THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHARON L. BUZZARD,
Grievant,

v. **Docket No. 2017-1420-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILD SUPPORT ENFORCEMENT AND
DIVISION OF PERSONNEL,
Respondents.

DECISION

Grievant, Sharon L. Buzzard, is employed by Respondent, Department of Health and Human Resources, Bureau for Child Support Enforcement ("DHHR/BCSE"). On December 22, 2016, Grievant filed this grievance against Respondent protesting her salary amount upon promotion. For relief, Grievant seeks a twelve percent increase rather than the seven percent increase she received.

On December 28, 2016, the level one grievance evaluator filed a *Notice of Level 1 Waiver*, waiving the matter to level two of the grievance process. By order entered January 4, 2017, the Division of Personnel ("DOP") was joined as a party. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on March 30, 2017. A level three hearing was held on October 23, 2017, 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 DHHR/BCSE was represented by counsel, James "Jake" Wegman, Assistant Attorney General. Respondent DOP was represented by counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on December 13, 2017, upon final receipt of Grievant's and Respondent DHHR/BCSE's

written Proposed Findings of Fact and Conclusions of Law. By letter dated November 17, 2017, DOP, by counsel, stated it would not be filing Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Child Support Technician 3. Grievant was selected as a Child Support Specialist 2 and agreed to a lower salary then indicated by the Division of Personnel's Pay Plan Policy. Grievant asserted she accepted the offer under duress and that Respondent's decision to offer her a lower salary was arbitrary and capricious. Grievant failed to prove Respondent's action was arbitrary and capricious or that she was otherwise entitled to the relief she seeks when she accepted the salary that was offered. 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 Respondent as a Child Support Technician 3, pay grade 10.

2. Grievant applied for a position as a Child Support Specialist 2, pay grade 12, and was the successful candidate.

3. By letter dated December 1, 2016, Commissioner Garrett M. Jacobs offered Grievant the position with a salary of $37,544.15, which was less than the standard promotional increase, "[d]ue to budgetary issues and so as not to create salary inequities."

4. Grievant accepted the position with the offered salary by her signature on the letter on December 7, 2016.

5. Although the letter was dated December 1, 2016, and stated that it must be returned by December 6, 2016, Grievant did not receive the letter until December 7, 2016.

6. When Grievant asked her manager, Nancy Light, why she did not receive the expected promotion amount, Ms. Light told Grievant that it was what personnel told her to do and that if Grievant did not accept the position with that salary, the position would be reposted.

7. The pay range for Child Support Specialist 2 is $26,160 to $48,396 and the average salary is $28,430.84.

8. Pay on promotion is governed by the DOP's *Pay Plan Policy*, which states:

> Salaries shall be increased 7% the first pay increment, 5% the second pay increment, 4% the third pay increment and 3% for each subsequent pay increment to a maximum of 25%, or to the minimum rate of the compensation range for the class, whichever is greater, except where an employee accepts a lesser increase within the compensation range to obtain the position.

Pay Plan Policy Section III.C.1., revised July 1, 2016.

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 she signed the letter under duress and that the decision to offer her a lower salary was arbitrary and capricious. Respondent asserts Grievant failed to prove Respondent acted in an arbitrary and capricious manner in offering her a lower salary and that Grievant accepted the lower salary as allowed by the DOP's policy.

Under the DOP's policy, the salary increase for two pay grades would have been twelve percent, "except where an employee accepts a lesser increase within the compensation range to obtain the position." Grievant signed the letter of offer accepting the lesser salary. Grievant argues this was not true acceptance because she signed the letter under duress. In support of her argument, Grievant cites *Smith v. Dep't of Corr.*, Docket No. 94-CORR-1092 (Sept. 11, 1995) and *McClung v. Dep't of Pub. Safety*, Docket No. 89-DPS-240 (Aug. 4, 1989). Neither of these cases are applicable as both concern forced resignation from employment in lieu of immediate termination from employment. The threat of immediate loss of employment is very different than the decision whether or not to accept a promotion when the salary offered was not what was expected. While Grievant may have felt that she "had no choice," that is not duress.

Grievant also argues that the decision to offer her a lower salary was arbitrary and capricious. 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).

In support of her argument that the salary decision was arbitrary and capricious Grievant asserts that the report of the average salary should be given no weight and that Respondent produced no evidence to support that granting Grievant the full salary increase would have created salary inequities or budget issues. Grievant did not object to the admission of the report of average salaries. The document is obviously a computerized record that appears to be a normal business record. Grievant has provided no reason to doubt its authenticity. Further, it is Grievant's burden to prove that the decision was arbitrary and capricious, not Respondent's to prove that it was reasonable. Grievant provided no evidence that Commissioner Jacobs' concerns were not legitimate. Commissioner Jacobs' stated reasons for offering Grievant a lower salary are plausible and reasonable. Even with limiting the increase of salary of seven percent, Grievant would be making ten thousand dollars more than the average salary of existing employees in the same classification.

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. 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).

3. Grievant failed to prove Respondent’s action was arbitrary and capricious or that she was otherwise entitled to the relief she seeks when she accepted the salary that was offered.

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: January 19, 2018

Billie Thacker Catlett
Chief Administrative Law Judge