THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MELISSA SUE PRINCE,

Grievant,

v. **Docket No. 2018-0271-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Melissa Sue Prince, filed a level one grievance on August 22, 2017, against her employer, Respondent, Division of Highways ("DOH"), stating as follows: "[d]enial of back pay for receipt of an 'internal equity.' Please see attached." Grievant attached to her statement of grievance a two-page, type-written narrative further explaining her grievance, along with several exhibits. Such is incorporated by reference as if stated in verbatim. Therein, Grievant explains that she was awarded a discretionary pay increase, but the same was not processed for ten months through no fault of her own. As such, she argues that she lost the additional pay for ten months and that she should be granted back pay for the time the increase was delayed. As relief sought, the Grievant requests, "[b]ack pay from August 8, 2016 thru June 23, 2017; interest on back pay from August 8, 2016 thru June 23, 2017; and the approval date of January 26, 2017 be the date of which eligibility will be allowed for the next internal equity."

A level one hearing was conducted on September 14, 2017. By the level one decision issued on October 5, 2017, the level one hearing examiner granted Respondent's Motion to Dismiss, concluding that "the relief requested by the Grievant is not available through the grievance process." Grievant appealed to level two on October

23, 2017. A level two mediation was conducted on January 18, 2018. Grievant perfected her appeal to level three on February 7, 2018.[1] Respondent, by counsel, filed a Motion to Dismiss on March 21, 2018, arguing that the Grievant has failed to state a claim upon which relief can be granted. By email dated March 22, 2018, the Grievance Board informed Grievant that if she should wish to respond to the motion to dismiss, she was to do so in writing by the close of business on March 29, 2018, as the level three hearing was then scheduled to be conducted on April 10, 2018. Grievant submitted her Response to Respondent's Motion to Dismiss by email on March 29, 2018. Respondent filed its "Objections to Grievant's Response and Request for Continuance." Based upon the filing of these pleadings, the ALJ scheduled this matter for a telephone conference on April 9, 2018, at 10:30 a.m.

The telephone conference was held as scheduled on April 9, 2018. Respondent appeared by counsel, Jesseca Church, and Natasha White, DOH Assistant Director of Human Resources. Grievant appeared *pro se*. Whereupon, the ALJ heard from both parties as to Respondent's Motion to Dismiss, Grievant Response thereto, and Respondent's Objections to Grievant's Response. Based upon the arguments and representations of the parties, the ALJ made the following rulings: granted Grievant to amend her grievance to include a claim of discrimination and the opportunity to file a formal amendment if she wished; ordered Respondent to review its records and to correct its discovery responses and to send the requested information with any amendments to

[1] The statement of grievance was received by the Grievance Board on February 8, 2018, in the U. S. Mail, and it was clocked-in as received accordingly. Its envelope was post marked February 7, 2018. As such, February 7, 2018, is considered the statement of grievance's filing date.

Grievant; granted the Respondent's Motion to Continue to allow both parties additional time to prepare, but ordered that the level three hearing be rescheduled in or about thirty days; and, held the Motion to Dismiss in abeyance and ordered that it would be heard at the rescheduled level three hearing to allow the parties to argue in person. Further, the ALJ made it clear to the parties that she would not consider a settlement agreement the parties executed in a prior grievance or any statements allegedly made by the level two mediator in making her decision in this matter. The ALJ stressed that the settlement agreement is only being considered to the extent to which its existence proves that Respondent's discovery responses were incomplete or erroneous. The parties agreed to work together to address other outstanding issues unrelated to this grievance and not before the ALJ. There were no objections to this order.

A level three hearing was held on May 24, 2018, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, *pro se*. Respondent appeared by counsel, Jesseca Church, Esquire. At the commencement of the hearing, the ALJ heard the Respondent's Motion to Dismiss and Grievant's Response to the same. After hearing the arguments of the parties, the ALJ denied Respondent's Motion to Dismiss as the relief sought is not unavailable, citing *Moore v. Dep't of Envtl. Protection*, Docket No. 2014-0046-DEP (May 9, 2014), and a Division of Personnel memorandum submitted as an exhibit by Respondent. The objections of counsel for Respondent were noted for the record. Thereafter, the level three hearing proceeded with the presentation of evidence. This matter became mature for decision on July 13, 2018, upon the receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Contract Development Manager. Grievant was submitted for a discretionary pay increase. However, Respondent's Human Resources Office took ten months to complete the processing of her pay increase so that she could start receiving the increased pay. The pay increase was implemented prospectively, and Grievant was denied back pay for the ten-month delay. Grievant alleged wrongdoing, including discrimination and harassment, against the former DOH Director of Human Resources. Respondent denied Grievant's claims, and asserted that while the processing took ten months, no laws, policies, or rules were violated by Respondent or its former director of Human Resources. Grievant failed to prove her claims by a preponderance of the evidence. 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 Contract development Manager. Grievant has held this position for three years, and has been employed by Respondent for about three and one-half years.

