

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**IRISCA LEGGETT et al.,
Grievants,**

v.

Docket No. 2017-1210- CONS

**DIVISION OF CORRECTIONS/
PAROLE SERVICES,¹ and
DIVISION OF PERSONNEL,
Respondents.**

DECISION

Grievants, Irisca Leggett and twenty-one additional employees² of the Division of Corrections (“DOC”) Parole Services filed similar grievances in November 2016. The grievances raise the same issues. Ms. Leggett’s grievance is a representative sample and states:

In approved Division of Corrections proposal SPB #2697, incumbents as defined by section B did not receive the 5% salary increase granted to incumbents of section C. This created a wage discrepancy between Probation and Parole officers of the same classification series. Employees hired prior to the effective date of SPB #2697 did not receive an increase for successful completion of a probationary period.

As relief Grievants seek:

5% salary increase due to successful completion of the probationary period, any applicable contributions to retirement, Medicare, and all contributions directly related to

¹ On July 1, 2018, the Division of Corrections became part of the Division of Corrections and Rehabilitation. See W. VA. CODE § 15A-3-2.

² Bryant Wallace, Amanda Brookman, Jannette Beeson, Heather Huffman, William Lewis, Brandi Otey, John Smith, David Toler, Brian Templeton, Jill Bryant, William Hicks, Emily LeDane, Shari Wince, Rebecca Harrison, Ryan Beals, Kaitlin Watson, Paula Graves, David Bolls, Erica Martin, Brittany Shrader, and John Tackett.

salary. Any back pay, including overtime. All related attorney fees.³

The separate grievances were consolidated at Level One. A Level One hearing was held and a decision was filed on May 15, 2017. The decision granted the consolidated grievances in part and denied them in part. Grievants appealed to Level Two on May 23, 2017, and a mediation was conducted on September 1, 2017. The grievances were placed in abeyance while the parties attempted to arrive at a settlement. An Order of Unsuccessful Mediation was entered on October 23, 2017, and Grievants appealed to Level Three on October 25, 2017, the appeal was not received at the West Virginia Public Employees Grievance Board until January 4, 2018. The Division of Personnel ("DOP") was joined as a party by Order dated January 31, 2018.

A Level Three hearing was held in Beckley, West Virginia on June 13, 2018. Two Grievants, Brandi Otey and Britany Shrader, appeared personally and Grievants were represented by Michael Froble, Esquire. Respondent Division of Corrections was represented by John H. Boothroyd, Assistant Attorney General, and Respondent Division of Personnel was represented by Karen O'Sullivan Thornton, Assistant Attorney General. At the beginning of the Level Three hearing, Mr. Froble clarified that Grievants were seeking as relief, back pay amounting to five percent of each Grievant's annual salary for the period of October 16, 2016 through April 27, 2017.

This matter became mature for decision on July 26, 2018, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.

³ It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). Accordingly, that remedy cannot be granted herein.

Synopsis

Grievants allege that the discretionary pay raise, they received on April 15, 2017, should have become effective on October 15, 2015, the day that a discretionary raise for new employees became effective. Grievants seek back pay for the period between the time the two raises became effective. Grievants provided no evidence, law, rule, regulation, or policy which requires Respondents to provide back pay to Grievants for a discretionary raise they received effective April 15, 2017.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact⁴

1. Grievants are employed by the Division of Corrections ("DOC"), Probation and Parole Services ("P&PS") and were all hired prior to October 15, 2015. Their positions are classified as either Parole and Probation Officer 1, Parole and Probation Officer 2, or Parole and Probation Officer 3. The Division of Corrections is within the Department of Military Affairs and Public Safety ("DMAPS").

2. At its meeting on September 15, 2015, the State Personnel Board ("SPB") considered the DMAPS/DOC's SPB proposal #2697 that requested various discretionary recruitment and retention salary increases. The proposal specifically requested that the DOC be permitted to do the following:

⁴ The only testimony provided at the Level Three hearing was offered by Respondent DOP. Grievants offered a document which purported to reflect Grievants hire dates and salary and a second document which purported to reflect the amount each Grievant would receive if granted the remedy they sought. After being given an opportunity to inspect these documents DOP alleged they were riddled with errors and objected to its admission. Since these documents were helpful only for the measure of damages they were not considered in the decision regarding the merits of Grievants' claims.

- Establish special hiring rates as follows:
 - PPO 1- \$27,913
 - PPO 2- \$29,304
 - PPO 3- \$32,400
- Provide current incumbents of the PPO class series a 10% salary increase or movement of salary to the new minimum established by the special hiring rate, whichever was greater.
- Provide a 5% salary increase at the end of the one-year probationary period for new employees hired into the PPO 1 classification after the effective date of the proposal.
- Provide retention incentive salary increases for PPO 1-3s as follows:
 - 5% salary increase upon completion of two years of employment,
 - 5% increase upon completion of three years of employment,
 - 7% increase upon completion of five years of employment.

(Respondent DOP Exhibit 1).

