THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHRISTINE DENTON
Grievant,

v. **Docket No. 2018-1174-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WELCH COMMUNITY HOSPITAL,
Respondent.

DECISION

Grievant, Christine Denton, is employed by Respondent, Department of Health and Human Resources ("DHHR"), and assigned to the Welch Community Hospital (Hospital) as a Cook. Ms. Denton filed a level one grievance dated May 3, 2018, alleging that she has been working at the Hospital for sixteen years and is one of the most experienced cooks at the facility. Yet, there are cooks who have much less experience than her who are paid more per hour than she is.[1] As relief, Grievant seeks to be paid "at least $10.00 an hour."

A level one hearing was held on July 26, 2018, and a decision denying the grievance was issued on August 16, 2018. Grievant appealed to level two and a mediation was conducted on January 14, 2019. Grievant appealed to level three the same day.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on May 8, 2019. Grievant was represented by Gordon

[1] This is a condensation of Grievant's full grievance statement which is incorporate herein by reference.

Simmons UE Local 170.[2] Respondent was represented by Katherine A. Campbell, Assistant Attorney General. This matter became mature for decision on June 7, 2019, upon receipt of the last Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is being paid a lower wage than other employees in her classification who were hired after her. She argues that paying these less experienced employees a higher wage is discriminatory, as well as arbitrary and capricious. All the employees in Grievant's classification are being paid in the appropriate Pay Grade for the cook classification. The West Virginia Supreme Court of appeals has held that an Agency is only required to pay employees in the same classification within the wage range established in the Pay Grade for that classification, which Respondent is doing in this instance.

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, Christine Denton, is employed by Respondent Department of Health and Human Resources ("DHHR") and assigned to the Welch Community Hospital (Hospital) as a Cook.

2. Grievant has been employed at the Hospital for sixteen years, the last six of which she was in the Cook classification. She has worked in the Hospital's dietary unit longer than any other current employee.[3]

[2] Grievant waived her right to appear personally.
[3] Prior to her promotion to Cook, Grievant had held the position of Food Service Worker for ten years giving her a total of sixteen years in the Hospital's dietary unit.

3. Grievant is a valued employee and regularly meets expectations on her routine Employee Performance Appraisals.

4. Grievant is paid $9.16 per hour. There are Cooks employed in the Hospital' dietary unit who were hired after Grievant, who are paid a higher hourly rate that Grievant. For example, there is a new employee who is paid $9.36 per hour while Grievant is paid only $9.16 per hour.

5. Cooks are paid in Pay Grade 4 of the Division of Personnel's Classification and Compensation Plan. Pay Grade 4 annual salaries range from $17,664 to $32,688. (Respondent Exhibit 2).

6. Grievant and all the other Cooks employed at the Hospital are paid within the Pay Grade 4 salary range.

7. The Division of Personnel Pay Plan Policy provides for specific procedures through which employees may receive individual pay increases. All these procedures are discretionary. Respondent's agents explored whether grievant qualified for any of the pay increase categories and found only one for which she could possibly qualify; Salary Advancements. (Respondent Exhibit 1).

8. A salary advancement is essentially a merit increase. Respondent has chosen not to seek salary advancements for any employees at Welch Community Hospital.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's 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.*

Grievant makes two basic arguments in this matter. First that it is discrimination for Respondent to pay Cooks who have been hired more recently than Grievant a higher hourly wage. Next, she argues that the failure to pay Grievant a salary advancement is arbitrary and capricious.

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).

The issue of whether it constitutes discrimination for a state agency to pay employees in the same classification different salaries has long been settled by the West Virginia Supreme Court of Appeals in *Largent v. W. Va. Div. of Health and Div. of*

Personnel, 192 W. Va. 239, 452 S.E.2d 42 (1994). Since the issuance of that decision the Grievance Board has consistently held:

> The principle of "equal pay for equal work" is embraced by W. Va. Code § 29-6-10. *See AFSCME v. Civil Serv. Comm'n*., 181 W. Va. 8, 380 S.E.2d 43 (1989). In *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994) the West Virginia Supreme Court of Appeals noted that W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. *Largent, supra*., at Syl. Pts. 2, 3 & 4. Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Largent, supra* at 246**. 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**. *See 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 essence, the employees are not being treated differently for pay purposes as long as they all are being paid within the pay grade appropriate to their classifications.**

Deem et al. v. Div. of Motor Vehicles, Docket No.2016-1041-CONS (Nov. 30, 2016). (Emphasis added).

All the Cooks employed by Respondent at the Hospital, including Grievant, are paid a wage that falls within Pay Grade 4. That is the appropriate Pay Grade for employees working in the Cook classification. (Respondent Exhibit 1). The fact that some of the Cooks are paid more than Grievant does not constitute discrimination as that term

is defined by W. VA. CODE § 6C-2-2 (d) even if those Cooks were hired after Grievant. Grievant did not prove discrimination by a preponderance of the evidence.

Next Grievant notes that Ginny Fitzwater, Human Resources Director for the DHHR Office of Human Resources Management testified that the Agency did not have the means of doing a salary advancement for Grievant's pay. Grievant argues that the prohibition for granting merit increases has been lifted and Ms. Fitzwater was mistaken about the availability of those advancements. Grievant asserts that Ms. Fitzwater's reason for not granting Grievant a Salary Advancement was mistaken rendering that decision arbitrary and capricious.

The "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. *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982).

Ms. Fitzwater explained that for a period the Governor's office had lifted the long-standing moratorium on granting merit pay advancements. However, prior to the filing of this grievance agencies had been informed the Governor's office was no longer approving requests for such advancements. Additionally, Respondent had not exercised its discretion to pursue salary advancements for any employees at the Hospital. Since such raise requests are discretionary Respondent is under no obligation to seek them even if they were available through the Governor's office. Grievant did not prove that the decision to not seek a merit-based salary advancement for Grievant was arbitrary or capricious.

As in the myriad other cases which the Grievance Board has decided on this issue, it is easy to understand Grievant's disappointment at seeing new employees hired at a higher wage than she receives, for the reasons set out in *Largent,* this action is lawful. Accordingly, the Grievance is DENIED.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's 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.*

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. 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. *See 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 essence, the employees are not being treated differently for pay purposes as long as they all are being paid within the pay grade appropriate to their classifications. *Deem et al. v. Div. of Motor Vehicles,* Docket No.2016-1041-CONS (Nov. 30, 2016).

5. The fact that some of the Cooks are paid more than Grievant does not constitute discrimination as that term is defined by W. VA. CODE § 6C-2-2 (d) even if those Cooks were hired after Grievant. Grievant did not prove discrimination by a preponderance of the evidence.

6. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982).

7. Grievant did not prove that the decision to not seek a merit-based salary advancement for Grievant was arbitrary or 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* 156 C.S.R. 1 § 6.20 (2018).

DATE: JULY 22, 2019

_____

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE