

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

**RAYMOND MARSHALL FROST,  
Grievant,**

**v.**

**Docket No. 2018-1139-NRCTC**

**NEW RIVER COMMUNITY and  
TECHNICAL COLLEGE,  
Respondent.**

## **DECISION**

Raymond Frost, Grievant, is employed by Respondent, New River Community and Technical College ("NRCTC") as a Trades Specialist 2. Mr. Frost filed a grievance dated April 30, 2018, alleging that Respondent failed to pay him the full five percent pay raise totaling \$2,160.00 which he believed had been mandated by the legislature. As relief he seeks to be paid the full raise of \$2,160.00. A level one hearing was held on May 21, 2018, and a decision denying the grievance was issued on June 6, 2018. Grievant filed a level two appeal dated June 19, 2018, and a mediation was conducted on September 21, 2018. Grievant appealed to level three by form dated September 27, 2018.

A level three hearing was conducted before Chief Administrative Law Judge, Billie T. Catlett, on May 31, 2019, at the Charleston offices of the West Virginia Public Employees Grievance Board. Grievant appeared personally and was represented by Wendi K. Frost. Respondent appeared through Amanda Baker, NRCTC Director of Human Resources, and was represented by Kristi McWhirter, Assistant Attorney General. This matter became mature for decision of July 1, 2019, upon receipt of the Respondent's

Proposed Findings of Fact and Conclusions of Law. For administrative reasons this matter was assigned to the undersigned to render a written decision.

### **Synopsis**

Grievant alleges that Respondent was required to spend the entire additional appropriation in the 2019 budget bill to provide a \$2,160.00 raise to the 75 employees it pays from funds it receives from the State General Revenue Fund. Grievant argues that these funds were appropriated from the General Revenue Fund, were part of a state-wide raise for State employees contemplated by the legislature and were required to be spent for that limited purpose.

Respondent counters that it gets its funding from four separate sources: The General Revenue Fund; student tuition and fees; state grants; and, federal grants. Respondent funds salaries for positions from all these areas but only received an additional appropriation from general revenue which was insufficient to provide a \$2160.00 raise to all its employees. Additionally, in recent years Respondent was forced to reduce all employee salaries to meet budget shortfalls. Respondent used the general revenue appropriation to give most employees a smaller raise and raise some employees to the level they were before the prior cuts were implemented. Finally, Respondent argues that Grievant failed to prove that the legislature placed any restrictions on how the colleges could spend the additional funds provided in the budget bill.

Grievant did not prove that Respondent was legally bound to spend the additional allocation it received in the budget bill from the General Revenue Fund to provide a specific raise to specific employees.

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. Raymond Frost, Grievant, is employed by Respondent, New River Community and Technical College ("NRCTC") as a Trades Specialist 2.

2. West Virginia Community and Technical Colleges, including NRCTC, are governed on the State level by the Council for Community and Technical College Education (WVCCTC) and on the individual institution level by a board of governors.

3. The Community and Technical Colleges are subject to specific classification and compensation statutes which apply to higher education institutions alone. Most other State agencies are subject to the classification and compensation policies and rules set out in the Division of Personnel Administrative rule.

4. NRCTC receives funding from four separate sources: The General Revenue Fund appropriated by the legislature; student tuition and fees; state grants; and, federal grants. The funds needed to fund the salaries for the various positions employed by the Colleges come from these sources. Different sources fund different classifications of employees.

5. Grievant's position and 74 others, which are generally "classified employees," are paid from appropriations from the General Revenue Fund. Respondent employs 119 full-time personnel.

6. During the 2016 fiscal year, NRCTC was facing state cuts in its General Revenue funding, as well as other funding issues,<sup>1</sup> which led to severe budget deficits. To meet these funding shortfalls, Respondent reduced the working hours for classified employees, including Grievant by 20% from April 1, 2016, through June 24, 2016, effectively reducing their wages by the same amount during that three-month period.

7. Respondent also reduced the base salary for all non-classified employees by 15% during the same period. Those employees included the college president, all employees reporting to the president, and those responsible for policy formation at the department or institutional level. This group was made up of most employees in the management of the college, including but not limited to the president, vice presidents, treasure, and department heads.

8. NRCTC restored the working hours and thus the wages of all classified employees to the pre-reduction levels within the three-month period. However, Respondent only restored 10% of the pre-reduction salaries to non-classified employees leaving their salaries 5% short of their initial base amount.

