

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**MARSHALL TINCHER, SR. and  
MARSHALL TINCHER, II,**

**Grievants,**

**v.**

**Docket No. 2019-0881-CONS**

**DIVISION OF CORRECTIONS AND REHABILITATION/  
BUREAU OF PRISONS AND JAILS/MOUNT OLIVE  
CORRECTIONAL COMPLEX AND JAIL,**

**Respondent.**

**DECISION**

Grievants, Marshall Tincher, Sr. and Marshall Tincher, II, filed separate grievances against their employer, Respondent, Division of Corrections and Rehabilitation, Bureau of Prisons and Jails, Mount Olive Correctional Complex and Jail ("DCR"), both dated February 8, 2019, and stating as follows:

[m]yself Correctional Officer One Marshall Tincher, Sr. and my son Correctional Officer One Marshall Tincher 2<sup>nd</sup> were both hired June 13, 2018 and started working here at Mount Olive Correctional Complex on July 9<sup>th</sup>, 2018. I was told by Casey Dorsey that since I did not physically start working here until after July 1<sup>st</sup>, 2018, I would not be receiving the special hiring rate (1) dollar more an hour. On Friday, 30 January 2019 I had a discussion with Correctional Officer One Tristen Hall who stated, he started here in August of 2018. He told me he did receive the special hiring rate dollar. He also told me that Captain Margaret Clifford would make sure he would receive that special hiring rate because if not he would not be accepting the job. We believe that since Mr. Hall received the (1) dollar special hiring rate after July 1<sup>st</sup>, 2018 that we too are entitled to receive the same rate.

As relief sought, Grievants state, "[w]e would like to receive the special hiring rate dollar an hour, plus back pay starting from July 9 with 1% interest rate. We also would like Mount Olive to do an investigation to find out if any other officers received the special

hiring rate dollar after the July 1<sup>st</sup> deadline.” These grievances were consolidated at level one as Docket No. 2019-0881-CONS.

A level one hearing was conducted on February 19, 2019.<sup>1</sup> The grievance was denied by decision issued on February 25, 2019. Grievants perfected their appeal to level two on March 11, 2019. A level two mediation was conducted on September 3, 2019. Grievants appealed to level three on September 3, 2019. A level three hearing was held on January 3, 2020, before the undersigned administrative law judge at the Grievance Board’s Charleston, West Virginia, office. Grievants appeared in person, *pro se*. Respondent appeared by counsel, Briana J. Marino, Esquire, Assistant Attorney General. At the end of the level three hearing, the parties agreed to February 14, 2020, being set as the mailing date for the submission of the parties’ proposed Findings of Fact and Conclusions of Law. Grievants submitted a joint proposed Findings of Fact and Conclusions of Law which was received by the Grievance Board on January 9, 2020. Respondent did not avail itself of the opportunity to submit proposed Findings of Fact and Conclusions of Law. Accordingly, this matter became mature for decision on February 14, 2020.

### **Synopsis**

Grievants are both employed by Respondent as Correctional Officer 1s. Grievants were hired as temporary employees and began working for Respondent on July 9, 2018.

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<sup>1</sup> At the commencement of the level three hearing on January 3, 2020, this ALJ ordered counsel for Respondent to provide the transcript of the level one hearing to the Grievance Board by January 17, 2020. In the event counsel for Respondent finds that the former level one hearing examiner failed to record the level one hearing, counsel was ordered to immediately inform the Grievance Board and Grievants of the same. On January 6, 2020, counsel for Respondent emailed the Grievance Board, copying Grievant, that there was no recording of the level one hearing heard by former hearing examiner Cedric Greene. As such, no transcript could be provided.

Grievants did not receive the across-the-board pay raise granted to state employees effective July 1, 2018. Grievants argue that they were improperly denied the same and claims discrimination and favoritism. Respondent denies Grievants' claims and argues that only regular, full-time employees who were employed prior to July 1, 2018, were eligible for the raise. Grievants failed to prove their claims by a preponderance of the evidence. Therefore, this 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. Grievants are employed by Respondent, Division of Corrections and Rehabilitation, as Correctional Officers at Mount Olive Correctional Complex and Jail. Grievants were both given written offers of employment on June 13, 2018, that set forth the terms of their employment and set July 9, 2018, as their effective start date. Both Grievants signed their offers on June 13, 2018. Grievants also signed documents entitled "Temporary Appointment Agreement" on that same date.<sup>2</sup>

2. Grievants both completed and submitted Applications for Employment on June 13, 2018, along with their signed employment offers and Temporary Appointment Agreements.<sup>3</sup>

3. The Division of Corrections and Rehabilitation was created by statute on July 1, 2018. Within the DCR are the Bureau of Prisons and Jails, the Bureau of Community Corrections, and the Bureau of Juvenile Services. DCR replaced the Division

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<sup>2</sup> See, Joint Exhibits 1 and 2, Offers of Employment and Temporary Appointment Agreements.

