THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LATICIA J. TRENT,
Grievant,

v. **Docket No. 2018-0672-DOT**

DIVISION OF MOTOR VEHICLES,
Respondent.

DECISION

Grievant, Laticia J. Trent, is employed by Respondent, Division of Motor Vehicles ("DMV"). On November 7, 2017, Grievant filed this grievance against Respondent in which she attached a one-page single-spaced attachment in which she essentially protests her non-selection for a merit increase. For relief, Grievant seeks "[t]o receive a merit increase."

Following the December 20, 2017 level one conference, a level one decision was rendered on January 12, 2018, denying the grievance. Grievant appealed to level two on January 17, 2018. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on April 27, 2018. A level three hearing was held on July 31, 2018, before the undersigned at the offices of the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Cassandra Lynn Means, Assistant Attorney General. This matter became mature for decision on August 29, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Transportation Services Manager 1. Grievant protests her non-selection for a merit increase. Grievant asserts Respondent failed to disseminate or adhere to its own guidelines regarding the merit increases and that the distribution of merit increases was arbitrary and capricious. Grievant failed to prove Respondent's decision not to grant Grievant a merit increase violated any law, rule, policy, or procedure or that it was otherwise arbitrary and capricious. 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. Grievant is employed by Respondent as a Transportation Services Manager 1.

2. Grievant has been employed with the Respondent since March 10, 2003, and has been employed as a Transportation Services Manager 1 for approximately fourteen years.

3. Grievant manages Respondent's Welch Regional Office, which is one of twenty-five regional DMV offices.

4. Grievant manages six employees including a supervisor, a lead customer service representative, and multiple customer service representatives.

5. During the relevant timeframe, Grievant reported to Roger L. Beane,

Regional Office Operations Manager[1], who reported to Linda K. Ellis, Transportation Services Director 2.[2]

6. Merit increases had been unavailable for state employees since 2005, but in 2017 merit increases were again allowed.

7. Merit increases are termed by the Division of Personnel as "salary advancements," which are governed by its *Pay Plan Policy*.[3] "Salary advancement" is defined as "[a] discretionary increase in compensation granted in recognition of the quality of job performance." *Pay Plan Policy,* Section II.BB. The policy states in relevant part:

> A salary advancement shall be based on quality performance as evidenced by the Employee Performance Appraisal 3 (EPA-3) annual employee performance appraisal form for the agency's most current established performance review cycle and shall not be given to any employee whose documented performance appraisal rating is below Meets Expectations.

Pay Plan Policy, Section III.C.2.

8. In the summer of 2017, Respondent's Commissioner notified Ms. Ellis to prepare for merit increases to occur. As a result, Ms. Ellis instructed all Regional Coordinators to seek recommendations from their Regional Office Managers for one or

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[1] This position was also referred to as "Regional Office Coordinator" in testimony, but Mr. Beane referred to himself by the title of "Regional Office Operations Manager" in his email.

[2] This position was also referred to as "Director of Regional Offices" in testimony. At some time after the initial decision was made, but before Grievant first protested the decision in email, Ms. Ellis became the Director of Investigations, Security, and Support Services.

[3] During the level three hearing, Respondent submitted the Pay Plan Policy effective December 1, 2017, which was not the policy in place at the time of the merit increase decision. Respondent was allowed one week to supplement the record with the Pay Plan Policy in effect at the time of the merit increase decision, which exhibit was received by email on August 8, 2018, and is accepted as an addendum to Respondent Exhibit 5 and is the policy quoted herein.

two people they felt deserved a merit increase and to recommend Regional Office Managers they believed deserved a merit increase.

9. In response, Mr. Beane sent the following email to his subordinate Regional Office Managers, including Grievant: "Please submit 1 or 2 people that you feel is deserving of a merit increase. This is in no way a concrete thing or a done deal, please do not discuss with employees-but if they are considering merit raises I want our employees considered first[.]"

10. Grievant replied to the email, "Me and me."

11. By *Memorandum* issued September 14, 2017, the Department of Transportation distributed guidelines for awarding merit increases. Each agency within the Department of Transportation was given an allocation for increases to be awarded in two rounds. Of relevance to this grievance, the guidelines required as follows: "Increases shall be based on 2016 performance evaluations and any other recorded measures of performance that enhance or detract from an employee's overall record. Equitable pay relationships and length of service may be considered as a secondary factor." Further, "5% or 10% are considered the standard raises to be granted."