9. In March 2017, the legislature enacted House Bill (H.B.) 2542 which, among other things, provided new definitions for higher education “classified” employees and “non-classified” employees. The bill also required linking the salaries of classified employees with the job market rather than the point system previously utilized.<sup>2</sup> The new system became effective September 1, 2017.

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<sup>1</sup> These problems included a reduction in funding from tuition and fees due to decreased student enrollment in previous years.

<sup>2</sup> The prior point-based classification and compensation system was referred to as the Mercer system and has been discussed in detail in many previous Grievance Board decisions.

10. In 2018, the legislature passed Senate Bill 152 which is commonly known as the budget bill. (Grievant Exhibit 2). This legislation became effective from passage on March 10, 2018. At “Section 1. General policy” the budget bill states, “The purpose of this bill is to appropriate money necessary for the economical and efficient discharge of the duties and responsibilities of the state and its agencies during the fiscal year 2019.” (Respondent Exhibit 3).

11. The appropriation to NRCTC from the General Revenue Fund for the 2019 fiscal year listed in the budget bill was \$5,452,807. (Respondent Exhibit 5).<sup>3</sup> That amounted to an additional allocation of \$205,042 above the 2018 allocation from the General Revenue Fund.<sup>4</sup> Respondent believed that amount was based upon a calculation of providing Respondent’s 75 employees who are fully funded from the General Revenue Fund a salary increase of approximately \$2,100. However, there was no guidance or requirement in the legislation regarding how the money was to be spent.<sup>5</sup>

12. Of the \$205,042, Respondent set aside \$5,918 to pay OASIS for fees charged to make payroll changes. Leaving \$199,124 for salary increases.

13. The NRCTC Board of Governors (“Board”) met on April 5, 2018, for a regular session. One of the issues on the agenda was how to use the additional appropriations to increase employee salaries. The Board made it clear that they wanted

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<sup>3</sup> Both parties offered the front page of Senate Bill 152 and specific pages from the bill as exhibits. Each party offered different pages of the bill, but no party offered the bill in its entirety.

<sup>4</sup> Grievant Exhibit 8.

<sup>5</sup> For the 2019 fiscal year NRCTC increased tuition by one percent which was estimated to produce approximately \$114,284 in additional revenue. (Grievant Exhibit 8).

to give all employees a salary enhancement regardless of the funding source for their salaries.

14. Leah Taylor, Vice President for Administration and Student Services, presented three spending options to the Board for consideration.

- Option one – provide all employees regardless of their status as classified or non-classified, including faculty, a 5% across-the-board raise. This option would require an additional expenditure of \$126,646.15 beyond the legislative appropriation which would have to be taken from Respondent's Operational Funds.
- Option two – provide all employees regardless of their status as classified or non-classified including faculty with a \$2160 salary increase. This option would require an additional expenditure of \$105,004 beyond the legislative appropriation which would have to be taken from Respondents Operational Funds.
- Option three – this option had five parts:
  - a. current classified employees would receive \$1200 across-the-board or the minimum salary of the new salary schedule established by the WVCCTCS, whichever is higher.
  - b. Currently non-classified employees that were formerly classified would receive \$1200 across-the-board or the minimum salary of the new salary schedule established by the WVCTC whichever is higher.
  - c. Faculty members would receive a \$1200 across-the-board salary increase.
  - d. Currently non-classified employees that were formerly non-classified would receive a \$1200 across-the-board increase or non-classified employees reduced by 5% in June 2016 would be brought to their base salaries as of fiscal year 2015-16 without any further increases.
  - e. All employees hired on or after July 1, 2018 would not receive an across-the-board raise. Classified in formerly non-classified employees below the minimum will be raised to the minimum salary no matter when hired.

This option would require an additional expenditure of only \$18,422.89 above the legislative appropriation which would have to be taken from Respondent's Operational Funds. This deficit amount is significantly lower than the other two options.

15. The Board of Governors adopted option three because it awarded all employees with a salary increase regardless of the funding source, met its primary goal of placing all employees within the minimum salary range pursuant to the new WVCTCS

compensation management system guidelines, and resulted in the least amount that had to be taken from the college's Operational Fund.

16. Under this option the NRCTC president, three vice presidents, and another administrator each received salary enhancements in excess of \$4000. These amounts restored their salaries back to the minimum they were paid prior to the 2016 cuts. (Grievant Exhibit 10).

