THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANNETTE J. BROWN,
Grievant,

v. **Docket No. 2017-1175-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR PUBLIC HEALTH AND
DIVISION OF PERSONNEL,
Respondents.

DECISION

Grievant, Annette J. Brown, is employed by Respondent, Department of Health and Human Resources, Bureau for Public Health ("BPH"). On November 14, 2016, Grievant filed this grievance against Respondent stating, "Discretionary Increase denied." For relief, Grievant seeks to "reconsider and reevaluate the discretionary increase decision. I want my salary comparable to other ASA III's [sic] under the Bureau. I was not hired in my current position based on my education, I qualified for my current position based on tenure and experience."

By *Notice of Level 1 Waiver* dated November 28, 2016, the grievance was waived to level two. On the same date, an *Order of Joinder* was entered joining the Division of Personnel ("DOP") as a necessary party. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on April 27, 2017. A level three hearing was held on January 29, 2018, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent BPH was represented by counsel, Brandolyn Felton-Earnest, Assistant Attorney General. Respondent DOP was represented by Karen O'Sullivan Thornton, Assistant Attorney General. By email dated

March 1, 2018, Respondent BPH, by counsel, stated it would not submit Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision on March 5, 2018, upon final receipt of the remaining parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by the Department of Health and Human Resources Bureau for Public Health as an Administrative Services Assistant 3. Grievant protests the Division of Personnel's denial of a discretionary pay increase based on internal equity. Grievant failed to prove Respondent Division of Personnel's determination that Grievant did not qualify for a discretionary pay increase was arbitrary and capricious. Grievant failed to prove Respondent DOP is required to change its policy, that Respondent DOP was without the authority to adopt the policy as written, or that the policy violates any law, rule, or regulation. 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 Department of Health and Human Resources Bureau for Public Health as an Administrative Services Assistant 3 ("ASA3").

2. On August 16, 2016, Respondent BPH submitted a Request for Approval to Respondent DOP seeking a 10% pay increase for Grievant under the internal equity provision of Respondent DOP's Pay Plan Policy. In making this request, Respondent BPH compared Grievant to fellow ASA 3, Crystal Lowe.

3. By letter dated August 30, 2016, then DOP Deputy Director, Joe Thomas, denied the request for discretionary pay increase, stating that Ms. Lowe was not an appropriate comparison employee because she and Grievant did not have comparable levels of education or performance.

4. By letter dated September 16, 2016, BPH Commissioner, Rahul Gupta, MD,MPH, FACP, appealed the DOP's determination to then Acting Director, Joe Thomas, protesting the determination, requesting the DOP review a different performance evaluation in which Grievant was rated as exceeding expectations and arguing that Grievant should still be eligible for a 10% pay increase as an undergraduate degree is valued at 10% of an employee's salary and the disparity between Grievant and Ms. Lowe was more than 20%.

5. By letter dated October 21, 2016, Acting Director Thomas notified Commissioner Gupta that the request for reconsideration was denied as Grievant and Ms. Lowe did not have comparable education, which is required by the Pay Plan Policy.

6. Grievant's request for pay increase is governed by Respondent DOP's Pay Plan Policy[1], which states, in relevant part:

> In situations in which one or more permanent, current employees are paid no less than 20% less than other permanent, current employees in the same job classification and within the same agency-defined organizational work unit, the appointing authority may recommend an in-range salary adjustment of up to 10% of current salary to every employee in the organizational unit whose salary is 20% less than other employees in the agency-defined work unit.
>
> a. The following conditions must be met for an employee to qualify for an internal equity increase:

[1] The Pay Plan Policy has been revised several times since the request for pay increase was made. The relevant Pay Plan Policy has a revision date of July 1, 2016.

