THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOSEPH ALLEN COMPTON, SR.,

Grievant,

v. **Docket No. 2018-0756-MAPS**

DIVISION OF JUVENILE SERVICES/JAMES H. MORTON JUVENILE CENTER,

Respondent.

DECISION

Grievant, Joseph Allen Compton, Sr., filed a level one grievance on November 22, 2017, against his employer, Respondent, Division of Juvenile Services, James H. Morton Juvenile Center, stating as follows: "[h]ired April 2013 - July 2015 Position changed to Kitchen Manager/Supervisor[.] No step increase for the position change. Still working at minimum wage $8.75 hr." As relief sought, the Grievant requests, "[p]ay increase to job level[.] I have been working for 2+ years."

A level one conference was conducted on December 4, 2017. The grievance was denied by the level one decision issued on December 20, 2017. Grievant appealed to level two on December 22, 2017. A level two mediation was conducted on April 3, 2018. Grievant perfected his appeal to level three on April 3, 2018. A level three hearing was held on July 18, 2018, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Anthony D. Eates, II, Esquire, Deputy Attorney General. This matter became mature for decision on August 30, 2018, upon the receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a cook. In July 2015, Grievant was required to assume additional kitchen duties because the persons hired to perform these functions vacated their positions. Grievant received no pay increase for these additional duties. Grievant asked his supervisor and administration for a pay increase to no avail, even though Respondent continues to compliment his work performance. Respondent has taken the position that it has no authority to grant such a pay increase. Respondent also asserts that pay increases that Grievant seeks are simply discretionary and are not required. Grievant has failed to prove by a preponderance of the evidence that he is entitled to a pay increase, or that Respondent has violated any law, rule, or policy by failing to grant him such. Accordingly, this grievance is DENIED.

The following Findings of Fact are based upon a review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a cook at the James H. Morton Juvenile Center, and has been so employed since 2013. Grievant's classification title is now and has always been "Cook."

2. There are three cook positions at the James H. Morton Juvenile Center. When Grievant was hired in 2013, a woman named Bonnie Bess was one of the other two cooks. The identity of the third cook is unknown.

3. At the time Grievant was hired, Ms. Bess served as "kitchen manager." However, based upon the evidence presented, her classification title was "Cook."[1]

[1] *See*, testimony of Deputy Director Denny Dodson.

4. In or about July 2015, Ms. Bess transferred to another position and no longer worked in the kitchen. Respondent hired another person to replace Ms. Bess, but that employee soon left due to health issues. At that point, Grievant was assigned the additional duties that Ms. Bess and the other employee had performed such as ordering food, maintaining inventory, scheduling shifts for the cooks, maintaining required records, working in the Oasis system, and locating in-service training for himself, as well as the other cooks. Grievant's classification title did not change and his pay was not increased for taking on these additional duties.

5. When Ms. Bess performed these duties, she was paid more than Grievant. Ms. Bess was classified as a cook, but because she had so many years of service, her pay was higher as she had been employed when raises were frequently given to employees.

6. Grievant's immediate supervisor is Margaret Fulks. Ms. Fulks' title is unknown. However, she performs evaluations of Grievant and the other cooks, approves their leave requests, and handles any disciplinary issues that may arise.

7. Grievant supervises and directs the work of the other two cooks when those positions are filled. Grievant has worked alone quite a bit while employed at James H. Morton Juvenile Center.

8. Within the facility, Grievant is referred to as the "kitchen manager." As such, he is required to take more hours of in-service training than the other cooks, and to obtain a certification from the ServSafe National Restaurant Association. For this certification, Grievant had to take and pass the "ServSafe Food Protection Manager Certification

Examination."[2] However, Grievant is classified as a Cook and there is no Division of Personnel classification title for "kitchen manager."

9. Jennifer Chapman is responsible for reviewing and approving the Grievant's purchasing orders. Ms. Chapman's title is unknown. However, she also interacts with Grievant regarding training that is required for the cooks, as well as for him.

10. On June 29, 2017, Grievant sent a letter to Ms. Fulks asking for his salary to be increased to that of a "Kitchen Manager/1Supervisor." Grievant was seeking a "step increase" for taking on these duties in addition to cooking.[3] However, this request was denied within the agency. Thereafter, Grievant continued to try to get an increase in pay for these additional duties.

11. In the level one decision, William K. Marshall, Director, Division of Juvenile Services, stated as follows:

> For child nutritional purposes, Grievant is considered a manager for his facility and is required to attend more training that (sic) the other cooks who work at the facility. However, Grievant's classification within the state civil service system (through OASIS) is as a Cook. While the job titles listed under the school service personnel does break down the duties and experience for cook positions, the civil service classification does not separate its classification for cook into different levels.
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> While I agree that Grievant is worth more than he is currently making and deserves a pay increase, I do not have the authority to grant Grievant his requested relief. . . .[4]

[2] *See*, Grievant's Exhibit 3, Certificate.
[3] *See*, Grievant's Exhibit 1, June 29, 2017, letter.
[4] *See*, Level One Decision dated December 20, 2017.

