THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SAM CASSELLA,

Grievant,

v. **Docket No. 2018-0565-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Sam Cassella, is employed by Respondent, Division of Highways. On October 12, 2017, Grievant filed this grievance against Respondent stating, "Grievant informed that he was not 'eligible' for merit raise". For relief, Grievant seeks "[t]o be made whole in every way including merit raise".

On October 20, 2017, the Grievance Board received the level one grievance evaluator's Order Waiving Grievance to Level Two. On October 30, 2017, an Order of Joinder was issued joining the West Virginia Division of Personnel (DOP) as a party Respondent. On April 18, 2018, an Order Denying Motion and Dismissing Party removed DOP as a party, since DOH "now has 'full authority to exercise its discretion regarding the application of the Division of Personnel's system of compensation for positions in the division within the classified and classified-exempt service. . . .' W.VA. CODE § 17-2A-24(c)(7)." A mediation session was held on September 7, 2018. Grievant appealed to level three of the grievance process on September 7, 2018. A level three hearing was held on April 3, 2019, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared in person and by Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent appeared through its party

representative, Natasha White, and by, Jesseca Church, Esq. This matter became mature for decision on May 13, 2019, after receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant has been employed in the Transportation Worker class series with Respondent since 2008. In 2017, Respondent refused to consider Grievant for a merit raise. The Department of Personnel Pay Plan Policy then in effect declared employees in the Transportation Worker class series ineligible for merit raises. The West Virginia Division of Highways Pay Plan Policy, which does not exclude Grievant from merit raises, now controls. However, the Governor issued a decade long freeze on merit raises, lifting the freeze for a short period in 2017, before reinstating it. Accordingly, this grievance lamenting the denial of a merit raise 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 as a Transportation Worker 2 Craftworker with Respondent, West Virginia Division of Highways (DOH), in Respondent's District 4.

2. Grievant has been employed by Respondent since 2008.

3. Natasha White has been Respondent's Assistant Director of Human Resources Division since 2014.

4. Shortly before this grievance was filed on October 12, 2017, DOH's Director of Human Resources, Lora Witt, informed Grievant he was ineligible to receive a merit raise. (Grievant's testimony)

5. A merit raise is a discretionary pay increase based on employee performance. A merit raise is not mandatory or automatic even if an employee meets all eligibility requirements. (Ms. White's testimony and Grievant's Exhibits 1 & 2)

6. The Governor decides when to allow merit raises. (Ms. White's testimony)

7. The Governor has frozen the issuance of merit raises for the past decade, allowing them only for a short period in 2017. (Ms. White's testimony)

8. The relevant governing policy at the time Grievant sought to receive a merit raise in October 2017, was the West Virginia Division of Personnel (DOP) Pay Plan Policy, as revised on July 1, 2017. (Grievant's Exhibit 1)

9. This version of the DOP Pay Plan Policy excluded all employees in the Transportation Worker class series from discretionary pay differentials such as merit raises. (Ms. White's testimony and Grievant's Exhibit 1)

10. In October 2017, Grievant was, as now, employed within the Transportation Worker class series.

11. In October 2017, Grievant was ineligible for a merit raise under the DOP policy then in effect.

12. Grievant chose not to participate in Respondent's Transportation Workers Apprenticeship Program (TWAP) at the time of its implementation in 2015. (Grievant's testimony)

13. Employees enrolled in TWAP are ineligible for merit raises and are instead eligible for tier raises based on criteria which include acquisition of skills centered on equipment training and certifications. (Ms. White's testimony)

14. During the short period the Governor permitted merit raises in 2017, Respondent issued merit pay raises based on two employee criteria: meeting expectations on a current annual employee performance appraisal (EPA3) and having no disciplinary action within the prior twelve months. (Ms. White's testimony)

15. Grievant has not received an EPA3 since his first year of post-probationary employment about ten years ago. (Grievant and Ms. White's testimony)

16. Respondent must issue EPAs to its employees at least annually. (Ms. White's testimony)

17. Completed EPA3s are to be submitted to DOH's human resources unit by April of each year. (Ms. White's testimony)

18. Respondent could not explain its failure to comply with its duty to conduct annual EPAs.

19. Subsequent to the short period in which merit raises were allowed in 2017, the Governor renewed the current freeze on merit raises. (Ms. White's testimony)

20. On December 1, 2017, DOP issued a revised Pay Plan Policy that removed the provision excluding DOH employees in the Transportation Worker series from merit raises. (Grievant's Exhibit 2)

21. Respondent did not inform Grievant of the December 1, 2017, revision to the DOP Pay Plan Policy. (Grievant's testimony)

22. Effective August 1, 2018, Respondent implemented its own Pay Plan Policy, which does not exclude Grievant from eligibility for a merit raise. (Ms. White's testimony and Respondent's Exhibit 1)

23. Grievant may choose to participate in TWAP at any time in order to take advantage of its tier raises. (Ms. White's testimony)

24. Merit raises are currently disallowed by order of the Governor, are discretionary rather than mandatory, have other restrictions such as no disciplinary action within the previous twelve months, and, because they are limited in scope and amount, cannot be granted to every eligible employee.

