

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JAYMI MARTIN AND ROBERT MCDONOUGH,**  
**Grievants,**

**v.**

**Docket No. 2018-1470-CONS**

**REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/  
SOUTHERN REGIONAL JAIL,**  
**Respondent.**

**DECISION**

Grievants, Jaymi Martin and Robert McDonough, are employed by Respondent, Regional Jail and Correctional Facility Authority at Southern Regional Jail. On October 19, 2017, Grievant Martin filed a grievance stating, "All uniformed correctional staff were granted an annual raise in salary of \$2,080 or approximately \$1.00 per hour. Since I perform many of the same duties as a correctional officer on a daily basis, I feel as though I should be receiving the same raise in pay." On October 24, 2017, Grievant McDonough filed a grievance stating, "Since I perform many of the same duties as a correctional officer, I feel as though I should be receiving the same raise in pay." Grievants both sought as relief the same raise in pay retroactive to October 1, 2017.

Separate level one conferences were held for both grievances on November 6, 2017. Separate level one decisions were rendered on the grievances on November 17, 2017, denying the grievances. Grievant Martin appealed to level two on December 8, 2017, and Grievant McDonough appealed to level two on December 6, 2017. Following separate unsuccessful mediation, Grievants separately appealed to level three of the grievance process on May 2, 2018. By order entered August 20, 2018, the grievances were consolidated. An amended order was entered on the same date correcting a typographical error in the docket number. A level three hearing was held on October 2,

2018, before the undersigned at the offices of the Raleigh County Commission on Aging in Beckley, West Virginia. Grievants appeared in person and *pro se*<sup>1</sup>. Respondent appeared by Donald Ames and was represented by counsel, Briana J. Marino, Assistant Attorney General. This matter became mature for decision on October 30, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievants are employed by Respondent Regional Jail and Correctional Facility Authority as Correctional Counselor 2s at Southern Regional Jail. Grievants assert that, as they perform many of the same duties as correctional officers, they should receive the same pay raise received by correctional officers. Grievants do not assert that they are misclassified and should be classified as correctional officers. Respondent sought a discretionary pay differential for correctional officers from the Personnel Board to address critical recruitment and retention issues in that classification series, which was supported by a report submitted along with the request. Grievants failed to prove Respondent acted arbitrary and capriciously in seeking a pay differential for the correctional officer classification series only. 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. Grievants are employed by Respondent Regional Jail and Correctional Facility Authority as Correctional Counselor 2s at Southern Regional Jail.

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<sup>1</sup> For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6<sup>th</sup> ed. 1990).

2. In recent years, West Virginia correctional agencies operated by the Department of Military Affairs and Public Safety, including the regional jails, began experiencing a staffing crisis. Although the Department of Military Affairs and Public Safety was experiencing staffing issues with all correctional staff, the issue was particularly severe with correctional officers. Correctional officer starting salary was the lowest in the nation and was under the United States Federal Poverty Guidelines for a family of four.

3. In response to this crisis, Cabinet Secretary Jeff S. Sandy requested from the Division of Personnel consideration of a special hiring rate and pay enhancement for all correctional officers. Cabinet Secretary Sandy did not request the same for any other classification, but continued to explore other options to increase salaries for all correctional employees, which eventually resulted in legislative intervention that provided a salary adjustment for all correctional employees.

4. Thereafter, on July 20, 2017, Joe F. Thomas, Acting Director of the Division of Personnel, submitted a proposal to the State Personnel Board recommending the Board approve an hourly increase for correctional officers and a special hiring rate for new officers.

5. On July 27, 2017, the State Personnel Board approved the Division of Personnel's proposal.

6. Grievants admit they are properly classified as Correctional Counselor 2s.

7. Grievants perform some of the same duties as correctional officers when correctional officers are not available such as escorting inmates and visitors, making telephone calls for inmates, and supervising inmates during telephone interviews.

Grievant Martin estimates forty percent of her time is spent on correctional officer duties. Grievant McDonough estimates forty to fifty percent of his time is spent on correctional officer duties.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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.*

Grievants argue they are entitled to the same raise in pay received by correctional officers because they perform many of the same duties as correctional officers, which are not included in their job classification of Correctional Counselor 2. Respondent asserts that Grievants were not entitled to the raise as it was discretionary and Grievants’ duties are not comparable to those of correctional officers.

Essentially, Grievants argue that the Department of Military Affairs and Public Safety acted arbitrarily and capriciously in failing to award them the same raise in salary received by correctional officers. 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, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “[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).

The Grievance Board has addressed this issue in three prior decisions, denying each grievance. See *Gregory and Rardin v. Div. of Juv. Serv.*, Docket No. 2018-0179-CONS (Feb. 12, 2018); *Prince v. Reg’l Jail and Corr. Facility Auth.*, Docket No. 2018-0583-MAPS (Sept. 18, 2018); *Rexrode et al. v. Div. of Corr.*, Docket No. 2018-0800-CONS (October 12, 2018). Grievants have not presented any facts or arguments to distinguish their grievance from the above cases.

“The [Personnel] Board may approve the establishment of pay differentials to address circumstances which apply to reasonably defined groups of employees.” W. VA. CODE ST. R. § 143-1-5.4.f.4 (2016). The Department of Military Affairs and Public Safety chose to seek raises and a special hiring rate through this process to address its most critical need: correctional officers. It was reasonable for the Department of Military Affairs and Public Safety to do so as it faced a critical shortage of correctional

officers due to difficulties with both recruitment and retention, which was tied to the extremely low starting salary of the entry to that classification series, all of which is supported by the *West Virginia DMAPS Correctional Staffing Crisis* report submitted in support of the request to the Division of Personnel.

While Grievants argue that they perform many of the same duties as correctional officers, they do not assert that they are misclassified and should be classified as correctional officers rather than correctional counselors.<sup>2</sup> Therefore, as correctional counselors, they were not entitled to the pay raise approved for correctional officers as only the Personnel Board can approve such a pay differential and its approval was specific to the correctional officer classification series.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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.*

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<sup>2</sup> Respondent asserts that Grievant’s were not performing as many correctional officer duties as they claimed because the Correctional Counselor 2 classification specification lists as an example of work “[m]ay assist correctional officers on living unit.” Grievant Martin attached to her PFFCL as an exhibit the site-specific job description of Correctional Counselor 2, which does not include the same language regarding assisting correctional officers as the classification specification. It is unnecessary to address these arguments as Grievants do not assert they are misclassified.

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, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “[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).

3. “The [Personnel] Board may approve the establishment of pay differentials to address circumstances which apply to reasonably defined groups of employees.” W. VA. CODE ST. R. § 143-1-5.4.f.4 (2016).

4. Grievants failed to prove Respondent acted arbitrary and capriciously in seeking a pay differential for the correctional officer classification series only.

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 (2018).

**DATE: December 11, 2018**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**