12. In April 2018, Deputy Director Dodson asked Grievant to submit a Position Description Form ("PDF") to him in an attempt to get Grievant a pay increase. Grievant complied. On the last page of the PDF, Deputy Director Dodson wrote the following:

> I have reviewed the contents and responses in this document and generally agree to all that is stated. Mr. Compton performs the tasks of a lead worker due to his experience and leadership abilities. He strives to keep expenses low and within budget and completes the purchase orders for food and equipment as needed to pass on to his immediate supervisor for authorization officially.[5]

Deputy Director Dodson, Director Marshall, Jeremy Dolin, facility Director, and Grievant all signed off on this PDF which was dated April 28, 2018.

13. By letter dated April 25, 2018, from Wendy A. Elswick, Assistant Director, Classification and Compensation, Division of Personnel (DOP), to Sharon Hayes, Director of Personnel, Military Affairs and Public Safety, Respondent was informed that DOP had reviewed the PDF and determined that Grievant was properly classified as a Cook. Therefore, there would be no reallocation or pay increase.

14. Neither Respondent nor Grievant challenged DOP's determination.

15. Grievant does not necessarily challenge his classification as a Cook. He simply wants a pay increase based upon all the duties he has had to assume.

16. Respondent has not applied for any kind of temporary upgrade for Grievant to increase his pay.

17. Respondent has not attempted to obtain a pay increase for Grievant under DOP's Pay Plan Implementation Policy.

[5] *See*, Joint Exhibit 1, PDF.

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). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Grievant argues that he should be granted a pay increase for assuming many additional duties in July 2015, and being deemed the "kitchen manager" at James H. Morton Juvenile Center. At the hearing in this matter, in the level one decision, and in the PDF, Respondent appeared to assert that it cannot grant Grievant a pay increase even though it wanted to. However, in its proposed Findings of Fact and Conclusions of Law, Respondent asserts that there is no law, policy, or rule that required it to give Grievant a pay increase, and that any increase in his pay would be discretionary.

Clearly, Respondent has not attempted to obtain a discretionary pay increase for Grievant through DOP's Pay Plan Implementation Policy. It is noted that neither party introduced that policy into evidence, but both make reference to it. The Grievance Board has stated that "[a]n agency's decision not to recommend a discretionary pay increase generally is not grievable." *Lucas v. Dep't Health and Human Res.,* Docket No. 07-HHR-141 (May 14, 2008). *See also Morgan v. Dep't Health and Human Res.*, Docket No. 07-HHR-131 (June 5, 2008). However, the word *generally* implies that there may be times

when such *is* grievable. In *Moore v. Department of Environmental Protection*, Docket No. 2014-0046-DEP (May 9, 2014), the Grievance Board stated as follows:

> [a]n agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't Health and Human Res.,* Docket No. 07-HHR-141 (May 14, 2008). However, discretionary decisions must be made in a manner that is reasonable and not arbitrary and capricious. *See [Mihaliak] v. Div. of Rehab. Serv., Docket No. 98-RS-126 (Aug. 3, 1998)*. 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 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Id. However, "the granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of the Respondent." *Harris v. Dep't of Transp.,* Docket No. 06-DOH-224 (Jan. 31, 2007).

"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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*,

196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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 Res.,* Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Grievant has made no allegations to suggest that Respondent is improperly granting discretionary pay increases to other employees, or is denying him a discretionary pay increase for improper reasons. Grievant has only asserted that he wants a pay increase for the additional kitchen manager duties he has been required to perform. Grievant has cited no law, policy, rule that would require Respondent to increase his pay, or to attempt to increase his pay. Respondent appears unwilling to seek a discretionary pay increase or a merit raise for Grievant, and the Grievance Board has no authority to require Respondent to do so. Accordingly, this grievance is DENIED.

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). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't Health and Human Res.,* Docket No. 07-HHR-141 (May 14, 2008). However, discretionary decisions must be made in a manner that is reasonable and not arbitrary and capricious. *See [Mihaliak] v. Div. of Rehab. Serv.,* Docket No. 98-RS-126 (Aug. 3, 1998). 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 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). *Moore v. Dep't of Envtl. Protection*, Docket No. 2014-0046-DEP (May 9, 2014).

3. "The granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of the Respondent." *Harris v. Dep't of Transp.,* Docket No. 06-DOH-224 (Jan. 31, 2007).

4. Grievant has failed to prove by a preponderance of the evidence that he is entitled to a pay increase for assuming the additional kitchen manager duties, or that Respondent is required to grant him such a pay increase.

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 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 (2018).

DATE: October 24, 2018.

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Carrie H. LeFevre
Administrative Law Judge