12. Although the memorandum established certain requirements for awarding the merit increases, Ms. Ellis did not direct that new recommendations be made by managers in accordance with those requirements. Instead, Ms. Ellis evaluated the existing recommendations using the memorandum requirements.

13. Employees were compared and considered for merit increase in three separate groups, coordinators, managers, and regular employees.

14. Ms. Ellis, in a collaborative effort with Regional Office Operations employees, chose alternate employees to receive merit raises when the employee initially recommended by the manager did not meet the criteria to receive a merit increase or when, like in Grievant's office, no subordinate employee was recommended by the manager.

15. Only a limited amount of funding was available for merit increases and agencies were directed to submit recommended employees in two rounds, the first in September 2017 and the second in December 2017.

16. In total, Ms. Ellis' section was permitted to give merit increases to only eighty-seven employees of the section's more than three hundred employees, which included five managers. Ms. Ellis recommended the same percentage of employees in each of the three groups, which was a total of five managers in the manager group.

17. Ms. Ellis reviewed and signed all of the final recommendations for the employees in her section and Respondent's Commissioner made the final decision on the merit increases.

18. Grievant was considered for merit increase in the "mangers" group, but was not one of the five managers Ms. Ellis recommended to receive an increase. The five managers who were chosen for merit increases had the same or higher scores on their performance evaluations and had demonstrated efforts above and beyond that of the other managers.

19. Of Grievant's subordinate employees, because Grievant did not make a recommendation, Ms. Ellis selected Cindy Snow as the employee to receive a merit

increase from Grievant's office. Ms. Snow served as the supervisor in the office, and directly reported to Grievant.

20. Ms. Snow's merit increase was approved and awarded during the first round of raises.

21. On October 31, 2017, Grievant sent an email to Ms. Ellis calling the decision to give Ms. Snow, rather than Grievant, a raise "unjust" and "unfair." Grievant questioned who had submitted the names for Grievant's office, protested that Ms. Snow had already received an increase in her salary previously, and questioned why, if not Grievant, another employee instead of Ms. Snow was not selected for merit pay.

22. Ms. Ellis responded, "I do feel like this is an assault on my integrity," and stated she was "shocked and quite disturbed by your reaction." Ms. Ellis went on to recognize Grievant's good service and explain that the number of employees who could be given raises was restricted. Ms. Ellis explained that the prior salary increase Ms. Snow had received was for internal equity, not merit, and that Grievant had not received a similar increase because she was not out of equity with other manager salaries. Ms. Ellis explained the process used to select employees for merit increases. Ms. Ellis then stated, "If you thought another employee should have been considered, you had the opportunity to submit that name to us for consideration. By not recommending an employee you gave up your opportunity to be involved in the merit increase."

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 the distribution of merit increases and Respondent's decision to exclude Grievant from merit pay were arbitrary and capricious. Grievant asserts Respondent failed to disseminate or adhere to its own guidelines regarding the merit increases. Respondent asserts it followed the applicable guidelines in making the merit pay decision, that its actions were not arbitrary and capricious, and that Grievant failed to prove any violation of statute, rule, policy or procedure, or that she was otherwise entitled to a merit increase.

Merit pay, officially designated as "salary advancement," is defined as "[a] discretionary increase in compensation granted in recognition of the quality of job performance." Division of Personnel *Pay Plan Policy*, Section II.BB. The policy states in relevant part:

> A salary advancement shall be based on quality performance as evidenced by the Employee Performance Appraisal 3 (EPA-3) annual employee performance appraisal form for the agency's most current established performance review cycle and shall not be given to any employee whose documented performance appraisal rating is below Meets Expectations.

Pay Plan Policy, Section III.C.2. "[A]n employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious, or contrary to law or properly-established policies or directives. *Little v. W. Va. Dep't of Health & Human Res.*, Docket No. 98-HHR-092 (July 27, 1998); *Salmons v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Terry v. W. Va. Div. of Highways*,

Docket No. 91-DOH- 185 (Dec. 30, 1991); *Osborne v. W. Va. Div. of Rehab. Serv.*, Docket No. 89-RS-051 (May 16, 1989)." *Johnson v. Div. of Highways*, Docket No. 2017-2504-CONS (Dec. 22, 2017).

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)). "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).

