

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**BRYAN D. ROSEN, et al.<sup>1</sup>**  
**Grievants,**

**v.**

**Docket No. 2017-1487-CONS**

**DEPARTMENT OF HEALTH AND HUMAN  
RESOURCES/OFFICE OF THE SECRETARY  
and DIVISION OF PERSONNEL,  
Respondents.**

## **DECISION**

Grievants, Bryan Rosen, Roberta Wagner, and Robert Price, are employed by Respondent, Department of Health and Human Resources (“DHHR”), in the Department’s Office of Purchasing. Each of these employees filed grievances dated January 3, 5 and 9, 2017, which were identical. Grievants allege that they have been subject to discrimination because they have been denied a discretionary pay increase based upon the completion of the West Virginia Procurement Basic and Advanced Certification Programs while at least one employee in the same office and classification has received a discretionary pay increase for completion of the Basic Certification Program. Grievants seek to be granted a discretionary pay increase for completion of each of those programs.<sup>2</sup>

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<sup>1</sup> There are three Grievants; Bryan Rosen, Roberta Wagner, and Robert Price. Two original Grievants; Harriet Bess and Mary Teel, withdrew from the grievance and separate orders were entered on March 15, 2018, dismissing them as parties.

<sup>2</sup> Grievants filed a much more detailed statement of grievance with documents attached. The foregoing is a summary of the entire grievance statement which is incorporated herein. by reference.

A level one conference was convened on January 9, 2017, where the parties agreed to consolidate the grievances and waive level one. The Division of Personnel (“DOP”) was joined as a party respondent by Order dated January 17, 2017. A mediation was conducted on April 18, 2017, and Grievants appealed to level three on April 24, 2017. A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on February 27, 2018. The Grievants appeared *pro se*.<sup>3</sup> Respondent DHHR was represented by Mindy Parsley, Assistant Attorney General, and Respondent DOP was represented by Karen O’Sullivan Thornton, Senior Assistant Attorney General. The parties waived presentation of Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision at the close of the hearing.

### **Synopsis**

Grievants earned the West Virginia Procurement Basic and Advanced Certifications (“WVPBC”) and (“WVPAC”), more than twelve months prior to approval by DOP for the training to qualify recipients for a discretionary raise under the DOP *Pay Plan Policy* (“PPP”). In October another employee working in their unit received a discretionary pay increase for passing virtually the same requirements and receiving the WVPBC. Grievants contend that granting one employee a pay increase for having the WCPBC and not giving a raise to others who have completed virtually the same training constitutes discrimination as defined in the grievance procedure.

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<sup>3</sup> “*Pro se*” is translated from Latin as “for oneself” and in this context, means one who represents oneself in a hearing without a lawyer or other representative. *Black’s Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

Respondent proved that Grievants were not similarly situated to the employee who completed her WVPBC training after the course of study was approved by the DOP to qualify for a discretionary increase under the PPP.

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 Fact**

1. Grievant Bryan Rosen is employed by Respondent DHHR in the Office of Purchasing. His position is in the Administrative Services Manager 3 classification and he serves as the supervisor for the other two Grievants. He has been in the ASM 3 position for nine years and has employed by the State for twenty years.

2. Manager Rosen received his Procurement Basic Certification in December 2011. He received the Procurement Advance Certification in July 2013 and was recertified in July 2016.

3. Grievant Roberta Wagner is also employed by Respondent DHHR in the Office of Purchasing. At the time this grievance was filed, her position was in the Senior Buyer classification, but she has subsequently been promoted to a position in the Buyer Supervisor classification. Grievant Wagner has been employed as a Buyer for the DHHR for four years and has been employed by the State for twelve years.

4. Supervisor Wagner received her Procurement Basic Certification on March 10, 2011. She received her Procurement Advanced Certification on March 26, 2012, and was recertified on March 26, 2015.

5. Like his fellow Grievants, Grievant Robert Price Jr. is employed by Respondent DHHR in the Office of Purchasing. Like Ms. Wagner, his position is in the

Buyer Supervisor classification. Grievant Price has been employed as a Buyer for DHHR since 2012 and has ten years of total service with the State.