2. Tom Smith is the Secretary of Transportation. Drema Smith is employed by Respondent as the Director of the Equal Employment Opportunity Division and Acting Director of Human Resources. Natasha White is employed by Respondent as its Assistant Director of Human Resources. John Toomey is Grievant's direct supervisor. Jason Boyd is the director of Grievant's division.

3. At the times relevant herein, Kathleen Dempsey was employed by Respondent as the Director of Human Resources. Ms. Dempsey vacated this position in or about December 2017.

4. Grievant was submitted for a discretionary internal equity pay increase on or about August 8, 2016. However, despite the required paperwork being completed properly and bearing all the signatures and approvals of the required members of management, Grievant's pay increase lingered unprocessed in Human Resources for ten months.

5. Near the end of May 2017, Grievant went to see Drema Smith about the lingering discretionary pay increase. Grievant brought Ms. Smith the paperwork for the same. Soon thereafter, Ms. Smith took the paperwork to Secretary Tom Smith at one of their weekly Human Resources Board/Committee meetings. Ms. Smith, Secretary Smith, and Ms. Dempsey were in attendance. Ms. Smith testified that at that time, Grievant's pay increase had been approved, but had not been processed. Ms. Smith testified that she asked the others in attendance if they wanted it processed, and they said yes. Apparently, only after this exchange did Grievant's pay increase get processed.

6. Soon after Drema Smith took the matter to the Human Resources Committee/Board in either late May or in June 2017, Grievant's pay increase was promptly processed and given the effective date of June 24, 2017.

7. Getting a discretionary pay increase, such as the one at issue herein, processed requires layers of approval within the Department of Transportation Division of Highways, its Human Resources office, the Governor's Office, and the Division of Personnel ("DOP). After all required approvals are obtained, the paperwork is returned

to Human Resources for processing through the Oasis System so that payment of the new amount can be initiated.[2]

8. There are, apparently, no rules setting a deadline, or maximum time period, for the processing of discretionary pay increases. These are not considered "a priority" transaction within DOH's Human Resources Office. Some things that are considered priority transactions are hiring, promotion, and employee leave.

9. As the processing of discretionary pay increases is not a priority transaction, it appears that those in DOH's Human Resources work on processing them when time allows.

10. Given the extensive review and approval process that is currently required to process these discretionary increases, and as they are not "priorities," it is not unusual for some delays to occur.

11. DOH has asserted that the Oasis System does not permit the "back dating" and effective date for a discretionary pay increase. However, no one from Oasis or DOP were called to testify in this matter.

12. Natasha White did not work on the processing of Grievant's discretionary pay increase. As such, Ms. White had no personal knowledge of what occurred during that time. She only testified generally about discretionary pay increases and how they are processed and implemented. Ms. White did not testify as to who processed Grievant's pay increase.

13. Respondent did not offer any specific explanation as to what caused the ten-month delay in processing Grievant's discretionary pay increase other than the

[2] *See*, testimony of Grievant; testimony of Drema Smith; and, testimony of Natasha White.

processing of these pay increases is complicated, time-consuming, cumbersome, and are low priorities within its Human Resources Office.

14. Kathleen Dempsey was not called as a witness in this matter.

15. John Toomey and Jason Boyd were not called as witnesses in this matter.

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 (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*.

Grievant argues that Kathleen Dempsey, then DOH Human Resources Director, delayed the processing of her discretionary pay increase for ten months due to a "personal vendetta" she had against Grievant, and that such constitutes discrimination and harassment. As such, Grievant is seeking back pay for the ten months her paperwork was stuck in processing due to the acts of Ms. Dempsey. Respondent denies Grievant's claims, and asserts that the ten-month delay was the result of the complicated nature of processing these discretionary pay increases, and nothing more. Respondent further argues that back pay on discretionary increases is not available, and that the Grievance Board has no authority to order such. It is noted that the ALJ denied the Respondent's Motion to Dismiss after hearing the arguments of the parties at the commencement of the level three hearing, finding that the relief sought in this grievance is available.

