THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TARA RICE & JODY HALL MICHAEL,
Grievants,

v. **Docket No. 2019-1861-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Grievants Tara Rice and Jody Michael are employed by Respondent, Department of Health and Human Resources/William R. Sharpe, Jr. Hospital. In promoting Grievants, Respondent moved them five paygrades and provided them a 22 percent pay raise commensurate with the Division of Personnel Pay Plan Policy.

On November 2, 2018, Grievant Rice filed a grievance[1] stating that "Grievant was not granted additional pay increase increment on promotion although her qualifications exceeded the minimum requirements which qualify her for additional increment under Pay Plan Policy." As relief, Grievant seeks "To be made whole in every way including additional increase with back pay and interest."

On June 11, 2019, Grievant Michael filed a grievance[2] stating that "Grievant offered lower salary than her qualifications exceeding minimum would justify under Pay Plan Policy." As relief, Grievant seeks "To be made whole in every way including higher rate with back pay with interest."

A level one hearing was held for Grievant Rice on November 9, 2018. A level one decision denying her grievance was issued on December 11, 2018. Grievant Rice

[1]Docket No. 2019-0567-DHHR.
[2]Docket No. 2019-1763-DHHR.

appealed to level two of the grievance process on December 17, 2018. A mediation session was held on March 25, 2019. Grievant Rice appealed to level three of the grievance process on April 5, 2019. Grievant Michael's grievance was waived to level three on July 12, 2019.

The grievances were consolidated under the current action on July 26, 2019. A level three hearing was held with the undersigned via an online platform on July 29, 2021. Grievants appeared and were represented by Michael Hanson, UE Local 170. Respondent appeared by Ginny Fitzwater and was represented by James "Jake" Wegman, Assistant Attorney General. This matter matured for decision on September 3, 2021. Each side submitted Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants were promoted to Mental Health Therapist positions at Sharpe Hospital, jumping five paygrades in the process. Grievants received the mandated 22 percent pay raise and are properly compensated within their paygrade. Nevertheless, Grievants seek an additional discretionary raise under the Division of Personnel Pay Plan Policy because their qualifications exceed the required minimum. Respondent cites budgetary restraints and risk of internal salary inequity in rejecting the additional raise. Grievants did not prove that this denial was arbitrary and capricious. Accordingly, the 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, William R. Sharpe, Jr. Hospital (Sharpe) as Mental Health Therapists, paygrade 17.

2. Grievants were a paygrade 12 in their prior position.

3. The Mental Health Therapist position currently held by Grievant Rice posted on August 13, 2018. The posting stated it was a paygrade 17 with a salary range between $35,028 and $64,812. (Respondent's Exhibit 1)

4. The Mental Health Therapist position currently held by Grievant Michael posted on February 6, 2019. The posting stated it was a paygrade 17 with a salary range of $36,779.04 and $68,040.96. (Respondent's Exhibit 4)

5. The Division of Personnel (DOP) Pay Plan Policy states that "[u]pon promotion or reallocation, salaries shall be increased 7% the first pay increment, 5% the second pay increment, 4% the third pay increment and 3% for each subsequent pay increment to a maximum of 25%, or to the minimum rate of the compensation range for the class, whichever is greater, except where an employee accepts a lesser increase within the compensation range to obtain the position." (Respondent's Exhibit 8, § III B. 1.)

6. The DOP Pay Plan Policy further states that "[a]dditional increments may be granted, at the discretion of the appointing authority, if the employee being promoted or reallocated has qualifications exceeding the minimum required for the new classification." (Respondent's Exhibit 8, § III B. 2.)

7. Under the DOP Schedule of Salary Grades, the annual salary for paygrade 17 must be between $36,779 and $68,041. (Respondent's Exhibit 9)

8. Grievant Rice was offered her Mental Health Therapist position and a salary of $44,329.85 by letter dated October 11, 2018. (Respondent's Exhibit 2)

9. Grievant Michael was offered her position and a salary of $43,001.50 by letter dated June 3, 2019. (Respondent's Exhibit 5)

10. Grievants accepted their tendered promotion and salary.

11. Under the DOP Pay Plan Policy, the minimum pay increase for Grievants upon their promotion to Mental Health Therapist was 22 percent.

