

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CINDY DAWN BURKE,

Grievant,

v.

Docket No. 2017-2135-DEA

DIVISION OF REHABILITATION SERVICES,

Respondent.

DECISION

Grievant, Cindy Burke, is employed by Respondent, Division of Rehabilitation Services. On April 29, 2017, Grievant filed this grievance against Respondent stating, "A pay raise is requested per the 'internal equity' section of the WV DOP pay plan policy (section D3, page 9/15). This was requested via email on 4/24/17 and was denied on 4/25/17". For relief, Grievant seeks "A 10% pay raise as specified in the policy".

A level one hearing was held on May 1, 2017. A level one decision was rendered on May 26, 2017, denying the grievance. Grievant appealed to level two on June 8, 2017. A mediation session was held on November 6, 2017. Grievant appealed to level three of the grievance process on January 24, 2018. A level three hearing was held on March 19, 2019, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant was represented by Jamie J. Beaton, President, UE Local 170, West Virginia Public Workers Union. Respondent appeared through its party representative, Assistant Director Aaron Johnson, and was represented by Mark S. Weiler, Assistant Attorney General. This matter became mature for decision on April 23, 2019, after Respondent's submission and Grievant's non-submission of written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant requested a discretionary pay raise from Respondent based on internal equity. Respondent refused to process the request through the Division of Personnel. Grievant protests Respondent's refusal. While internal equity pay raises must be approved by the DOP, Respondent has the discretion to submit to the DOP an employee's request for an internal equity pay raise. Grievant did not prove that Respondent's refusal was arbitrary and capricious or in violation of any law or policy. 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, Division of Rehabilitation Services (DRS). She has been a Senior Disability Evaluation Specialist, pay grade 15, since January 2013. (Grievant's testimony and Respondent's Exhibit 7)
2. In August 2016, Grievant transferred to Quality Assurance. This move was lateral and did not involve a pay increase or change in pay grade. (Grievant's testimony and Respondent's Exhibit 7)
3. At all relevant times, Grievant was being paid within the DOP's pay range for the pay grade to which her job classification is assigned. (Respondent's Exhibits 7 & 4)
4. On April 25, 2017, Grievant requested an "internal equity" pay raise in accordance with the Department of Personnel (DOP) Pay Plan Policy. (Grievant's testimony and Grievant's Exhibit 1 & 4)

5. On April 27, 2017, Respondent denied Grievant's request, stating that "pay equity determinations are discretionary and that the agency is in a hiring freeze now and not approving pay equity requests." (Grievant's Exhibit 1)

6. On July 18, 2017, the Governor's office issued a memorandum lifting the moratorium on Salary Advancements/merit increases. (Respondent's Exhibit 6)

7. Wendy Campbell is the Assistant Director of the DOP Classification and Compensation Section.

8. In order to award a merit increase, Respondent must submit a Request for Approval to the DOP. (Ms. Campbell's testimony)

9. Respondent has the discretion to submit to the DOP a Request for Approval after an employee demands an internal equity pay raise. (Grievant and Ms. Campbell's testimony)

10. In its statement of purpose, the DOP Pay Plan Policy states, in part, "[w]hen increases are discretionary, appointing authorities have no obligation to pursue and employees have no entitlement to receive them. Such increases are subject to authorization or limitation by the Governor's Office, appointing authority and/or the State Personnel Board." West Virginia Division of Personnel Pay Plan Policy. At I. (Effective in 1994 and revised on December 1, 2017).

11. Under "Internal Equity", the DOP Pay Plan Policy states, in part, that "[i]n situations in which one or more permanent, current employees are paid no less than 20% less than other permanent, current employees in the same job classification and within the same agency-defined organizational work unit, the appointing authority may submit the Request for Approval form recommending an in-range salary adjustment of up to 10%

of current salary to all eligible employees in the organizational unit whose salary is at least 20% less than other employees in the agency-defined work unit.” West Virginia Division of Personnel Pay Plan Policy. At III.E.2. (Effective in 1994 and revised on December 1, 2017).

Discussion

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 (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 contends that Respondent should have submitted her request for an “internal equity” pay raise to the DOP because another employee in her job classification and pay grade makes significantly more than her. Respondent counters that it has sole discretion to submit requests for “internal equity” pay raises to the DOP and to then grant a pay raise if approved by the DOP. Respondent asserts it was justified in denying Grievant’s request because of budget and funding issues and because it was not giving out any raises at the time of her request, implicitly arguing this denial was not arbitrary and capricious.