<sup>3</sup> See, DCR Exhibits 2 and 6 from level one.

of Corrections, Regional Jail and Correctional Facility Authority, and Division of Juvenile Services.

4. DCR is usually able to start temporary employees to work faster than regular employees. DCR asserts such is why Grievants were hired as temporary employees.<sup>4</sup>

5. Grievants' written offers of employment from Respondent were signed by Acting Warden Ralph Terry and stated, in part, as follows:

I am delighted to confirm your offer of employment with the Division of Corrections. Information pertinent to your new position is outlined below.

Position Title:	Correctional Officer
Employment Status:	Temporary
Reports To:	AWS Jonathan Frame
Starting Salary:	\$11.0000 hourly
Work Hours:	Rotating Shift
Effective Date:	9 July 2018, Tentatively, Pending approval of OASIS documents
Work Location:	Mount Olive Correctional Complex, Mount Olive, WV 25185

This offer is contingent upon satisfactory results from a drug test and criminal records search, as well as the verification of your application data, references, and authorization to work in the United States. . .

Please sign below affirming your acceptance of the offer and give this letter to Human Resources on your first day of employment. If you accept this offer, please be aware that it is with the understanding and agreement that you will be employed as a temporary employee, which means that you may terminate your employment at any time and that the Division of Corrections may terminate your employment at any time for any reason not prohibited by applicable law.<sup>5</sup>

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<sup>4</sup> See, testimony of April Darnell, DCR Assistant Director of Human Resources.

<sup>5</sup> See, Joint Exhibits 1 and 2, Letters dated June 14, 2018.

6. The “Temporary Appointment Agreement” both Grievants signed states, in part, as follows:

This is to advise you that the employment you are accepting is in a temporary position not covered under the merit system administered by the West Virginia Division of Personnel. This position has the following restrictions:

1. It is temporary employment. The maximum period of employment is 1,000 hours in a 12-month period. However, there is no guarantee of a minimum number of hours under this temporary appointment.
2. You will not accrue sick leave.
3. You will not accrue annual leave.
4. You will not be paid for holidays or other time off due to inclement weather, office closings, etc.
5. This time will not count as tenure or service time for any purpose.
6. You will not be eligible to participate in the retirement program.
7. You will not be eligible to participate in the insurance program.
8. You do not have the right to appeal before the State Personnel Board or Public Employees Grievance Board.
9. This time cannot be counted towards completion of a Probationary period if subsequently hired for permanent employment.
10. In order to be appointed to a position covered by the Division of Personnel, it will be necessary for you to be selected from a list of applicants certified from a competitive register unless you have previously been certified permanent under the State Merit System and are eligible for reinstatement.
11. Your temporary employment may be ended at any time with or without cause. . . .<sup>6</sup>

7. Grievants began working for Respondent as temporary employees on July 9, 2018, pursuant to their written offers of employment.

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<sup>6</sup> See, Joint Exhibits 1 and 2, “Temporary Appointment Agreement.”

8. There were two pay increases during the time at issue, and Grievants appear to be confusing them. There was a special hiring rate of one extra dollar per hour and there was a separate 5% across-the-board pay increase for permanent state employees. Grievants received the additional one dollar special hiring rate, but not the 5% across-the-board pay raise.<sup>7</sup>

9. Grievants were not hired from the Division of Personnel's register. Also, neither Grievant was already a state employee when they were hired by Respondent.

10. However, to become permanent state employees, Grievants were required to complete certain testing and make application for employment before they could be placed on the register. Based upon the evidence presented, it appears that Grievants' completed applications were processed and they completed the required testing between the date they were hired as temporary employees on July 9, 2018, and July 27, 2018.

