

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**REBECCA JENNINGS et al.,
Grievants,**

v.

Docket No. 2019-0402-CONS

**DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/BUREAU
FOR CHILDREN AND FAMILIES,
Respondent.**

DECISION

At the time this grievance was filed, each of the Grievants¹ were employed by Respondent, Department of Health and Human Resources, (“DHHR”), in the Bureau for Children and Families (“BCF”). Grievants’ positions are in the classifications of Child Protective Services (“CPS”) Supervisor, Youth Services (“YS”) Worker, YS Supervisors, Adult Protective Services (“APS”) Worker, or APS Supervisor.²

Each Grievant filed a level one grievance form dated September 21, 2018. alleging:

Inequitable salary and compensation for classifications of Adult Service/Adult Protective Services, Youth Services, and Child Protective Services in the total range of 2% - 3% with aggregate of 5% salary increase.”³

As relief, Grievants seek:

In-range salary increases equitable to those by CPS trainee and worker classifications, effective September 1, 2018,

¹ Rebecca Jennings, Alice Hamilton, Melanie Minnix, Diana Halsey, Heidi Peck, Steven Quackenbush, Jeanie Ogden, Hannah Wickline, Diana Gibson, Will Pack, Angie Cook, Erica Ramsey, Vanita Dowell, Christina Beckett, and Amber Monroe.

² Subsequent to the filing of the grievance, Alice Hamilton and Rebecca Jennings have transferred to a Health and Human Resources Supervisor Senior positions. The remaining issue for these Grievants is back pay.

³ Attached to the grievance form was a narrative statement and exhibits which are incorporated herein by reference.

including compensation for the economic losses suffered by employees as a result of pay discrimination for work already performed (back pay).

These grievances were consolidated at level one. On October 3, 2018, the level one grievance evaluator waived the consolidated grievances to level two finding the Chief Administrator lacked authority to decide the matters alleged. See W. VA. CODE ST. R. § 153-1-4.3.3. A level two mediation was conducted on June 10, 2019, and Grievants appealed to level three on June 18, 2019.

A level three hearing was conducted by video conference via the Zoom video platform on April 14, 2021. Grievants Rebecca Jennings, Alice Hamilton and Diana Halsey personally appeared. Respondent DHHR appeared in the person of Michelle Massaroni and was represented by Steven Compton, Deputy Attorney General. The parties waived submission of Proposed Findings of Fact and Conclusions of Law. Therefore, this matter became mature for decision on that day.

Synopsis

Respondent sought and received permission to grant an increase in pay for CPS Workers and CPS Trainees to attract and retain employees in those classifications. Grievants are employed in other classifications which require them to have similar education and perform a lot of the same duties as CPS Workers and Trainees with at-risk adults rather than children. They also note that there are shortages of staff in their classifications as well. Grievants argue that they are being subject to discrimination because they are not getting the incentive pay and they are similarly situated to CPS Workers and Trainees. Respondent provided sufficient justification for making the discretionary decision to limit the incentive increases to CPS Workers and Trainers.

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 are employed by the Department of Health and Human Resources in the Bureau for Children and Families. Grievants' positions are in the classifications of Child Protective Services ("CPS") Supervisor, Youth Services ("YS") Worker, YS Supervisors, Adult Protective Services ("APS") Worker, or APS Supervisor.

2. Alice Hamilton and Rebecca Jennings have transferred to Health and Human Resources Supervisor Senior positions. At the time the grievance was filed, Grievant Hamilton was a Child Protective Service Supervisor and Grievant Jennings was an Adult Services Supervisor.

3. DHHR Cabinet Secretary Bill J. Crouch sent a memorandum to John Myers, Chairman of the State Personnel Board, dated May 4, 2018, seeking retention incentives for employees in the CPS Worker and CPS Trainee classifications in the BCF. The incentives would include a 5% increase at two years of service, followed by another 5% increase at five years of service.⁴

4. The reason for this proposal was that the DHHR was seeing a marked departure of CPS Workers at approximately 2 years of service. Those that remained after two years would often leave prior to reaching five years of service. As an example, Cabinet Secretary Crouch presented *inter alia*, the following data:

⁴ This proposal would replace a prior proposal approved in 2016. It would also leave in place an incentive proposal to retain employees in Adult Protective Service classification series that was approved in 2000 and clarified in 2016.