6. Supervisor Price received his Procurement Basic Certification on March 30, 2015. When the level three hearing was held, he had not completed the Procurement Advanced Certification.

7. The DOP *Pay Plan Policy* provides ways for employees to qualify for discretionary pay increases. For those pay increases to be implemented, the appointing authority of an agency must request that identified employees be given the increase, the employees must meet the specific qualifications set out in the PPP, and the increase must be approved by the DOP Director.

8. Section III.D.4 of the PPP provides for discretionary pay increases of up to ten percent of the employee's current salary based upon the employee completing approved "formal training, education, certification, or licensure," as long as those competencies are not required for the employee to meet the minimum qualifications for his or her job classification.

9. The conditions which must be met for employees to qualify for the "Professional Skills/Competence Development" pay increase are the following:

- a. The appointing authority must file with the [DOP] Director a list for prior approval of professional skills/competencies for the for the formal training, education, certification, or licensure and related competencies of the job classification for which this type of adjustment, and the amount of the adjustment. *Failure to obtain prior approval shall result in denial.* (Emphasis added).
- b. When the appointing authority requests a discretionary increase under this section for an employee, it shall provide a request for and documentation to the Division for all employees who acquire the same formal training, education, certification, or licensure.

- c. The formal training, education, certification, or licensure, must be received subsequent to appointment to the classification.
- d. The formal training, education, certification, or licensure must demonstrate the acquisition of competencies which are used in essential duties of the job class and/or position and are critical to the ongoing operations of the agency.
- e. The employee may receive an in-range salary adjustment under this section for which they applied and received reimbursement for employment-related educational expenses under the West Virginia Division of Personnel Education Expense Reimbursement/Leave Program Policy (DOP-P16).
- f. The request for the in-range salary adjustment shall be submitted within one (1) year of the employee obtaining the formal training, education, certification, or licensure.<sup>4</sup>
- g. No in-range salary adjustment shall be permitted under this policy for any recertification, regardless of whether the employee received an in-range salary adjustment for the original certification.<sup>5</sup>

10. On November 12, 2013, Grievant Rosen sent an email to Lynn Huddleston, Personnel Operations Manager in the DHHR Office of Human Resource Management. He inquired whether the Division of Purchasing's certification program qualifies for a discretionary increase pursuant to the DOP PPP. (Grievant Exhibit 1, Attachment B).

11. Manager Huddleston replied, **"We have disapproved requests in regard to the 'Division of Purchasing' certification."** (Emphasis in original), *Id.*

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<sup>4</sup> This requirement was added in the policy revision which took effect on July 1, 2016. However, the one-year rule had been consistently applied by the DOP for years. The addition of the provision in the policy was to give employees and agencies notice of the rule. (Level three testimony of Wendy Campbell, DOP Assistant Director for Classification and Compensation.)

<sup>5</sup> DOP-PPP-III.4.

12. The DOP approved the WV Procurement Certification Program to qualify for discretionary salary adjustments under the PPP on February 3, 2016.<sup>6</sup>

13. On August 11, 2016, Samantha S. Knapp, Manager of the Purchasing Division Communications and Professional Development Unit, sent an email with an attached letter to Grievants. Both the email and letter stated:

The Purchasing Division is please to inform you that the West Virginia Division of Personnel recently approved, Basic and Advanced, of the West Virginia Procurement Certification Programs as acceptable certifications for Pay Plan Policy eligibility under the Professional Skills/Competencies category.

The Division of Personnel Recognized this certification program with one caveat. Any individual who received this certification more that 12 months ago will not be considered eligible to receive a salary adjustment through the Pay Plan Policy, should their agency choose to submit a request as part of this Policy on their behalf.

(Grievant Exhibit 1, Attachment C). This was the first time that Grievants were notified that the Procurement Certification Program was eligible for PPP consideration.