11. By letters dated July 27, 2018, Grievants were informed that they were receiving offers of new positions by letters signed by Acting Superintendent Ralph Terry stating, in part, as follows:

I am delighted to confirm your offer of employment with the Division of Corrections. Information pertinent to your new position is outlined below:

Position Title:	COI
Employment Status:	Probationary
Reports To:	AWS Jonathan Frame
Starting Salary:	\$12.8193 per hour
Work Hours:	Rotating Shifts
Effective Date:	18 August 2018, tentatively, pending approval of all Oasis Documents
Work Location:	Mount Olive Correctional Complex Mount Olive, WV

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<sup>7</sup> See, testimony of April Darnell.

This offer is contingent upon satisfactory results from a drug test, agility test and criminal records search, as well as the verification of your application data, references, and authorization to work in the United States. . . .<sup>8</sup>

12. Grievants accepted the offer of employment as probationary employees by signing the July 27, 2018, letters on July 30, 2018. As such, they began receiving the benefits described in the July 27, 2018, letter on or about August 18, 2018.

13. Once Grievants were approved as probationary employees in August 2018, they became eligible to earn annual leave, sick leave, tenure, and became eligible to participate in the state employees insurance program and retirement. They also received an increase in pay, from \$11.00 per hour to \$12.8193 per hour.

14. It is unknown how long Grievants were employed as probationary employees. However, no documents stating the date on which Grievants moved from probationary employees to permanent state employees were presented. It is noted, however, that Assistant Human Resources Director Darnell stated during her testimony that Grievants became permanent employees in August 2018.

15. It is undisputed that Grievants attained probationary employee status in August 2018.

16. At some point after they were hired by Respondent, Grievants were told that they were not eligible for the 5% across-the-board pay raise granted to state employees effective July 1, 2018. They understood the reason for such to be that it was because they were hired after July 1, 2018.

17. Grievants were told on June 13, 2018, that Respondent wanted them to start working right away. However, Grievant Tincher, Sr. needed to give his former

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<sup>8</sup> See, Joint Exhibits 3 and 4, July 27, 2018, offer letters.

employer notice, and he did not want to start before his son was approved to start. Thereafter, they were given the July 9, 2018, start date.

18. Sometime before February 8, 2019, Grievants learned from another correctional officer, Tristan Hall, that he had received the 5% across-the-board raise and he was hired after July 1, 2018. Grievants contend that Mr. Hall started working for Respondent about the time they did. However, they offered no evidentiary proof other than their allegations.

19. Grievants believed they would get the 5% raise, and did not. However, certain co-workers, who started around the same time as they did, received the raise, and at least some of those co-workers were sworn in with them, got the 5% raises.

20. Grievants were not aware of Mr. Hall's employment status when he was hired, or those of the other officers who had received the 5% raises.

21. Grievant Tincher, Sr. has been off from work since June 2018 due to medical reasons. He is classified as a CO 1. Grievant Tincher, II, is now classified as a CO 2 and continues to be employed by Respondent.

22. Neither party called Ralph Terry, Donnie Ames, or Tristan Hall to testify as witnesses at the level three hearing in this matter.

23. It appears undisputed that Mr. Hall was one of the national guard members who had been deployed upon the order of the Governor to work at Mount Olive. However, none of Mr. Hall's records regarding the dates or times he worked at Mount Olive as a national guard member were presented as evidence at level three. However, at level one, a written offer of employment made by Acting Warden Ralph Terry to Mr. Hall, dated June 5, 2018, was presented by Respondent as an exhibit.



24. In the June 5, 2018, letter from Ralph Terry to Mr. Hall, Acting Warden Terry offered Mr. Hall a CO 1 position, as a probationary employee at \$11.8577 per hour, tentatively starting June 25, 2018. Otherwise, this letter is nearly identical to those sent to Grievants. Mr. Hall signed his offer of employment on June 5, 2018.<sup>9</sup>

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.*

Grievants assert that they are entitled to pay increases of about \$1.00 per hour based upon what they were told when they were hired and because of pay increases co-workers received. They contend that a co-worker, Mr. Hall, told them that he received an additional pay raise of about \$1.00 per hour, and he had been sworn in with them. They also argue that Mr. Hall started working after July 1, 2018, just as they did, which they allege was the “cut-off date” for getting this pay increase. While Grievants did not use the terms “discrimination” and “favoritism,” such claims are interpreted from their statements of grievance.