In support of its position, Respondent revived some of the arguments included in its Motion to Dismiss, which was denied, and cites a line of Grievance Board cases that involve discretionary pay increases. It is true 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. The line of cases Respondent cites involve situations in which a Grievant was simply seeking back pay on a discretionary pay increase. *See Green v. Dep't of Amin. and Div. of Personnel,* Docket No. 2011-1577-DHHR (Oct. 1, 2012); *Hapney v. Pub. Employees Insurance Agency, Dep't of Admin., and Div. of Personnel,* Docket No. 2013-0861-DOA (Feb. 24, 2014); *Boggess v. Public Serv. Comm'n,* Docket No. 2015-0079-PSC (Mar. 25, 2015); *Rakes v. Div. of Highways*, Docket No. 2016-0564-DOT (Oct. 6, 2016).

As further support of its position, Respondent attached as an exhibit to its Motion to Dismiss a Memorandum from then Director of DOP, Sara P. Walker regarding "Settlement Agreements." Therein, Secretary Walker states, in part, as follows: [t]he following guidelines apply to the review and approval of settlement agreements. These guidelines do not apply to court orders or Level 3 grievance decisions: . . .**Discretionary Increases:** Retroactive wages will not be authorized for discretionary increases without a court order or Level 3 grievance decision. . . ."[3] This alone implies that the Grievance Board has the authority to grant back pay on a discretionary pay increase. Respondent

[3] *See*, Respondent's Motion to Dismiss, Exhibit A.

also attached as an exhibit a Memorandum dated December 21, 2015, from Ms. Dempsey in which she states, in pertinent part, as follows:

> [o]n December 10, 2015 Sara P. Walker, Director of the West Virginia Division of Personnel (DOP), issued a memorandum clarifying the requirements for settlement agreements. Pursuant to W. Va. Code R. 143-1-21.1, all back pay affecting classified employees must be accompanied by a legal settlement agreement that the Director of the DOP will review and must approve prior to being effectuated. The following requirements will not apply to court orders of Level 3 grievance decisions: . . .**Discretionary Increases:** Retroactive wages, commonly referred to as back pay, will not be authorized for discretionary increases. . . .[4]

In none of the cases cited by Respondent were the Grievants alleging that the employer's discretionary decisions were made or applied in a discriminatory manner. In this case, while Grievant, admittedly, did not use the words "discrimination" or "harassment" until her Response to the Motion to Dismiss, she had consistently asserted that the delay in processing her discretionary pay increase was caused by wrongdoing on the part of Ms. Dempsey. At the April 9, 2018, phone conference, the ALJ granted Grievant's request to amend her statement of grievance to include a claim of discrimination. Grievant's claim that Ms. Dempsey acted improperly, or in a discriminatory manner, to delay the processing of Grievant's discretionary increase distinguishes the matter from the earlier Grievance Board Decisions.

DOP and Ms. Dempsey's memoranda specifically address settlement agreements, and nothing else. They are not applicable to the internal processing of a discretionary pay increase. These memoranda apply only when an employer and employee reach a settlement to a dispute which is required to be approved by DOP. DOP's memorandum

[4] *See*, Respondent's Motion to Dismiss, Exhibit B.

makes clear that it requires a court order or Level Three grievance decision before it will approve back pay on a discretionary increase. Ms. Dempsey's memorandum is less clear, and seems to imply that DOH will not authorize back pay on discretionary pay increases ever. Nonetheless, this memo, which has been referred to as DOH policy, applies only to settlement agreements and nothing else.

In *Moore v. Dep't of Envtl. 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. (Emphasis added).

"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).

An employer clearly has discretion in deciding to award these pay increases. However, an employer is prohibited from making such discretionary decisions in a manner that is unreasonable and arbitrary and capricious. Further, logic dictates that an employer is prohibited from awarding, denying, or otherwise implementing these discretionary increases in a manner that is contrary to law, rule, or policy.

Grievant has alleged that even though her discretionary increase was properly submitted and approved, Ms. Dempsey discriminated against her by intentionally delaying the processing of such for ten months, and that such also amounts to harassment. Discrimination for purposes of the grievance process has a very specific definition. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or

are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Therefore, in order to establish a discrimination claim under the grievance statutes, an employee must prove the following by a preponderance of the evidence:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008) . "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "What constitutes harassment varies based upon the factual situation in each individual grievance." *Sellers v. Wetzel County Bd. of Educ.,* Docket No. 97-52-183 (Sept. 30, 1997).

Grievant testified at the level three hearing and called Drema Smith as a witness. It is undisputed that Grievant's discretionary pay increase lingered for ten months before Ms. Smith, at the urging of Grievant, checked on its status and brought it to the attention of the Human Resources Board/Committee. It appears obvious from the evidence presented that Ms. Smith's actions resulted in Grievant's pay increase getting processed and implemented effective only a few weeks later. However, Ms. Smith did not testify about any wrongdoing or impropriety on the part of Ms. Dempsey, or anyone else. Further, Ms. Smith was not asked and did not testify about anything said in the Human

Resources Board/Committee meeting other than when she asked them if they wanted it processed, the other members present, including Ms. Dempsey, said "yes."

