

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JAYMI S. MARTIN et al.,<sup>1</sup>**  
**Grievants,**

**v.**

**Docket No. 2018-1483-CONS**

**REGIONAL JAIL AND CORRECTIONAL  
FACILITY AUTHORITY/SOUTHERN  
REGIONAL JAIL,**  
**Respondent.**

## **DECISION**

Grievants, Jaymi Martin and Robert Michael McDonough, are employed by Respondent, Regional Jail and Correctional Facility Authority (“RJA”)<sup>2</sup> in the Correctional Counselor 2, classification. Grievant, Tammy Adkins, is employed by Respondent in the Office Assistant 3, classification. All Grievants are assigned to the Southern Regional Jail. The Grievants filed separate grievance forms in May 2018. The grievance statements were virtually the same. The following is a representative example:

I am earning more than 20% less than other individuals in correctional counselor 2 positions. See WV Department of Personnel (“DOP”) pay plan policy DOP-12 (Internal Equity). I am furthering this grievance due to lack of communication or results with human resources department in seeking the pay raise.<sup>3</sup>

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<sup>1</sup> Grievants are Jaymi Martin, Tammy Adkins, and Robert Michael McDonough.

<sup>2</sup> Respondent is now the Bureau of Prisons and Jails within the Division of Correction and Rehabilitation.

<sup>3</sup> Grievance statement of Grievant McDonough.

As relief, all Grievants are seeking an annual increase in their salary as authorized by the DOP *Pay Plan Policy* effective the date of Grievant's initial filing including back pay with interest.

All three Grievants were denied by separate decisions at level one, and timely appealed to level two where separate mediations were held. The grievances were appealed to level three. Respondent filed a Motion to Consolidate the three grievances on March 28, 2019. By Order dated April 5, 2019, the three grievances were consolidated for hearing and decision.

A level three hearing was held in Beckley, West Virginia on August 13, 2019. Grievants Martin, McDonough, and Adkins appeared *pro se*.<sup>4</sup> Respondent was represented by Briana J. Marino, Assistant Attorney General. This matter became mature for decision on September 3, 2019, upon receipt of the Proposed Findings of Fact and Conclusion of Law submitted by Respondent.<sup>5</sup>

### **Synopsis**

All the Grievants are employed in the Southern Regional Jail in positions which are not classified as correctional officers. They have each identified at least one co-worker in each of their classifications who is being paid an annual salary which is more than 20% higher than the annual pay received by each Grievant. Grievants seek "internal equity" pay increases pursuant to the Division of Personnel *Pay Plan Policy* III. E. 2. Grievant's

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<sup>4</sup> "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

<sup>5</sup> Grievants opted not to submit post-hearing pleadings, relying upon the record and arguments made at the prior proceedings.

allege that they meet all the requirements set out in the policy and Respondent's failure to recommend them for the internal equity increase is arbitrary and capricious.

Respondent admits that it may have numerous employees including Grievants who may meet the qualifications for an internal equity increase. Respondent has identified a division-wide problem with recruitment and retention of employees and has implemented a large-scale plan to systematically increase the salaries of all their employees over the past few years. The priority of the agency has been to focus on the overall salaries of employees before exercising its discretion to address pay equity issues. This strategy is not arbitrary and capricious or an abuse of discretion.

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. Grievants, Jaymi Martin and Robert Michael McDonough, are employed by Respondent, Regional Jail and Correctional Facility Authority ("RJA") in the Correctional Counselor 2 classification. They are assigned to the Southern Regional Jail.

2. Grievant, Tammy Adkins, is employed by Respondent in the Office Assistant 3, classification. She is also assigned to the Southern Regional Jail.

3. Employees in the Office Assistant 3 classification are compensated at pay grade 7. The annual salary range for that pay grade is \$20,472 to \$37,884. Grievant Adkins is paid within the salary range established for pay grade 7.

4. Employees in the Correctional Counselor 2 classification are compensated at pay grade 11. The annual salary range for that pay grade is \$24,912 to \$46,092.