- On July 1, 2014, BCF had filled 328 CPS Worker and CPS Trainee positions. During FY 2015 the BCF lost 155 or 47% of those employees.
- By July 1, 2015 the BCF had filled 309 CPS Worker and CPS Trainee positions. During FY 2016 BCF lost 108 or 35% of those employees.
- As of April 20, 2018, 122 (23%) of DHHRs 525 CPS worker and CPS trainee position allocations were vacant.⁵

5. Respondent worked with the Division of Personnel (“DOP”) to develop a specific proposal for those incentives to present to the full State Personnel Board. A Proposal Review Summary with the Proposal Number 2798 was prepared and submitted to the Board on May 10, 2018. If approved the proposal was to become effective September 1, 2018.⁶ (Respondent Exhibit 2)

6. The State Personnel Board approved Proposal Number 2798 on May 17, 2018. DOP Director Sheryl R. Webb sent a letter to Cabinet Secretary Crouch informing him that State Personnel Board (“SPB”) #2798 was approved with one modification. The 3% retention incentive for the Adult Protective Services worker class series set forth in SPB #2713 was retained. (Respondent Exhibit 2)

7. BCF Commissioner Linda Watts sent a memorandum dated September 5, 2018, to BCF affected CPS workers regarding the retention incentive. The memorandum explained the incentive program as follows:

- Employees in the CPS Worker classification with more than two (2) but who have not yet attained three (3) years of service in either the CPS Worker Trainee or CPS worker classifications will receive a 5% salary increase.

⁵ Respondent Exhibit 3

⁶ The proposal noted that “DHHR will retain current 3% retention incentive for Adult Protective Service Worker series.”

- Employees with more than three (3) years but less than five (5) years of service in either the CPS Worker Trainee or CPS Worker classification will be granted a 2% salary increase. This is to allow those employees that previously received 3% increase (under the prior guidelines) at three years, to obtain the remaining 2% for a total 5% increase.
- Employees with the CPS Worker classification with five (5) or more years of service in either the CPS Trainee or the CPS Worker classification will receive a 7% salary increase. This is to allow those employees that previously received 3% increase (under the prior guidelines) at 3 years, to obtain the remaining 2% for a total of 5% plus the additional 5% at five years.
- Those employees that meet the criteria based on the new policy in the future will receive a 5% increase at two years and then an additional 5% increase at five years of service.⁷

The incentive program became effective September 1, 2018.

8. The Grievants are not in the CPS Worker or CPS Trainees classification.

None of them were eligible for the retention incentive SPB #2798.

9. Employees in the classifications of Child Protective Services (“CPS”) Supervisor, Youth Services (“YS”) Worker, YS Supervisors, Adult Protective Services (“APS”) Worker, or APS Supervisor, are required to have at least a bachelor’s degree like those in the CPS Worker and CPS Trainee classification.

10. Employees in the classifications held by Grievants perform similar duties as those employees in the CPS Worker and CPS Trainee classifications. For example, the “Nature of Work” section of the classification specifications for a CPS Worker states:

Under general supervision, performs advanced and complex social casework in the area of child protective services. Work is characterized by cases involving abuse/neglect/exploitation of children. The nature of the situations require expertise and judgment to deal with problems that are potentially dangerous

⁷ Grievants Exhibit 1.

to the client and the worker. Work requires the use of personal automobile for extensive travel. Employee is subject to being on call during nonbusiness hours and must be available and have access to a telephone. Requires ongoing training to be fully accountable for a high volume of demanding time restricted cases. Performs related work as required.⁸

Similarly, the “Nature of Work” section of the classification specifications for an APS Worker states:

Under general supervision, performs advanced and complex social casework in the area of Adult Protective Services. Work is characterized by cases involving abuse/neglect/exploitation of adults. The nature of the situations requires expertise and judgment to deal with problems that are potentially dangerous to the client and the worker. Work requires use of personal automobile for travel. Employee is subject to being on call during nonbusiness hours and must be available and have access to a telephone. Performs related work as required.⁹

These descriptions are virtually identical. The only significant difference is the client served by the employees (children or adults).¹⁰

11. Often Grievants in the CPS Supervisor classifications are required to perform the duties of CPS Workers when there are not enough CPS Workers available due to illness, vacation, or vacancies.

