WEST VIRGINIA
PUBLIC EMPLOYEES GRIEVANCE BOARD

STEVEN BAUGHMAN,

Grievant,

v. **DOCKET NO. 2018-0451-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,

Respondent.

DECISION

Steven Baughman ("Grievant") filed this grievance on September 24, 2017, against his employer, the Department of Health and Human Resources, William R. Sharpe, Jr. Hospital ("Respondent" or "DHHR"), challenging the pay rate he was given subsequent to his voluntary demotion from Health Service Assistant to Health Service Worker. The Statement of Grievance reads: "Demotion with prejudice took excessive percentage." As relief, Grievant is seeking "[t]o be made whole in every way including correction of pay plus interest."

Following a Level One grievance hearing conducted on October 12, 2017, Respondent DHHR denied the grievance on November 1, 2017. Immediately thereafter, Grievant appealed to Level Two of the grievance procedure on November 1, 2017. After mediation was completed at Level Two on February 9, 2018, Grievant appealed to Level Three on February 16, 2018. A Level Three hearing was held before the undersigned Administrative Law Judge on May 15, 2018, at the Grievance Board's office in Westover, West Virginia. Grievant was represented by Gordon Simmons with UE Local 170 of the West Virginia Public Workers Union. DHHR was represented by

Assistant Attorney General Katherine A. Campbell. Grievant did not appear nor testify at the hearing. Respondent presented testimony from Jeff Price, Marsha Jordan, and Kim Flesher. This matter became mature for decision on June 12, 2018, upon receipt of the last of the parties' post-hearing arguments.

Synopsis

Grievant is currently employed by Respondent as a Health Service Worker. Grievant was employed as a Health Service Assistant until September 16, 2017, when he accepted a voluntary demotion without prejudice to Health Service Worker. Grievant was informed that his annual salary upon acceptance of the voluntary demotion to Health Service Worker would be $27,734.75. Grievant filed this grievance upon learning that the new salary represented a 6.541 percent reduction from his previous salary, a reduction which Grievant believes to be excessive. However, Grievant failed to show that the reduction to the lowest permissible amount violated any applicable law, rule or regulation, or that the reduction was the result of arbitrary and capricious decision making. Accordingly, this grievance will be denied.

The undersigned Administrative Law Judge makes the following Findings of Fact based upon the record developed at the Level One and Level Three hearings:

Findings of Fact

1. Grievant is employed by the Respondent Department of Health and Human Resources as a Health Service Worker ("HSW") at William R. Sharpe, Jr. Hospital ("Sharpe"). Level I HT at 5.

2. Grievant has been employed at Sharpe for a period in excess of eight years. Level I HT at 5.

3. Grievant was previously employed as a Health Service Assistant ("HSA") at Sharpe before he requested a voluntary demotion without prejudice to HSW.

4. Grievant's voluntary demotion from an HSA position in pay grade 7 to an HSW position in pay grade 6 was documented in correspondence from Sharpe Assistant CEO Michelle Markovich, dated August 10, 2017. *See* R Ex 2 at Level I.

5. As a result of Grievant's request for a voluntary demotion, Grievant's annual salary was reduced to $27,734.75. *See* R Ex 2 at Level I.

6. Grievant signed the correspondence from Ms. Markovich on August 13, 2017, acknowledging his receipt and agreement. *See* R Ex 2 at Level I.

7. Although Ms. Markovich's letter explicitly describes the reduced salary Grievant would receive upon becoming an HSW, it does not reflect the percentage reduction in salary Grievant would suffer from the demotion action. *See* R Ex 2 at Level I.

8. Grievant's salary was reduced by 6.541 percent.

9. Under the West Virginia Division of Personnel's Pay Plan Policy, dated July 1, 2017, Respondent had general discretion to reduce Grievant's pay or not as follows: "An employee who has been demoted without prejudice or reallocated downward may retain his or her current salary or have his or her salary reduced at the appointing authority's discretion so long as the employee's pay rate is within the

compensation range of the job class to which the employee was demoted or reallocated." *See* R Ex 1 at Level I at 6.

