2016."

On June 30, 2016, Respondent waived the grievance to level two of the grievance process. By order entered July 6, 2016, the undersigned joined the Division of Personnel as an indispensable party. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on September 13, 2016. A level three hearing was held on January 27, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Fred Tucker, United Mine Workers of America. Respondent General Services Division was represented by counsel, Mark S. Weiler, Assistant Attorney General. Respondent Division of Personnel was represented by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature

for decision on March 8, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.¹

Synopsis

Grievant is employed by the General Services Division as the Building Operations Maintenance Manager. Grievant protested the amount of discretionary pay increase he received for completion of a certification and sought the pay increase retroactive to his receipt of the certification. Grievant failed to prove the Division of Personnel erred in determining the amount of pay increase warranted by his certification. Grievant asserted no law, rule, or policy that required Respondent General Services Division or Respondent Division of Personnel to act on the discretionary pay increase within a certain timeframe, therefore, Grievant is not entitled to a retroactive award of his pay increase. 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 employed by the General Services Division as the Building Operations Maintenance Manager.
2. In 2014 Grievant began online training to acquire certification as a Facility Management Professional from the International Facility Management Association.

¹ By letter dated March 2, 2017, Respondent General Services Division, by counsel, notified the undersigned it declined to file Proposed Findings of Fact and Conclusions of Law.

3. Employees who acquire certain formal training, education, certification, or licensure may be eligible to receive a discretionary pay increase under the Division of Personnel's Pay Plan Implementation Policy.

4. Agencies must request prior approval from the Director of the Division of Personnel of the training, education, certification, or licensure and the amount of adjustment before recommending employees for adjustment.

5. The record does not reflect when the General Services Division requested review by the Division of Personnel of the Facility Management Professional certification, but Division of Personnel staff reviewed the certification and recommended it be eligible for a five percent pay increase on March 17, 2016.

6. The Division of Personnel reviews the training, education, certification, or licensure under review based on the requirements of the same, and not the individual effort required by a particular employee. The percentage increase available is determined by the Professional Skills/Competency Development Decision Tree, which is divided into three types: DOP Approved Internal Certification, eligible for up to three percent; External Professional Certification/DOP Certification, eligible for up to seven percent; and Degree, eligible for up to ten percent. The percentage amount is determined by the amount of time required to obtain the training, education, certification, or licensure.

7. The Facility Management Professional certification was reviewed by two Division of Personnel employees. The Facility Management Professional certification was evaluated by the information based on the International Facility Management Association's brochure for the certification and information provided on the Association's website which stated that an exam is required for certification and that it requires, on

average, fifty to one hundred hours of study. The certification fell within the External Professional Certification/DOP Certification category, which included the following: Short Range, which requires one to five days for completion and is eligible for up to a four percent increase; Medium Range, which requires six to twenty days for completion and is eligible for up to a five percent increase; and Long Range, which requires more than twenty days for completion and is eligible for up to a seven percent increase. Both reviewers agreed that the certification warranted a five percent increase.

8. On April 6, 2016, Grievant received certification as a Facility Management Professional from the International Facility Management Association.

9. On April 20, 2016, Gregory L. Melton, Director of the General Services Division approved the Pay Plan Implementation Policy Request for Approval form, requesting a ten percent salary adjustment. The record does not reflect if Director Melton was aware that the Division of Personnel had determined the certification was only eligible for a five percent increase or upon what basis Director Melton requested a ten percent increase. Cabinet Secretary Mary Jane Pickens approved the request on April 26, 2016.

10. On May 6, 2016, Joe Thomas, Director of the Division of Personnel, approved the request with a reduction of the adjustment to five percent and forwarded the request to the Governor's Office for approval on that same date. Director Thomas incorrectly completed the form, which provided three options for completion: "Approved," "Disapproved," or "Modified." Director Thomas marked the request as "Approved" when he should have marked "Modified." When selecting "Disapproved," or "Modified," the form requires that a reason be completed on the form. Director Thomas modified the request without providing a reason.