12. The promotion resulted in Grievants receiving a pay increase of 22 percent. (Grievants' testimony)

13. At all relevant times, Grievants were paid within the DOP pay range for their paygrade. (Grievants' testimony)

14. Grievant Rice had over 10 years of experience and Grievant Michael 12 years in various capacities in and outside the agency at the time of their promotion. (Grievants' testimony)

15. When they accepted their promotion, Grievants were told they could apply for a discretionary pay increase based on their experience. When Grievants later asked for an increase based on their experience, they were told to file a grievance. (Grievants' testimony)

16. There was a greater likelihood that Respondent would have considered Grievants' experience for a discretionary increase had they been new employees. The reason is that experience credited to new employees is added to a minimum salary but for promoted employees is added to their increased salary. (Testimony of HR Director Ginny Fitzwater)

Discussion

As this grievance does not involve a disciplinary matter, Grievants have 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.*

Grievants acknowledge that they received a 22 percent pay raise with their promotion to Mental Health Therapist positions and are compensated within their new paygrade range. However, they claim entitlement to an additional raise under the Division of Personnel (DOP) Pay Plan Policy because their qualifications exceed the minimum for their new positions. Respondent does not dispute that Grievants exceed the minimum qualifications but argues it has the discretion to deny the raise. Respondent cites budgetary restraints and risk of internal salary inequity. Grievants counter that Respondent only has discretion to deny an additional raise in the context of their qualifications. Grievants contend that Respondent acted unreasonably and outside of its discretion in denying the raise on grounds unrelated to their qualifications.

The DOP Pay Plan Policy provides that, in addition to the 22 percent raise applicable to Grievants, "[a]dditional increments may be granted, at the discretion of the appointing authority, if the employee being promoted or reallocated has qualifications exceeding the minimum required for the new classification." (§ III B. 2.) Grievants treat "may" as a word of command to compel additional pay increments. Respondent interprets "may" as permissive.

Respondent's "interpretation of its rules is entitled to deference, unless it is contrary to the plain meaning of the language, is inherently unreasonable, or is arbitrary and capricious. Dyer, supra." *Skiles v. DHHR*, Docket No. 2-HHR-111 (Apr. 8, 2003). 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's reading of "may" as permissive is not unreasonable and is supported by case law. "As a general rule of statutory construction, the word 'may' inherently connotes discretion and should be read as conferring both permission and power. The Legislature's use of the word 'may' usually renders the referenced act discretionary, rather than mandatory, in nature." Syl Pt. 1, *Pioneer Pipe Inc. v. Swain*, 237 W. Va. 722, 791 S.E.2d 168 (2016).

Further, 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). "[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). "The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of the *Division of Personnel. Moore v. W.Va. Dep't of Health and Human Res./Div. of Personn*el, Docket No. 94-HHR-126 (Aug. 26, 1994). Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. *See Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989)." *Lindsey Gregory et al. v. Division of Juvenile Services*, Docket No. 2018-0179-CONS (February 12, 2018).

Respondent cites budgetary restraints and risk of internal salary inequity as the basis for not considering an additional salary increase for Grievants upon their promotion. While Respondent states it was more likely to consider Grievants' experience for a discretionary increase had Grievants been new employees, it reasons that any increase for new hires is added to a base salary. This is a reasonable basis for not considering a discretionary raise for existing employees who have already received a 22 percent pay increase in conjunction with their promotion. Grievants failed to prove by a preponderance of evidence that this rationale was arbitrary and capricious or that Respondent acted in violation of law or policy. Accordingly, the 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, 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. "As a general rule of statutory construction, the word 'may' inherently connotes discretion and should be read as conferring both permission and power. The Legislature's use of the word 'may' usually renders the referenced act discretionary, rather than mandatory, in nature." Syl Pt. 1, *Pioneer Pipe Inc. v. Swain*, 237 W. Va. 722, 791 S.E.2d 168 (2016).

3. 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).

4. "[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).

5. 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)).

6. Grievants did not prove by a preponderance of evidence that Respondent lacked discretion to decide against additional pay increments or that Respondent exercised this discretion in an arbitrary and capricious manner.

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: September 22, 2021

Joshua S. Fraenkel
Administrative Law Judge