3. Pursuant to W. Va. Code R. §143-1-5.4(f)(4), the SPB approved the DMAPS/DOC's proposal #2697 with an effective date of October 15, 2015.

4. The DOC discovered that the implementation of SPB proposal #2697 caused the unintended consequence of providing a 5% retention incentive salary increase for new hires after one year of employment but did not provide a similar increase to tenured employees.

5. To address this issue, the DMAPS/DOC returned to the SPB with a request to modify their original proposal and provide a 5% increase to all the PPO 1-3s who had been hired prior to the October 15, 2015, effective date of the original proposal. (Respondent DOP Exhibit 2).

6. The State Personnel Board considered and approved SPB proposal #2697-A at its March 16, 2017 meeting, with an effective date of April 15, 2017. (Respondent DOP Exhibit 2).

7. The effective dates for enactment of SPB proposals are recommended for SPB consideration through a cooperative process between the DOP, the proposing

agency, the WVOasis and the State Budget Office. DMAPS did not request that SPB proposal #2697-A be retroactive and the SPB actions are prospective as a rule, based upon legal advice the Board has received regarding retroactive pay.⁵

8. The Parole and Probation Officer 1s who received a 5% increase as a result of the original proposal SPB #2697 were all hired by the DOC after the effective date of October 15, 2015.

9. The SPB consists of five members appointed by the Governor, with the advice and consent of the Senate, and the Secretary of the Department of Administration or his or her designee who serves as the chairperson and an ex officio nonvoting member. The SPB is a separate and distinct entity from the DOP. The staff of the DOP often bring proposals, information and data to the SPB, but they have no authority or control over the Board.

Discussion

This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

⁵ Testimony of Wendy Campbell, DOP Assistant Director for Classification and Compensation.

The issues in this case first arose when Respondent requested various discretionary recruitment and retention salary increases which were approved by the State Personnel Board in SPB proposal #2697. This proposal became effective October 15, 2015, and provided, *inter alia*, for Probation Officers hired after that date to receive a 5% salary increase upon completion of their one-year probationary period. DOC's decision to seek this proposal was discretionary. When the proposal was implemented, Probationary Officers hired before October 15, 2015, pointed out that they too should receive a 5% increase for having completed their probationary periods.

Respondent DOC was under no obligation to submit an additional proposal to the State Personnel Board to provide the 5% increase for workers who completed their proposals prior to October 15, 2015.⁶ In *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994), the West Virginia Supreme Court of Appeals noted that W. Va. Code § 29-6-10 (related to equal pay) requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. See *Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009); *Buckland v. Div. of Natural Res.*, Docket No. 2008-0095-DOC (Oct. 6, 2008); *Boothe, et al., v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2009-0800-CONS (Feb. 17, 2011); *Lott v. Div. of Highways and Div. of Personnel*, Docket No. 2011-1456-DOT (Sept.

⁶ See for example, *Rosen et al., v. Dep't of Health and Human Res. and Div. of Per.*, Docket No. 2017-1487-CONS (May 2, 2018), holding that it did not constitute discrimination when employees who had received training prior to that training being approved for a discretionary increase did not receive the increase received by employees who completed the training after it was approved.

9, 2014); *Bowser, et al., v. Dep't of Health & Human Ser./William R. Sharpe, Jr. Hosp.*, Docket No. 2013-0247-CONS (Feb. 13, 2014).

Respondent did seek a second pay adjustment to propose a 5% increase for the Probation Officers who had completed their probationary period prior to October 15, 2015. SPB #2697-A was passed by the State Personnel Board at its March 16, 2017, meeting, with an effective date of April 15, 2017. Neither Respondent proposed that the State Personnel Board make this pay increase retroactive. Further, Grievants did not provide any law, rule or policy which required that the proposal be applied retroactively.

Grievants have not proved by a preponderance of the evidence that Respondents are required to provide back pay for a discretionary salary increase which became effective on April 15, 2017. Accordingly, the consolidated grievances are DENIED.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. It is not discriminatory for employees in the same classification to be paid different salaries as long as they are paid within the appropriate pay grade. *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994). See also, *Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.*, Docket

No. 02-HHR-366 (Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009); *Buckland v. Div. of Natural Res.*, Docket No. 2008-0095-DOC (Oct. 6, 2008); *Boothe, et al., v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2009-0800-CONS (Feb. 17, 2011); *Lott v. Div. of Highways and Div. of Personnel*, Docket No. 2011-1456-DOT (Sept. 9, 2014); *Bowser, et al., v. Dep't of Health & Human Ser./William R. Sharpe, Jr. Hosp.*, Docket No. 2013-0247-CONS (Feb. 13, 2014).

3. Grievants have not proved by a preponderance of the evidence that Respondents are required to provide back pay for a discretionary salary increase which became effective on April 15, 2017.

Accordingly, the consolidated grievances are 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 156 C.S.R. 1 § 6.20 (2008).

DATE: August 22, 2018.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**