11. The request was approved by the Governor's Office on June 29, 2016.
12. The Division of Personnel notified the General Services Division of the Governor's Office approval by email on July 1, 2016.
13. Grievant's salary was increased by five percent effective July 9, 2016.

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 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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).

Grievant asserts he is entitled to the full ten percent increase as requested by Respondent General Services Division, and that Respondent Division of Personnel did not have the authority to override Respondent General Services Division's request for the full discretionary increase. Grievant also asserts Respondent Division of Personnel improperly interpreted its policy and failed to properly review the certification in question. Respondent Division of Personnel asserts its determination of the percentage of increase was proper and that Grievant is not entitled to a retroactive increase.

The pay increase Grievant sought is governed by Respondent Division of Personnel's Pay Plan Implementation Policy II.D.4, which states:

Professional Skills/Competency Development. Under the following conditions, an appointing authority may recommend

an in-range salary adjustment of up to 10% of current salary to an employee who acquires certain formal training/education, certification, or licensure, not required to meet the minimum qualifications of the job classification.

- a. The appointing authority must file with the Director of Personnel a list for prior approval of professional skills/competencies for the formal training/education, certification, or licensure and related competencies of the job classification for which this type of adjustment will be authorized, and the amount of the adjustment.
- b. The appointing authority shall assure that all eligible employees for which this type of adjustment is authorized, who acquire the formal training/education, certification, or licensure, are recommended for the adjustment.
- c. The formal training/education, or licensure, must be received subsequent to appointment to the classification.
- d. An employee may not receive an in-range salary adjustment under this section for which they applied and received reimbursement for employment-related educational expenses under the West Virginia Division of Personnel Education Expense Reimbursement/Leave Program Policy (DOP-P16).

The Professional Skills/Competency Development pay increase falls under Section D, which states, “Each discretionary pay differential requires prior approval of the Director of Personnel before the appointing authority implements salary adjustments under this section of the policy.” Contrary to Grievant’s assertion that the General Services Division had “the ultimate decision authority,” and that he was entitled to receive the ten percent pay increase once submitted by the General Services Division, the pay increase was not an entitlement and was clearly subject to the approval of the Division of Personnel.

Grievant asserts that the Division of Personnel has interpreted its policy too broadly in including college and post-graduate degrees. The Division of Personnel is vested with the authority to interpret the policy. “Upon approval of this policy, the State Personnel Board assigns and authorizes the Director of Personnel to interpret and apply

the policy in conjunction with the Administrative Rule of the West Virginia Division of Personnel or any other applicable Division of Personnel law, rule or policy in a manner consistent with fair and equitable pay administration within the affected agencies.” Pay Plan Implementation Policy § II.J. An agency's interpretation of the provisions of its own internal policy is entitled to some deference by this Grievance Board, unless the interpretation is contrary to the plain meaning of the language, or is inherently unreasonable. See *Dyer v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996). However, the West Virginia Supreme Court of Appeals has held that “[w]hile long-standing interpretation of its own rules by an administrative body or municipal agency is ordinarily afforded much weight, such interpretation is impermissible where the language is clear and unambiguous. Syl. Pt. 3, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970).” Syl. Pt. 2, *Habursky v. Recht*, 180 W. Va. 128, 375 S.E.2d 760 (1988).

Grievant admits that the policy in question is not clear and unambiguous, stating in his Proposed Findings of Fact Conclusions of Law that the policy was “vague.” Therefore, Division of Personnel was entitled to interpret its policy. Further, the Division of Personnel’s interpretation is reasonable. The policy provides for pay increases up to ten percent. It is reasonable to determine the percentage of increase for which an employee is eligible based on the amount of effort required to obtain the training, education, certification, or licensure. Grievant’s assertion that the receipt of a degree should not be included in the policy is preposterous. Under Grievant’s interpretation of the policy, an employee who spent years obtaining a degree would not be eligible for a pay increase while an employee who spent only days in training would be eligible for a pay increase.