In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant asserts that Ms. Ellis excluded her from consideration because she nominated only herself and that her leave balances were improperly considered against her, which Ms. Ellis disputes. Therefore, it is necessary to evaluate Ms. Ellis' credibility. Ms. Ellis was credible. Ms. Ellis' demeanor during her testimony was calm, professional, and direct. She demonstrated an appropriate memory of events. Her explanation of what she meant by the statements in her emails is plausible. While Ms. Ellis was obviously

upset with the tone of Grievant's email in which Grievant accused Ms. Ellis of being unfair, this does not provide sufficient evidence of bias against Grievant to find Ms. Ellis not credible.

It does appear Ms. Ellis failed to adhere to the Department of Transportation guidelines. Prior to the issuance of the guidelines memorandum, Ms. Ellis instructed the regional office coordinators to ask managers for recommendations of employees who should receive merit increases without any explanation of the criteria the managers should use. After the memorandum was issued, Ms. Ellis did not instruct her subordinates to make recommendations based on the requirements of the memorandum. Instead, Ms. Ellis asserts she applied the memorandum criteria to the pool of already-recommended employees, who had been recommended based on no stated criteria.

However, Grievant failed to prove she was impacted by the initial failure to adhere to the guidelines memorandum. Although it is not clear from her PFFCL, it appears Grievant asserts she was not considered for a merit increase due to her response to the initial email requesting recommendations. Grievant's evidence for that contention is the text of the email Ms. Ellis sent in response to Grievant's email complaining of her non-selection for merit pay. Reading the disputed statement in context with the entire email exchange, Ms. Ellis' response was clearly offered in explanation to Grievant's contention that someone other than Ms. Snow should have been selected. Ms. Ellis' statement meant nothing more than that Grievant gave up her opportunity to recommend which of her subordinate employees would receive a raise because she had nominated only herself. Ms. Ellis consistently explained Grievant was included in the pool of recommended managers for the merit increase but was not selected. As Grievant was

considered for a merit increase, the initial failure to specify that the recommendation be made based on the criteria outlined in the later guidelines did not impact Grievant's consideration for a merit increase.

Grievant appears to argue that the decision to deny her a merit increase was arbitrary and capricious because she should have received a merit increase rather than her subordinate employee, because her leave balances where inappropriately considered against her, and because more managers received merit increases than Ms. Ellis testified. Ms. Ellis testified without rebuttal that she considered her subordinates for merit pay within three groups of like employees: coordinators, managers, and regular employees. Grievant was considered within the group of managers and Ms. Snow was considered in the group of regular employees. Making merit increase decisions based on the comparison of like employees is reasonable and not arbitrary and capricious. Although Ms. Ellis testified that leave balances were considered, she clarified that only employees who were abusing leave were excluded from merit increases and that Grievant was not excluded based on her use of leave. Grievant points out that Ms. Ellis' testimony regarding how many managers received merit pay did not match the list of employees who received merit pay. Ms. Ellis was only the director of one section of the DMV and the list entered into evidence by Grievant appears to include all DMV employees, not just those subordinate to Ms. Ellis. This is supported by the total number of employees who received merit increases, which was one hundred sixty-four employees. Ms. Ellis credibly testified that only eighty-seven out of her more than three hundred employees received merit pay.

Grievant provided no evidence of her own performance or the performance of any other manager that did receive merit pay. Ms. Ellis' testimony regarding the five managers she asserts received merit pay all included factors that were properly considered under the Department of Transportation's guidelines. Grievant failed to prove Respondent's decision not to grant Grievant a merit increase violated any law, rule, policy, or procedure or that it was otherwise arbitrary and capricious.

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 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*.

2. "[A]n employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious, or contrary to law or properly-established policies or directives. *Little v. W. Va. Dep't of Health & Human Res.*, Docket No. 98-HHR-092 (July 27, 1998); *Salmons v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Terry v. W. Va. Div. of Highways*, Docket No. 91-DOH- 185 (Dec. 30, 1991); *Osborne v. W. Va. Div. of Rehab. Serv.*, Docket No. 89-RS-051 (May 16, 1989)." *Johnson v. Div. of Highways*, Docket No. 2017-2504-CONS (Dec. 22, 2017).

3. 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)). "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).

4. "'[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).

5. Grievant failed to prove Respondent's decision not to grant Grievant a merit increase violated any law, rule, policy, or procedure or that it was otherwise arbitrary and capricious.

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: October 12, 2018

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Billie Thacker Catlett
Chief Administrative Law Judge