Respondent first asserts that there is some confusion as to the raises. Respondent argues, and the evidence presented supports, that there was a special hiring rate of \$1.00

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<sup>9</sup> See, June 5, 2018, letter, Lower Level DCR Exhibit 7.

per hour extra, and there was a separate 5% across-the-board raise that state employees received on July 1, 2018, that would have amounted to another \$1.00 per hour pay increase. Respondent denies Grievants' claims, asserting that Grievants received the \$1.00 per hour special hiring rate, but they did not receive the 5% across-the-board pay increase permanent state employees received on July 1, 2018. Respondent contends that Grievants were not eligible for the 5% across-the-board pay raise because it was for permanent state employees already employed before July 1, 2018. Respondent further asserts that even if Grievants had started working before July 1, 2018, because they were hired as temporary employees, they would not have been entitled to this pay increase. The evidence presented demonstrates there has, indeed, been some confusion as to the raises at issue. According to Respondent's records, Grievants received the extra \$1.00 per hour special hiring rate, but not the 5% across-the-board pay raise given to permanent state employees on July 1, 2018.<sup>10</sup>

A permanent employee is "[a]ny classified employee who was hired from a register and who has completed the probationary period prescribed by the Board for the job class, or any classified-exempt employee who was hired to fill a position for an unlimited period of time, notwithstanding the appointing authority's right to terminate the employee for cause or at his or her will." W. VA. CODE ST. R. § 143-1-3.65. (2016). A probationary period is "[a] specified trial work period prescribed by the Director designed to test the fitness of an employee selected from a competitive list of eligibles for the position for which an original appointment has been received. W. VA. CODE ST. R. § 143-1-3.69 (2016). Temporary employment is "[e]mployment exempt from the classified service for

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<sup>10</sup> See, testimony of April Darnell, Assistant Director of Human Resources for WVDCR.

a period not to exceed 1,000 work hours per twelve-month period.” W. VA. CODE ST. R. § 143-1-3.85 (2016).

Grievants were hired as temporary employees and started on July 9, 2018. According to Grievants, the hiring personnel at Mount Olive wanted them to start in June 2018. However, they could not start that soon. Their written offers of employment dated June 13, 2018, explicitly state that they were hired as temporary employees. The “Temporary Appointment Agreement” each Grievant signed on that same date explicitly states that they were being hired as temporary employees, and lists the rights and benefits to which they were not entitled based upon their temporary status. Such rights and benefits are those granted to permanent state employees and probationary employees. WEST VIRGINIA CODE STATE RULES § 143-1-9.4 (2016), known as the Administrative Rule states, in part, as follows:

Temporary Employment. -- Appointing authorities may employ individuals for a limited period of time not to exceed 1,000 hours in any twelve-month period in accordance with the provisions of this rule and W. Va. Code § 29-6-1 et seq. Individuals employed under the provisions of this subsection are exempt from the classified service. Provided, temporary employees may be retained in a temporary appointment status while receiving workers’ compensation temporary total disability benefits as a result of a personal injury or illness received in the course of and resulting from employment with the State or its political subdivisions in accordance with W. Va. Code § 23-4-1.

WEST VIRGINIA CODE OF STATE RULES § 143-1-10, “Probationary Period,” states, in part, as follows:

10.1. Nature, Purpose, and Duration.

10.1.a. The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or

her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process and the appointing authority shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.

10.1.b. Appointing authorities shall make all original appointments to permanent positions from officially promulgated registers for a probationary period of not more than one (1) year. The Board shall fix the length of the probationary period for each class of position. The appointing authority shall notify the Director when a probationary period has been completed and permanent status has been granted. This subdivision shall not be construed to prohibit application of time served in a provisional status to completion of a probationary period. The period of provisional appointment may apply toward completion of the probationary period only for that part served continuously, in the same class, and immediately prior to an original appointment. However, it is the responsibility of the appointing authority to state in writing at the time permanent status is being granted that the time served in a provisional status has been applied toward completion of a probationary period.

The definitions and provisions of the Administrative Rule demonstrate that there are significant differences between temporary state employees, probationary state employees, and permanent state employees. Accordingly, based upon the evidence presented, it does not appear that Grievants were eligible to receive the across-the-board 5% raise granted to state employees effective July 1, 2018.