Grievant further asserts the Division of Personnel failed to properly review his certification. The Division of Personnel relied on information published by the organization offering the certification in determining the average amount of time required to obtain the certification. This is proper and in no way unreasonable. Whether it took an individual employee a longer or shorter time than average to complete does not change the value of the training, education, certification, or licensure. The Division of Personnel then compared that time to the Professional Skills/Competency Development Decision Tree, which clearly shows that an increase of five percent is warranted for the amount of time required to obtain the certification. Although Grievant alleged in his Proposed Findings of Fact Conclusions of Law that the decision tree did not exist at the time the determination was made, the only evidence Grievant offered on this point was the assertion that the decision tree was not mentioned in the policy or the form and had not been provided to Grievant or his senior manager. This allegation is refuted by the testimony of multiple employees of the Division of Personnel who testified in detail as to its creation at the direction of former Division of Personnel Director, Sarah Walker and by reference to the certification being in the “medium range” in the March 17, 2016 recommendation document. Grievant failed to prove the Division of Personnel erred in determining his certification warranted a five percent pay increase.

“A grievant is not entitled to a retroactive discretionary pay increase when there is no law, rule, or policy requiring the agency, DOP, or the Governor’s Office to act within a certain timeframe on a request for a discretionary pay increase.” *Hapney v. Pub. Emp. Ins. Agency, Dep’t of Admin., and Div. of Pers.*, Docket No. 2013-0861-DOA (Feb. 24, 2014) (citing *Green v. Dep’t of Health and Human Res. and Div. of Pers.*, Docket No.

2011-1577-DHHR (Oct. 1, 2012)); *Hart v. Div. of Highways and Div. of Pers.*, Docket No. 2015-1717-DOT (May 23, 2016). "[T]here is simply no applicable legal basis for authorizing back pay in these circumstances." *Bogges v. Pub. Serv. Comm'n*, Docket No. 2015-0079-PSC (Mar. 25, 2015). Grievant asserted no law, rule, or policy that required Respondent General Services Division or Respondent Division of Personnel to act on the discretionary pay increase within a certain timeframe, therefore, Grievant is not entitled to a retroactive award of his pay increase.

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 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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).

2. An agency's interpretation of the provisions of its own internal policy is entitled to some deference by this Grievance Board, unless the interpretation is contrary to the plain meaning of the language, or is inherently unreasonable. See *Dyer v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996). However, the West Virginia Supreme Court of Appeals has held that "[w]hile long-standing interpretation of its own

rules by an administrative body or municipal agency is ordinarily afforded much weight, such interpretation is impermissible where the language is clear and unambiguous. Syl. Pt. 3, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970)." Syl. Pt. 2, *Habursky v. Recht*, 180 W. Va. 128, 375 S.E.2d 760 (1988).

3. Grievant failed to prove the Division of Personnel erred in determining the amount of pay increase warranted by his certification.

4. "A grievant is not entitled to a retroactive discretionary pay increase when there is no law, rule, or policy requiring the agency, DOP, or the Governor's Office to act within a certain timeframe on a request for a discretionary pay increase." *Hapney v. Pub. Emp. Ins. Agency, Dep't of Admin., and Div. of Pers.*, Docket No. 2013-0861-DOA (Feb. 24, 2014) (citing *Green v. Dep't of Health and Human Res. and Div. of Pers.*, Docket No. 2011-1577-DHHR (Oct. 1, 2012)); *Hart v. Div. of Highways and Div. of Pers.*, Docket No. 2015-1717-DOT (May 23, 2016). "[T]here is simply no applicable legal basis for authorizing back pay in these circumstances." *Boggess v. Pub. Serv. Comm'n*, Docket No. 2015-0079-PSC (Mar. 25, 2015).

5. Grievant asserted no law, rule, or policy that required Respondent General Services Division or Respondent Division of Personnel to act on the discretionary pay increase within a certain timeframe, therefore, Grievant is not entitled to a retroactive award of his pay increase.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: May 8, 2017

Billie Thacker Catlett
Chief Administrative Law Judge