12. Respondent also experiences difficulties with attracting and retaining employees in the classifications held by Grievants. These problems often create shortages in those positions.

⁸ Grievants Exhibit 5.

⁹ Grievants Exhibit 4.

¹⁰ The classification specification for the remaining classifications held by Grievants are similar. The supervisor classifications include duties related to supervision of employees.

Discussion

This grievance does not involve a disciplinary matter. Consequently, Grievants bear the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

Grievants argue that they are similarly situated to employees in the CPS Worker and CPS Trainee classifications. They noted that their jobs require similar education and the duties performed are virtually identical. The main difference is whether the clients are adults, children, or another specific class. They also testified that there are often difficulties in attracting and retaining employees into their classifications.

To implement a retention incentive program the agency must certify that the Bureau seeking the incentive has funds available in the budget to pay for it.¹¹ Respondent did not have a sufficient budget to provide a retention incentive across all classifications at one time. Respondent determined that its largest problem in 2018 was the retention of CPS Workers and CPS Trainees. Respondent provided evidence to demonstrate that those issues were preventing it from providing necessary services for children at risk. Based upon that, Respondent proposed a retention incentive increase for employees in those classifications only.

¹¹ See Respondent Exhibit 4, a certification of funds for the CPS retention incentives.

Respondent does not dispute that there are and have been difficulties in attracting and retaining employees in the classifications in which Grievants are employed. In fact, the evidence shows that Respondent has sought and received retention incentives for the Adult Protective Service Workers classification series. It maintained that incentive pay in the implementation of SPB #2798. Additionally, Respondent DHHR and the BCF have recently sought classification changes to include career ladders for employees in the APS classifications to provide additional salary increases as they gain experience and competence.¹²

This issue of retention incentives has been raised in a similar case involving Correctional Officers. The Division of Corrections was having extreme difficulty in recruiting Correctional Officers to work at the prisons and regional jails. They were also having trouble retaining those Officers once they had been trained. To address this problem the Division of Corrections, with the assistance of the DOP, successfully proposed to increase the pay of all Correctional Officers by one dollar per hour. Correctional Counselors argued that it was discriminatory for them not to also receive the increase because many of their duties were similar to the Correctional Officers, they were subjected to similar risks of harm, and they were regularly assigned to fill in for Correctional Officers because of shortage of personnel on shifts. In those situations, they were literally performing Correctional Officer duties. *Crowder et al. v. Div. of Corr.*, Docket No. 2018-0417-CONS (Oct. 4, 2018).¹³

¹² See Respondent Exhibits 8 & 9.

¹³ This is one of a number of decisions issued by the Grievance Board addressing this particular retention incentive action.

Administrative Law Judge (“ALJ”) wrote:

Respondent introduced evidence showing that only COs were included in the pay raise because recruiting and retaining COs is a critical issue for relevant state-run facilities, given that over eighty percent (80%) of correctional vacancies, as of July 27, 2017, were for Correctional Officers. Respondent correctly asserts that it does not have authority to grant discretionary pay raises to non-uniformed employees such as Grievants, and that the West Virginia Division of Personnel must authorize such raise increases.

In another case dealing with the same issue, the ALJ explained that:

The raise was given to address a recruitment and retention problem in the Correctional Officer classification only. The State Personnel Board only authorized the payment of the wage enhancement to employees holding positions in that classification. Respondent is without authority to extend that raise to people working in other classifications at the Jail. *Gregory v. Div. of Juvenile Ser., supra. Prince v. Reg. Jails and Corr. Facilities Auth.*, Docket No. 2018-0583-MAPS (Sept. 18, 2018).