1) The employee must be paid at least 20% less than the employee to whom he or she is being compared (No rounding);

2) The employees must be in the same agency-defined organizational unit;

3) The employees must be in the same classification for at least twelve (12) consecutive months at the time of the request;

4) The employees must have comparable education;

5) The employees must have comparable training;

6) The employees must have comparable experience;

7) The employees must have comparable duties and responsibilities;

8) The employees must have comparable performance levels based upon the EPA-3 for each employee;

9) The employees must have comparable years of classified service.

b. The purpose of internal equity adjustments is to facilitate more equitable pay among similarly situated employees and not to recognize superior performance. Internal equity adjustment is not intended to ensure employees in the same job classification receive the same salary.

c. For purposes of this policy, comparable years of classified service shall be defined as within five (5) years with the following exceptions:

1) Employees, who have attained ten (10) or more years of classified service experience may be compared to other employees with 20 or more years of classified service.

2) Employees with greater tenure in the classified service may be compared to less tenured employees in the classified service who are paid at a minimum 20% more than the greater tenured employee.

3) The Director of Personnel shall determine if exceptions to subparagraphs 1. And 2. Of this subsection are necessary based upon the minimum qualifications of the classification.

d. Internal equity increases shall be limited to once every three (3) years for the same job classification in the same agency.

e. The employee(s) used for comparison cannot have received a discretionary increase in the last 12 months, cannot be in a temporary classification upgrade status, cannot be receiving a salary adjustment for additional temporary duties, cannot be receiving a Project Based incentive Increase, and cannot have been appointed, promoted, or reallocated to the classification within the last twelve (12) months.

f. When the appointing authority requests a pay equity increase for an employee, it shall provide a request for and documentation to the Division for all employees in the same job classification within the agency-defined work unit, including their tenure and salary, who may also be eligible for a pay equity increase.

g. The appointing authority shall submit a completed DOP-PPP-III.D.3 and also provide any additional supporting documentation as required by the Division.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 argues that Respondent DOP's denial of a pay increase based on internal equity was arbitrary and capricious. Respondent DOP asserts its determination was proper under its applicable policy.

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, 614, 474 S.E.2d 534, 544 (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). "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 Resources*, Docket No. 93-

HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

Grievant appears to argue that it is arbitrary and capricious for Respondent DOP to require comparable levels of education in the determination of the discretionary pay increase at issue when the minimum qualifications for the class specification allow the substitution of experience for the education requirement. It is clear in this case that Respondent DOP followed its policy, which requires the compared employees to have comparable education, and that is certainly not arbitrary and capricious. Grievant does not dispute that she has a lower level of education than Ms. Lowe. Therefore, Grievant appears to argue the policy itself is arbitrary and capricious. "[I]t is not the role of this Grievance Board to change agency policies…. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed." *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009) (citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997)) (other citations omitted). Grievant cites no law, rule, or regulation that would mandate Respondent DOP change its policy, nor does Grievant make any argument that Respondent DOP was without the authority to adopt the policy as written, or that the policy violates any law, rule, or regulation.

Grievant also appears to argue it was an error that Grievant was not compared to any other employee apart from Ms. Lowe. Per the policy, it was within Respondent BPH's discretion to define the organizational work unit within which Grievant could be compared to other employees in her classification. Grievant provided no evidence that Respondent BPH's determination of the organizational work unit was in error. In her PFFCL, Grievant

points to one other specific employee, Johnny Douglas, stating that he was paid significantly more than Grievant, although he had ten years less experience. Under the policy, Mr. Douglas clearly was not a comparable employee, as the policy requires the employees "be in the same classification for at least twelve (12) consecutive months at the time of the request." At the time the request was made and reviewed, Mr. Douglas had not been in the same classification as Grievant for twelve months.

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 her 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. "[I]t is not the role of this Grievance Board to change agency policies…. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed." *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009) (citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997)) (other citations omitted).

3. Grievant failed to prove the Division of Personnel's determination that Grievant did not qualify for a discretionary pay increase was arbitrary and capricious.

4. Grievant failed to prove the Division of Personnel is required to change its policy, that the Division of Personnel was without the authority to adopt the policy as written, or that the policy violates any law, rule, or regulation.

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: March 26, 2018

_____

Billie Thacker Catlett
Chief Administrative Law Judge