17. The State Budget Office required all higher education institutions including NRCTC to submit a memorandum from their individual Board of Governors indicating their FY18-19 approved salary increases for each employee group (Faculty, Classified and Non-Classified) including the amounts and effective date. The memoranda indicate the institutions spent the funds in a variety of ways; some gave all full-time employees a \$2,160 increase, another gave a 3% across-the-board increase, yet another gave an across-the Board 5% increase not to exceed \$2,550, still another, like NRCTC varied the increases depending upon the various classifications.

### **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 argues that Respondent was obligated to provide a pay increase to the 75 employees whose positions are funded from the General Revenue Fund \$2,160. The funds remaining from the additional allocation in the budget bill (if any existed) could then be used to provide salary enhancement to Respondent's remaining employees. Grievant points to memorandum from the West Virginia Division of Personnel ("DOP") regarding "Instruction for Across-the-Board Increase" dated April 9, 2018. In that memorandum the DOP instructed all Agencies, Boards and Commissions be required to follow the Classification and Compensation Policies established by the DOP that "All eligible full-time employees shall receive an increase in their annual Salary of \$2,160." (Grievant's Exhibit 3).

This exhibit seems very compelling if the NRCTC is one of the Agencies, Boards or Commissions controlled by the DOP policies. However, it is not. Respondent's compensation to employees is governed under the Classification and Compensation Plan established pursuant to statute by the WVCCTC. That body provided no such guidance to the community and technical colleges. The funding sources for classification and compensation positions are much different for the community colleges than for the employees covered by the DOP which are generally funded through the General Revenue Fund.

Next, the first page of WEST VIRGINIA CODE § 5-5-1 was submitted by Grievant as a Grievant Exhibit 5. Article 5 of Chapter 5 is entitled "Salary Increases for State Employees" and Section one defines "Eligible employees" for the purposes of that Article. That definition includes Classified Employees employed by Community and



technical colleges. Grievant's position is clearly in that group. The definition also includes full-time faculty employed at such institutions.

WEST VIRGINIA CODE CHAPTER 5, Article 5 refers to: "Incremental salary increases based on years of experience," W. VA. CODE § 5-5-2; optional lump sum payment for accrued and unused leave at termination of employment, W. VA. CODE § 5-5-3; "Department of Health and Human Resources Salary Adjustments," W. VA. CODE § 5-5-4; "Department of Health and Human Resources Facility Employee Classifications," W. VA. CODE § 5-5-4A; Pay equity salary adjustments for employees in correctional facilities, W. VA. CODE § 5-5-4B; "Pay Equity Adjustment," W. VA. CODE § 5-5-5; and "Payment For Unused Sick Leave," W. VA. CODE § 5-5-6.

There is no doubt that Grievant is an employee covered by Article 5 and he is entitled to all "salary increases for state employees" covered in that section. Unfortunately, none of the pay enhancement listed in those statutes apply to a general annual salary increase. Consequently, like the DOP memorandum, this statutory provision is simply not relevant to the case at hand.

Grievant was unable to point to any requirement in the budget statute or any policy which required Respondent to spend the additional allocation for the 2019 fiscal year in any specified way. NRCTC, like other Higher Education Institutions, used the allocation to enhance all employee salaries. The raise expenditure plan adopted by the NRCTC BOG was submitted to, and accepted by, the West Virginia State Budget Office. Respondent chose not to incur a significant budgetary deficit by giving all employees a \$2,160 annual increase. This decision was based upon sound fiscal reasoning and was not arbitrary or 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." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).<sup>6</sup>

Grievant and his coworker would be upset when it appeared that they were receiving a \$1,200 annual raise while the highest paid NRCTC employees received an increase in excess of \$4,000. However, Grievant's raise was on top of his salary as it existed in 2018. The non-classified employees merely receive an increase that brought their salary back to the level it was in 2016 when it was severely cut to meet a prior budgetary deficit. In fact, those employees received no increase in their base salary.

Grievant did not prove by a preponderance of the evidence that Respondent was required by statute, rule or policy to use the additional allocation received from the General Revenue in the Budget Bill to provide the NRCTC's 75 employees whose positions are funded through general revenues a salary increase of \$2,160 or that Respondent's actions were arbitrary or capricious. 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*

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<sup>6</sup> Because Grievant did not allege that Respondent's action were arbitrary and capricious the issue is only briefly addressed herein.

*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. 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)).

3. Grievant did not prove by a preponderance of the evidence that Respondent was required by statute, rule or policy to use the additional allocation received from the General Revenue in the Budget Bill to provide the NRCTC's 75 employees whose positions are funded through general revenues a salary increase of \$2,160 or that Respondent's actions were 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: SEPTEMBER 9, 2019.**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**