As in those cases, Respondent DHHR is without authority to unilaterally provide incentive or discretionary raises to its employees. Discretionary raises must be approved by the Division of Personnel based upon specific criteria. Incentive programs must be approved by the State Personnel Board. Therefore, the DHHR cannot unilaterally expand the incentive increases in SPB #2798. The Grievance Board has no authority to order an agency to do something that is prohibited by law. This remedy is not available.¹⁴

The question remaining is whether DHHR must seek a similar incentive program for Grievants who are allegedly similarly situated to CPS Workers and CPS Trainees. Seeking an incentive pay program from the State Personnel Board, much like seeking

¹⁴ See W. VA. CODE ST. R. § 156-1-6.11 concerning dismissal of claims for which no relief is available.

equity increases pursuant to the DOP Pay Plan Policy is discretionary. There is no statute or policy which requires Respondent to seek such increases in pay. Rather they are authorized to seek the increases if they choose to do so. See *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). (related to equity pay proposals). The Grievance Board has held that "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). *Martin et al. v. Reg. Jails and Corr. Facilities Auth.*, Docket No. 2018-1483-CONS (Oct. 2, 2019).

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). 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).

Respondent demonstrated that it had significant problems with retention of CPS Workers and CPS Trainees after they were initially hired and after they had been fully trained. DHHR provided substantial evidence demonstrating the nature of the problem and that this was the reason for proposed incentive. This discretionary action was based upon factors which were appropriate to be considered and reasonable. Respondent's decision to seek the incentive increases for CPS Workers and CPS Trainees was not arbitrary and capricious. Respondent acknowledged that there were retention problems in the APS Worker classification series and other classification series. However, Respondent presented data indicating that it was reasonable to prioritize its limited budget to seeking CPS Worker and CPS Trainee classifications at that time. Grievants did not demonstrate that the need for attracting and retaining employees in their classifications was as of, or more of, a problem than was occurring in the identified CPS classifications. Respondent's decision to limit the incentive proposal was not arbitrary and capricious.¹⁵

Grievants contend that it was discriminatory for Respondent to provide an incentive increase for CPS Workers and not for them. 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:

¹⁵ See *Martin et al. v. Reg. Jails and Corr. Facilities Auth.*, Docket No. 2018-1483-CONS (Oct. 2, 2019), where the Division of Corrections acknowledged that it had significant pay equity issues among its employees but prioritized getting an incentive increase for Correctional Officers prior to seeking pay equity increases for other employees.

(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).

Grievant's argue that they are similarly situated to CPS Workers and Trainees because their positions require the same or higher levels of education and their duties are virtually the same as CPS Workers with a different clientele. As pointed out above, it was not arbitrary or capricious for DHHR to limit the incentive proposal to the CPS Worker and CPS Trainee classifications. Since Grievants' positions are not in those classifications they are not similarly situated to CPS Workers. Grievants did not prove by a preponderance of the evidence that Respondent's decision to seek an incentive increase for only CPS Employees and Trainees was arbitrary and capricious. Additionally, Grievants did not prove by a preponderance of the evidence that they were subjected to discrimination as that term is defined in W. VA. CODE § 6C-2-2 (d). Accordingly, the consolidated grievance is **DENIED**.

Conclusions of Law

1. This grievance does not involve a disciplinary matter. Consequently, Grievants bear the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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. There is no statute or policy which requires Respondent to seek such increases in pay. Rather they are authorized to seek the increases if they choose to do so. See *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). (related to equity pay proposals).

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). *Martin et al. v. Reg. Jails and Corr. Facilities Auth.*, Docket No. 2018-1483-CONS (Oct. 2, 2019).

4. 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).

5. Grievants did not prove by a preponderance of the evidence that Respondent's decision to seek an incentive increase for only CPS Employees and Trainees was arbitrary and capricious.

6. 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).

7. 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).

8. Grievants did not prove by a preponderance of the evidence that they were subjected to discrimination as that term is defined in W. VA. CODE § 6C-2-2 (d).

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: May 13, 2021

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**