(Respondent Exhibit 2). Grievants Martin and McDonough are paid within the salary range established for pay grade 11.

5. In May and June 2018, Grievants sought information from Charlotte Underwood, Human Resources Department for Southern Regional Jail, regarding the procedure for requesting an internal equity pay increase through the DOP *Pay Plan Policy*. Ms. Underwood helped compile some salary information for Grievants and others. (Grievants Exhibit 3A).

6. Ms. Underwood forwarded information regarding the Grievants' requests to April Darnell, Respondent's Director of Human Resources in May 2018 and followed up in June to determine if any action had been taken. By e-mail dated June 15, 2018, Director Darnell replied that because of other pressing matters her office would "not be able to do anything with the pay plan until the middle or end of July." (Grievants Exhibit 3A).

7. By e-mail dated September 10, 2018, Manager Underwood notified Director Darnell and others that Grievants' request would need to be forwarded to DOP for review and asked if further information needed to be submitted. (Grievant Exhibit 3B).

8. On Friday September 21, 2018, Deputy Commissioner Mike Coleman, met with employees at the Southern Regional Jail to discuss internal equity pay. He had sent a memorandum to Michael Francis, Southern Regional Jail Administrator on September 14, 2018, announcing his visit and explaining the policy framework controlling the application for discretionary internal equity increases. (Grievants Exhibit 2). Deputy Commissioner Coleman told the employees that the issue would be explored.

9. Assistant Commissioner Marvin C. PlumleysSent an email to Grievant Martin dated September 28, 2018 stating that he had discussed the pay equity issue with

Administrative Services. He noted that “They are currently identifying the group that will [be] compiled and used for comparison. That may take a little bit of time, but the process is moving forward.” (Grievants Exhibit 4).

10. By email dated October 29, 2018, Assistant Commissioner Plumley updated Grievant Martin as follows:

I have received the percentages that were compiled by Administrative Services. When reviewing these it was observed that several employees not only at SRJ but throughout the Jails will meet the 20% threshold and the time and grade requirements. That alone does not guarantee anything, but it does clear the first hurdles. I am working on a document for the Commissioner that will present the facts to her and then decisions will be made about how we will proceed from here.

(Grievants Exhibit 4).

11. Respondent has not submitted a request to the Division of Personnel seeking internal equity pay increases for Grievants or other employees referenced by Assistant Commissioner Plumley in his October 29, 2018, email to Grievant Martin.

12. Respondent has been engaged in a comprehensive strategy for addressing the salaries paid to their system-wide employees, as well as a series of reallocations and reclassifications related legislation combining correctional systems into a single division. These efforts have included gaining approval from the State Personnel Board for a special hiring rate for correctional officers and securing an across the board pay increase for agency employees from the legislature. This is an ongoing process intended to address the overall pay of agency employees as well as internal equity problems in various

classifications. Respondent has focused on the low pay of employees across-the board prior to addressing internal inequities.<sup>6</sup>

### **Discussion**

This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' 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." *Leichtliter 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.*

Grievants make more than 20% less than other employees in their classification. They allege that they meet all the requirements for an internal equity in-range salary adjustment available pursuant to the DOP *Pay Plan Policy*. They seek to require Respondent to submit a request for approval for the salary adjustment to the DOP for consideration and approval.

The DOP *Pay Plan Policy* ("PPP") at Article III Section E. DESCRETIONARY PAY DIFFERENTIALS, states the following:

The following discretionary pay differentials are established to address circumstances which apply or can be applied to reasonably defined groups of employees. Each discretionary pay differential requires prior approval of the Director<sup>7</sup> before the appointing authority implements salary adjustments under this section of the policy. . .

*Id.*

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<sup>6</sup> Testimony of Deputy Commissioner Coleman.

<sup>7</sup> Director of the DOP.