14. By letter dated September 16, 2016, to DOP Assistant Director Campbell, Purchasing Director Tincher proposed that individuals who were certified prior to one year before the Program was approved for a PPP discretionary salary increase could drop out of the old certification program and be recertified under the new program recently approved by the DOP.

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<sup>6</sup> Grievant Exhibit 1, letter from DOP Acting Director, Joe Thomas, to Director of the Purchasing Division, David Tincher. See *also*, Respondent DOP Exhibit 3, Letter from Purchasing Director Tincher to DOP Assistant Director Campbell.

15. As part of his proposal, Director Tincher set out a number of changes which had “been made to advance and improve the West Virginia Certification Program since its implementation.”

16. DOP personnel closely reviewed these changes to see if they constituted a new certification program to allow individuals to receive a new certification rather than a be recertified under the program they completed originally. By letter dated October 3, 2016 DOP Acting Director Joe Thomas informed Purchasing Director Tincher of the DOP’s determination and stated *inter alia* the following:

Both DOP’s Classification and Compensation, and Organizational and Human Resource Development sections have reviewed the changes outlined in your September 16, 2016, letter and it is our determination that the basic structure of the program has not changed, and as such, the changes are not significant enough [to] be viewed as a new certification. The updating of the material to reflect changing times and needs is a function of any professional certification and is the reason why many associations require recertification to maintain credentials. Those individuals retaking these trainings would be, in essence, completing a recertification for which discretionary increases are not afforded under the Pay Plan Policy.

(Grievant Exhibit 1, Attachment A).

17. Alethea Greenhowe is an employee in the DHHR Office of Purchasing where the Grievants work. Her position is in the Buyer classification and Grievant Rosen is her supervisor.

18. Ms. Greenhowe completed the WVPBC program on October 13, 2016, and Grievant Rosen submitted the documentation to the DOP to get her a discretionary pay increase pursuant to the PPP. The five percent increase was approved by the DOP and became effective on January 1, 2017.

19. Grievants filed their grievance forms within fifteen days of the effective date of the pay increase granted to their coworker.

### **Discussion**

This grievance does not challenge a disciplinary action, so Grievants bears 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.*

Grievants argue that they are subject to discrimination as the term is defined in the Public Employees Grievance Procedure because a coworker in the same unit, performing the same or similar work, received a discretionary pay increase under the DOP *Pay Plan Policy* after receiving the Division of Purchasing Procurement Basic Certificate. The coworker completed a significant training program to qualify for the certification. Grievants have completed virtually the same training program and have received the same certification<sup>7</sup> but have been declared ineligible for the discretionary pay increase.

Respondent DOP argued that the appointing authority for Grievants, DHHR, never requested that Grievants be considered for the discretionary increase as required by the

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<sup>7</sup> Two Grievants have qualified for the Procurement Advanced Certification. It is not disputed that someone in the proper classification who now completes the training to qualify for this certification and makes a timely request through their agency will receive an additional discretionary pay increase.



pay plan policy. DOP further avers that if the DHHR had requested that Grievants receive the discretionary increase, that request would have been denied because the request would have been made more than one year after the training had been approved by the DOP for consideration under the PPP policy. DOP asserts that Grievants are not similarly situated to Ms. Greenhowe which is an essential element in the proof of discrimination.<sup>8</sup>

For purposes of the grievance procedure, discrimination is defined as "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). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (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).

Grievants argue that they are similarly situated to Ms. Greenhowe because they do very similar work and have received the virtually the same training<sup>9</sup> for which she received a discretionary salary increase. They note that the denial of the increase for them is not related to actual job responsibilities because they perform similar work. It is

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<sup>8</sup> Respondent DHHR took a neutral position in this action and made no argument for or against granting the grievances.

<sup>9</sup> See FOF 16 *supra*.

undisputed that the certification is a benefit in their jobs as well as a benefit to Ms. Greenhowe. Finally, Grievants point out that they did not agree to being treated differently regarding the discretionary salary increase.