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 discriminated against him in not considering him for a merit raise, even though the DOP Pay Plan Policy then in effect made him ineligible; that Respondent was obligated to inform him of the December 1, 2017, change to the DOP Pay Plan Policy which removed the exclusion from merit raises of employees in the transportation worker series; that Respondent's failure over the last decade to issue Grievant annual EPAs hampered his ability to receive a merit raise; and that DOP's rationale for excluding employees in the transportation worker series from merit raises should not apply to Grievant because he turned down the opportunity to receive regular tier raises when he chose not to enroll in the Transportation Workers Apprenticeship

Program (TWAP). Respondent counters that it acted within its authority in informing Grievant he was ineligible for a merit raise; that it had no obligation to even consider Grievant's request for a merit raise; that its failure to perform EPAs on Grievant had no bearing on his failure to receive a merit raise; and that it cannot now grant a merit raise due to the Governor's freeze thereon.

Respondent has immense discretion when it comes to giving an employee a merit raise. "[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). Respondent established that it was prohibited from giving Grievant a merit raise under the policy in effect on October 1, 2017, when it told Grievant he was ineligible. The DOP Pay Plan Policy issued on July 1, 2017, specifically excludes all employees in the Transportation Worker class series from any discretionary pay differentials such as merit raises. The next revised Pay Plan Policy, which lifted this ineligibility, was issued on December 1, 2017. Grievant has been in the Transportation Worker class series since he began working for Respondent in 2008, and was therefore ineligible for a merit raise in October 2017, when he made his request.

Respondent's denial was not arbitrary and capricious. 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 acted reasonably in informing Grievant that he was ineligible because it had no leeway under the DOP Pay Plan Policy then in effect to even consider Grievant for a merit raise.

Grievant argues that this denial of a merit raise was discrimination. "'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). In order to establish a discrimination or favoritism 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). Grievant did not satisfy the first element of discrimination because he did not

present any evidence that similarly situated employees were given a merit raise at the time his request was denied. Grievant did not identify any other employee or set out any circumstances that would allow the undersigned to determine that Grievant was similarly situated to any employee who may have received a merit raise. Grievant failed to prove discrimination.

Respondent's failure over the last decade to issue Grievant annual EPAs did not affect his ineligibility for a merit raise. The evidence shows that the DOP Pay Plan Policy in effect when Grievant requested a merit raise in October 2017, precluded him from receiving a merit raise due to his employment in the Transportation Worker class series. Further, the Governor had placed a freeze on all merit raises for the decade prior to 2017, and only lifted that freeze for a short time in 2017, before reinstating it. While the DOP Pay Plan Policy issued on December 1, 2017, and the DOH Pay Plan Policy currently in effect, do not prohibit merit raises for employees in the Transportation Worker class series, Respondent is precluded from considering Grievant for a merit raise due to the current freeze.

Grievant failed to present any authority for his remaining contentions. Grievant did not prove that Respondent was obligated to inform him of the December 1, 2017, change in the DOP Pay Plan Policy removing the exclusion from merit raises of employees in the transportation worker series. Grievant failed to prove that DOP's rationale for excluding from merit raises employees in the transportation worker series should not apply to him just because he passed on the opportunity to receive regular tier raises through the Transportation Workers Apprenticeship Program (TWAP). Further, Grievant presented no authority that would allow the undersigned to change agency policy.

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. "[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. "'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). In order to establish a discrimination or favoritism 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).

6. Respondent provided substantial evidence and a rational basis for its actions. Respondent appropriately informed Grievant that he was not eligible for a merit raise due to the DOP Pay Plan Policy then in effect.

7. Grievant did not prove by a preponderance of evidence that Respondent violated any law, rule, policy, or procedure when it informed Grievant that he was ineligible for a merit raise or when it failed to give Grievant a merit raise, and did not prove that these actions were 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: June 6, 2019

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Joshua S. Fraenkel
Administrative Law Judge