Subsection 2. of Section III E. relates to Internal Equity and provides:

In situations in which one or more permanent, current employees are paid no less than 20% less than other permanent, current employees in the same 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 the 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.

*Id.*

The policy establishes nine conditions employees must meet to qualify for the internal equity pay increase. Grievants allege that they each meet all those criteria; however, that issue is not addressed since the matter is resolved on other ground.

Grievants essentially base their argument on the reasonable concept that all employees should receive equal pay for equal work. Grievants point out that they are performing the same duties under the same conditions as their coworkers who are paid significantly more for no apparent reason.

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 WEST VIRGINIA 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, 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).

Grievants are all paid in the appropriate pay grade for their classifications. All of the employees who are paid in excess of 20% more than Grievants are in Grievants' classification and their salaries are in the same pay grade. Pursuant to *Largent, supra* this meets the requirement of "equal work for equal pay" as contemplated by WEST VIRGINIA CODE § 29-6-10.

Grievants also argue that there is no rational basis for them to be paid so much less than their comparable coworkers, thus it is arbitrary and capricious for Respondent to not pursue an available method for rectifying this pay disparity.

First it must be pointed out that the granting of internal equity pay increases pursuant to the DOP's PPP is a decision that is within the discretion of the agency to make, and such increases are not mandatory on the part of the Respondent. *Green v. Dep't of Health & Human Res./Bureau for Children & Families and Div. of Pers.*, Docket No. 2011-1577-DHHR (Oct. 1, 2012); *Harris v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007). Additionally, discretionary actions of a public agency are consistently upheld unless they are found to be arbitrary and capricious. *McComas v. Public Service Commission*, Docket No. 2012-0240-PSC (Apr. 24, 2013); *See generally, Dillon v. Bd. of Educ.*, 177 W.Va. 145, 51 S E.2d 58 (1986); *Christian v. Logan County Bd. of Educ.*, Docket No. 94-23-173 (Mar. 31, 1995).



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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). 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)). "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 his or her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

Respondent's decision not to seek internal equity increases for Grievants cannot be viewed in a vacuum. The agency has been following a comprehensive strategy in recent years to address salary deficiencies for all its employees in an effort to attract and retain competent employees. These efforts have included gaining approval from the State Personnel Board for a special hiring rate for correctional officers and securing an across-the-board pay increase for agency employees from the legislature. This is an ongoing process intended to address the overall pay of agency employees as well as internal equity problems in various classifications. Respondent has made a policy decision to

initially address salary rates for all employees prior to addressing internal equity issues which it acknowledges is a significant problem as well. Clearly Respondent has developed a reasonable strategy based upon what management identified as the agency's most pressing needs. While reasonable people may differ upon the nature of the strategy, it is not arbitrary and capricious. Accordingly, the consolidated grievance is DENIED.

### **Conclusions of Law**

1. This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' 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).

2. WEST VIRGINIA 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 v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994). 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).

3. Grievants did not prove by a preponderance of the evidence that Respondent's failure to pursue an internal equity increase for Grievants violated West Virginia law related to "equal work for equal pay."

4. Seeking of internal equity pay increases pursuant to the DOP's PPP is a decision that is within the discretion of the agency to make, and such increases are not mandatory on the part of the Respondent. *Green v. Dep't of Health & Human Res./Bureau for Children & Families and Div. of Pers.*, Docket No. 2011-1577-DHHR (Oct. 1, 2012); *Harris v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007).

5. Discretionary actions of a public agency are consistently upheld unless they are found to be arbitrary and capricious. *McComas v. Public Service Commission*, Docket No. 2012-0240-PSC (Apr. 24, 2013); *See generally, Dillon v. Bd. of Educ.*, 177 W.Va. 145, 51 S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ.*, Docket No. 94-23-173 (Mar. 31, 1995).

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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

7. Grievants did not prove by a preponderance of the evidence that Respondent's decision to not pursue an internal equity increase for Grievants at this time was arbitrary and capricious.

Accordingly, the consolidated 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: October 2, 2019.**

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