Respondent has the discretion to submit requests for “internal equity” pay raises to the DOP and to grant internal equity pay increases once approved by the DOP. Under “Internal Equity”, the DOP Pay Plan Policy states, in part, that “the appointing authority

may submit the Request for Approval form recommending an in-range salary adjustment . . . ”. At III.E.2. (Effective in 1994 and revised on December 1, 2017). The word “may” is used to denote optional and discretionary action rather than mandatory conduct. BLACK’S LAW DICTIONARY 979 (6th ed. 1990). In its statement of purpose, the DOP Pay Plan Policy states, in part, that “[w]hen increases are discretionary, appointing authorities have no obligation to pursue and employees have no entitlement to receive them. Such increases are subject to authorization or limitation by the Governor’s Office, appointing authority and/or the State Personnel Board.” At I.

“The granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of the Respondent.” *Harris v. Dep’t of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007). This Board has also held that it is not discriminatory for employees in the same classification to be paid different salaries as long as they are paid within the appropriate pay grade. *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994). See also, *Thewes and Thompson v. Dep’t of Health & Human Res./Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009); *Buckland v. Div. of Natural Res.*, Docket No. 2008-0095-DOC (Oct. 6, 2008); *Boothe, et al., v. W. Va. Dep’t of Transp./Div. of Highways*, Docket No. 2009-0800-CONS (Feb. 17, 2011); *Lott v. Div. of Highways and Div. of Personnel*, Docket No. 2011-1456-DOT (Sept. 9, 2014); *Bowser, et al., v. Dep’t of Health & Human Ser./William R. Sharpe, Jr. Hosp.*, Docket No. 2013-0247-CONS (Feb. 13, 2014). In comparing wages with those of a much higher paid coworker under the same classification and pay grade, Grievant implies that Respondent is obligated to

increase her pay. This argument is without merit. “In *Largent* this Court recognized that, although State employees doing same work had to be placed in same classification, there could be pay differences within that classification.” *Hammond v. West Virginia Department of Transportation, Division of Highways and the Divisions of Personnel*, 229 W.Va. 108, 727 S.E.2d 652, 655 (2012). Respondent pays Grievant and the coworker to whom she compares herself within the DOP’s pay range for the pay grade to which their job classification is assigned.

While the undersigned must still ensure that Respondent adheres to certain standards when paying an employee within pay range for her pay grade, this oversight is limited in scope. “The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of the *Division of Personnel*. *Moore v. W.Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. See *Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989).” *Lindsey Gregory et al. v. Division of Juvenile Services*, Docket No. 2018-0179-CONS (February 12, 2018). “[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). Respondent informed Grievant that it was having budgetary problems, was in a hiring freeze, and was not approving pay equity requests. This is a sound basis for not processing a pay raise request. Grievant implies that Respondent did not have the budget and monetary restrictions it represented. However, Grievant did not present any authority as to how having the ability to pay her more would obligate Respondent to provide her a pay raise. The undersigned therefore does not have the leeway to second guess Respondent’s judgment.

Accordingly, the 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 (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. “The granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of the Respondent.” *Harris v. Dep’t of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007).

3. It is not discriminatory for employees in the same classification to be paid different salaries as long as they are paid within the appropriate pay grade. *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994). See also, *Thewes and Thompson v. Dep’t of Health & Human Res./Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009); *Buckland v. Div. of Natural Res.*, Docket No. 2008-0095-DOC (Oct. 6, 2008); *Boothe, et al., v. W. Va. Dep’t of Transp./Div. of Highways*, Docket No. 2009-0800-CONS (Feb. 17, 2011); *Lott v. Div. of Highways and Div. of Personnel*, Docket No. 2011-1456-DOT (Sept. 9, 2014); *Bowser, et al., v. Dep’t of Health & Human Ser./William R. Sharpe, Jr. Hosp.*, Docket No. 2013-0247-CONS (Feb. 13, 2014).

4. “In *Largent* this Court recognized that, although State employees doing same work had to be placed in same classification, there could be pay differences within that classification.” *Hammond v. West Virginia Department of Transportation, Division of Highways and the Divisions of Personnel*, 229 W.Va. 108, 727 S.E.2d 652, 655 (2012).

5. “The Grievance Board’s role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of the Division of Personnel. *Moore v. W.Va. Dep’t of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. See *Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989).” *Lindsey Gregory et al. v. Division of Juvenile Services*, Docket No. 2018-0179-CONS (February 12, 2018).

6. “[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).

7. 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).

8. Grievant failed to prove that Respondent’s decision to not submit Grievant’s request for an “internal equity” pay raise 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: May 16, 2019

Joshua S. Fraenkel
Administrative Law Judge