Grievants claim that they were improperly treated differently than Mr. Hall and, possibly, others. Such is being considered as claims of discrimination and favoritism. Grievants did not call as witnesses Mr. Hall or any other co-workers. Discrimination for purposes of the grievance process has a very specific definition. “‘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). “‘Favoritism’ means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h). Therefore, in order to establish discrimination and favoritism claims under the grievance statutes, an employee must prove the following by a preponderance of the evidence:

(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).

While no records for Mr. Hall were presented at level three, a letter dated June 5, 2018, presented at level one, which is part of this record, states that Mr. Hall was hired as a probationary employee, not a temporary employee.<sup>11</sup> Also, the evidence presented suggests that Mr. Hall had been working at Mount Olive as a national guard member based upon the order of the Governor immediately before his application and hiring. However, it is unknown how long he had been doing such. Given that Grievants were temporary employees and Mr. Hall was a probationary employee upon hiring, they are not similarly situated and cannot be compared. As temporary employees, Grievants were not entitled to the same rights and privileges of a probationary or permanent state

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<sup>11</sup> See, June 5, 2018, letter to Mr. Hall, Level One Record, DCR Exhibit 7.

employee. Accordingly, Grievants have failed to prove their claims of discrimination and favoritism by a preponderance of the evidence.

Grievants assert they were told that they would be getting the special hiring rate when they accepted their offer of employment on June 13, 2018. The evidence demonstrates that they did get that special hiring rate. Grievants assert they were also told they would get the across-the-board pay raise. Neither party introduced into evidence any documents regarding the across-the-board raise, or those eligible for it. Assistant Director Darnell testified that only regular state employees employed before July 1, 2018, were eligible for the same. However, given that temporary employees, such as Grievants, have none of the rights and benefits of regularly employed state employees, it would seem logical that they would not receive the across-the-board raise.

As such, it appears more likely than not that if Grievants were told that they would receive the across-the-board raise effective on July 1, 2018, that statement was erroneous. Respondent cannot be bound by any such error. “A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. *Cunningham v. County Court of Wood County*, 148 W.Va. 303, 310, 134 S.E.2d 725, 729 (1964).” Syl. Pt. 1, *West Virginia. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv. Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985). “Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.” *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985) (*citing Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)).

Lastly, this ALJ cannot find that Grievants proved Respondent's failure to grant them the across-the-board raise was 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).

"[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).

The undersigned is sympathetic to Grievants' position. Grievants signed documents on June 13, 2018, that informed them that they were being hired as temporary employees and that this status did not come with the same benefits other types of state employment. It appears from the record that Respondent hired Grievants as temporary employees to get them started to work quickly with the understanding that during their temporary status they would take the needed actions to get placed on the state register for hiring as a regular state employee, which they did. However, there has been no evidence presented to suggest that temporary employees were entitled to the across-the-board pay raises implemented on July 1, 2018. For the reasons set forth herein, this 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, Grievants have the burden of proving their 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 permanent employee is "[a]ny classified employee who was hired from a register and who has completed the probationary period prescribed by the Board for the



job class, or any classified-exempt employee who was hired to fill a position for an unlimited period of time, notwithstanding the appointing authority's right to terminate the employee for cause or at his or her will." W. VA. CODE ST. R. § 143-1-3.65. (2016).

3. A probationary period is "[a] specified trial work period prescribed by the Director designed to test the fitness of an employee selected from a competitive list of eligibles for the position for which an original appointment has been received. W. VA. CODE ST. R. § 143-1-3.69 (2016).

4. Temporary employment is "[e]mployment exempt from the classified service for a period not to exceed 1,000 work hours per twelve-month period." W. VA. CODE ST. R. § 143-1-3.85 (2016).

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).

6. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

7. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. *Cunningham v. County Court of Wood County*, 148 W.Va. 303, 310, 134 S.E.2d 725, 729 (1964)." Syl. Pt. 1, *West Virginia. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv. Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985). "Any other rule would deprive the people of their control over the civil service, and leave the status

and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.” *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985) (citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)).

8. 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).

9. “[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).

10. Grievants failed to prove by a preponderance of the evidence that they were entitled to receive the 5% across-the-board raise on granted to state employees on July 1, 2018. Grievant's also failed to prove by a preponderance of the evidence their claims of discrimination and favoritism.

Accordingly, this 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: April 2, 2020.**

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**Carrie H. LeFevre**  
**Administrative Law Judge**