Respondent DOP points out that in order to receive the Professional Skills/Competencies Development discretionary salary adjustment, all of the requirements of the *Pay Plan Policy* must be followed. For those pay increases to be implemented the appointing authority of an agency must request that identified employees be given the increase.

Grievants did not prove that the DHHR ever asked that they be considered for the discretionary raise. The only evidence on this point was the email message from Lynn Huddleston stating, **“We have disapproved requests in regard to the ‘Division of Purchasing’ certification.”**<sup>10</sup> Assistant Director Campbell noted that this might be an answer given by the DOP staff, but it would be incomplete. DOP probably disapproved such requests because neither the Division of Purchasing nor the DHHR requested that the specific training be examined for inclusion in the pay plan.

Before any training may be considered for a discretionary increase, an agency must request that the training be considered and submit information and documentation regarding the program. The DOP Organizational and Human Resource Development section does significant review of the training to determine if it applies to the targeted job classifications and the percentage of increase the program will qualify an employee to

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<sup>10</sup> See FOF 12 *supra*.

receive.<sup>11</sup> There is no proof that either the Purchasing Division or the DHHR made such a request prior to the one leading to the approval on February 3, 2016.

Additionally, the policy specifically provides “The request for the in-range salary adjustment shall be submitted within one (1) year of the employee obtaining the formal training, education, certification, or licensure” DPO-PPI-III.4(f). There is no dispute that the none of the Grievants were recommended by their appointing authority for a discretionary pay increase under the statute within one year of completing the certification training. Consequently, the PPP was not followed in a way that would qualify Grievants to receive the discretionary pay increase for completing the training programs.

Regarding the discrimination allegation, Respondent DOP correctly points out that Grievants and Ms. Greenhowe are not similarly situated regarding the discretionary salary adjustment. The DHHR, through her supervisor (Mr. Rosen) requested that Ms. Greenhowe be considered for the discretionary increase after that program had been presented to the DOP and approved for inclusion in the PPP. That did not happen with Grievants. Additionally, the request for Ms. Greenhowe was made within twelve months of her completing the training program. The request for Grievants was not made within one year of completion of the program.

There is no doubt that Grievants are similarly situated with Ms. Greenhowe in relation to their duties and responsibilities. However, there are significant differences in their situations related to their applications for the discretionary pay increase at issue.

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<sup>11</sup> See Respondent Exhibit 2, the PPI Certification Review Worksheet utilized to examine the Procurement Certification Program. Education and training programs may be approved for a salary increase between one and ten percent depending upon the length and complexity of the training program among other factors.

Grievants are not similarly situated to Ms. Grievance with regard to the granting of the discretionary pay increase under the DOP PPP. No discrimination was proven related to the granting of that increase. Accordingly, the consolidated grievances are DENIED.

As a final note Grievants' frustration is understandable. As Director Tincher pointed out in his letter to the DOP:

"Multiple agency purchasers who have obtained their basic and/or advanced-level certification(s) shortly after the Program's implementation, and prior to the formal approval of the program by DOP for inclusion in the Pay Plan Policy, have [like Grievants] expressed their concern over the disparity they believe would occur if they are permanently prohibited from obtaining discretionary increases while those who had obtained their certifications within the last year would be eligible. (Respondent DOP Exhibit 2).

It appears that DOP appreciated the concerns raised by the Purchasing Division and worked with that agency to provide a way to alleviate the problem. Unfortunately, that effort fell short. Now Grievants have attempted another approach to seek redress for the situation which the long serving purchasers find themselves. This approach also did not fit within the legal framework Grievants have put forward. The agencies involved may still find a way to address these concerns.

### **Conclusions of Law**

1. Grievants bears the burden of proof in this non-disciplinary matter. 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).

2. For purposes of the grievance procedure, discrimination is defined as "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).

3. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(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).

4. Grievants did not prove by a preponderance of the evidence that they were similarly situated to their coworker who received the discretionary salary increase or that they were subjected to discrimination as that term is defined in W. VA. CODE § 6C-2-2 (d).

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: May 2, 2018.**

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**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**