10. Under the West Virginia Division of Personnel's Pay Plan Policy, dated July 1, 2017, Respondent had discretion to reduce Grievant's salary by as much as seven (7) percent, although it was only required to reduce Grievant's salary to an amount within the pay range authorized for HSW's. *Id.*

11. Normally, an employee at Sharpe who accepts a voluntary demotion without prejudice loses the full seven (7) percent of their salary permitted by the Pay Plan Policy.

12. Sharpe did not reduce Grievant's salary by the full seven (7) percent because it is mandated by a court order in the so-called "*Hartley*" matter to pay HSW's a minimum annual salary of $27,734.75. *See* R Ex 1 at Level III.

13. Grievant initiated this grievance upon discovering that the percentage reduction he experienced in accepting a voluntary demotion reduced his annual salary in excess of 6.5 percent.

Discussion

Because the subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "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), *aff'd*, Cir. Ct. of Pleasants County, No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, Grievant has not met his burden. *Id*.

Grievant asserts that Sharpe's decision to reduce his salary to the minimum permitted for an HSW under the "*Hartley*" consent order constituted an arbitrary and capricious action. Contrary to Grievant's claims, it was not established that Sharpe's CEO was unaware that he had discretion to retain Grievant's salary at the same level, or to impose a lesser percentage reduction. Sharpe's CEO, Patrick W. Ryan, was never called as a witness in this matter, appearing solely in a representative capacity for Respondent at the Level One hearing. Certainly, Sharpe's Human Resources Director, Jeffrey Price, indicated in his Level One testimony that the Division of Personnel's Pay Plan Policy gives an employer discretion to reduce or not reduce an employee's salary in the course of a demotion without prejudice.

In reviewing an agency action to determine whether it is arbitrary and capricious, consideration should be given to whether the agency relied on prohibited factors, entirely ignored important aspects of the issue to be decided, explained its decision contrary to the available evidence, or whether the decision is so implausible it cannot be ascribed to a difference in view. *See Bedford County Memorial Hosp. v. Health & Human Serv*., 769 F.2d 1017, 1022 (4th Cir. 1985); *Woolridge v. Dep't of Transp*., Docket No. 2008-0416-DOT (Jan. 23, 2009). Although 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 his judgment for that of the employer. *Trimboli v. Dep't of Health & Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd,* Cir. Ct. of Mercer County No. 97-CV-374-K (Oct. 16, 1998). Ultimately, the arbitrary and capricious standard of review is a deferential one which presumes an agency's actions are valid, as long as the decision is supported by substantial evidence, or by a rational basis. *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001); *In Re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

It is understandable that Grievant seeks to ameliorate the amount of pay he lost upon taking a voluntary demotion. Grievant's salary is now set at the same level as newly-hired HSW's, even though he has worked at Sharpe for several years. However, just because an employer is parsimonious with its compensation does not equate to engaging in arbitrary and capricious decision making. The Division of Personnel Pay Plan Policy gives Sharpe substantial discretion on whether to reduce the pay of an employee who takes a voluntary demotion to a position in a lower classification. Sharpe reduced Grievant's pay to the lowest legally permissible amount. That may be harsh and even stingy, but the record does not demonstrate that this decision was based upon arbitrary and capricious decision making, or that the reduction was otherwise impermissible.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence.

Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). "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), *aff'd*, Cir. Ct. of Pleasants County, No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, Grievant has not met his burden. *Id*.

2. The "arbitrary and capricious" standard of review is a deferential one which presumes an agency's actions are valid as long as the decision is supported by substantial evidence or a rational basis. *See* Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). 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 & Human Serv*., 769 F.2d 1017, 1022 (4th Cir. 1985).

3. Grievant failed to establish by a preponderance of the evidence that the decision to reduce his salary by approximately 6.541 percent, upon his acceptance of a voluntary demotion without prejudice from Health Service Assistant to Health Service Worker, represented arbitrary and capricious decision making by his superiors. *See Pringle v. Dep't of Health & Human Res*., Docket No. 2012-1424-DHHR (Oct. 22, 2013).

4. Grievant failed to establish that the salary reduction he experienced in the course of a voluntary reduction without prejudice violated any law, rule or regulation applicable to his employment situation.

Accordingly, this 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: June 21, 2018

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LEWIS G. BREWER
Administrative Law Judge