Grievant testified that she believes that Ms. Dempsey had a personal vendetta against her and that Ms. Dempsey treated her differently than other employees. Grievant testified that, initially, Ms. Dempsey denied her the position she holds, and Grievant had to fight for it. Grievant also testified that on another issue involving Human Resources she had to file a grievance. Grievant did not call Ms. Dempsey to testify in this matter. With respect to the processing of the discretionary increase at issue herein, Grievant testified that her director had "a verbal altercation" with Ms. Dempsey over this discretionary increase. However, Grievant also did not call her director to testify at the level three hearing, and Grievant did not explain the specific details of the "verbal altercation," or what exactly occurred.

Under the statues and procedural rules regarding the grievance process, the formal rules of evidence are not applicable in grievance proceedings, except as to the rules of privilege recognized by law. *See* W. VA. CODE § 6C-2-4(a)(3). The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Accordingly, an administrative law judge must determine what weight, if any, that is to be accorded hearsay evidence in a disciplinary proceeding. *See Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010), *aff'd*, Kan. Co. Cir. Ct., Civil Action No. 10-AA-73 (June 9, 2011); *Warner v. Dep't of Health and Human Resources,* Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W.*

Va. Dep't of Health and Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with firsthand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *See Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010), *aff'd*, Kan. Co. Cir. Ct., Civil Action No. 10-AA-73 (June 9, 2011)*; Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997); *Sinsel v. Harrison County Bd. of Educ.,* Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't,* Docket No. 90-H-115 (June 8, 1990).

Grievant did not testify about the specific details of the alleged altercation between Ms. Dempsey and her director. She alleged that it was about her discretionary pay increase that was still pending at the time. While not entirely clear from her testimony, it appears that Grievant is asserting that her director told her about the incident. As such, this testimony should be treated as hearsay. Grievant did not present a written sworn

statement from her director, and did not allege that he was unavailable to testify. Accordingly, evidence pertaining to the alleged altercation is entitled to no weight.

Grievant also did not present any specific evidence of similarly situated employees being treated differently than she was treated with respect to the processing of her discretionary pay increase. She testified that she knew of other employees whose discretionary pay increases were processed in two months. No names were provided, and those people were not called as witnesses. The parties appeared to agree that a ten-month delay was unusual; however, Ms. White testified that the time for processing these increases varies from one to another, and that she had seen some completed in as few as two months. It is also undisputed that there is no set time frame during which the discretionary pay increases must be completed. Therefore, the ten-month delay in processing Grievant discretionary increase did not violate any law, rule, or policy. Given the evidence presented, the ALJ cannot conclude that the delay was arbitrary and capricious. Further, Grievant presented no direct evidence to suggest that Ms. Dempsey was intentionally delaying her discretionary pay increase. Grievant argues that Ms. Dempsey did these things, but no witnesses offered any testimony about what happened with Grievant's paperwork at Human Resources, or what actions Ms. Dempsey took with respect to the paperwork except for signing it. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.,* Docket No. 93-BOD-400 (Apr. 11, 1995)).

Based upon the evidence presented, the ALJ must conclude that Grievant did not meet her burden of proving her claims of discrimination or harassment by a preponderance of the evidence. While Grievant's testimony demonstrated that she and Ms. Dempsey have been at odds several times, Grievant did not establish by a preponderance of the evidence that Ms. Dempsey discriminated against her or harassed her. Grievant also did not prove by a preponderance of the evidence that the ten-month delay was arbitrary and capricious. The evidence presented certainly showed that DOH exhibited an incredible level of incompetence in processing the Grievant's discretionary pay increase; however, the same suggests that it is just as likely to be as incompetent when processing other discretionary pay increases. Given that there is no set time period during which the processing of such must be completed, delays such as this are all but guaranteed. The ALJ finds it ridiculous that the processing of Grievant's discretionary pay increase took ten months, and that all it took to get it completed was Ms. Smith asking the Human Resources Board/Committee about it during their weekly meeting. Nonetheless, the evidence presented did not establish that any law, rule, or policy was violated. 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. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

4. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "What constitutes harassment varies based upon the factual situation in each individual grievance." *Sellers v. Wetzel County Bd. of Educ.,* Docket No. 97-52-183 (Sept. 30, 1997).

5. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359

(Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.,* Docket No. 93-BOD-400 (Apr. 11, 1995)).

6. Grievant failed to prove her claims of discrimination and harassment by a preponderance of the evidence.

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: August 24, 2018.

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Carrie H. LeFevre
Administrative Law Judge