

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**TIMOTHY KERNS,
Grievant,**

v.

Docket No. 2019-1356-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL
and DIVISION OF PERSONNEL,
Respondents.**

DECISION

Grievant, Timothy Kerns, is employed by the Department of Health and Human Resources (DHHR)/William R. Sharpe, Jr. Hospital (Sharpe), Respondent. On April 2, 2019, Grievant filed a grievance protesting his salary. The grievance alleges, "Electrician with 20% inequity." The relief sought states, "To be made whole in every way including raise with back pay and interest."

On April 22, 2019, a level one hearing occurred. A level one decision denying the grievance was issued on May 10, 2019. Grievant appealed to level two on May 16, 2019. Mediation occurred on August 19, 2019. Grievant appealed to level three on September 19, 2019. An *Order of Joinder* joining the Division of Personnel (DOP) as a necessary party was entered on November 21, 2019. On October 23, 2020, a level three hearing was held before the undersigned, via an online platform. Grievant appeared and was represented by Gary DeLuke, UE Local 170 West Virginia Public Workers Union. Respondent DHHR/Sharpe was represented by Mindy Parsley, Assistant Attorney General. Respondent DOP appeared by Wendy Mays, Assistant Director of the Classification and Compensation section, and was represented by Karen O'Sullivan

Thornton, Assistant Attorney General. This matter became mature for decision on December 11, 2020. DHHR/Sharpe submitted Proposed Findings of Fact and Conclusions of Law (PFFCL) while DOP declined to do so. Grievant failed to submit PFFCL after repeated inquiries regarding his intentions.

Synopsis

Grievant has been employed by DHHR/Sharpe and is classified as an Electrician. Grievant seeks an “Internal Equity” pay increase and points to a pay disparity of more than 20% between himself and other State employees classified as Electricians. DHHR counters that it only requests an “Internal Equity” pay increase from DOP if there is at least a 20% pay disparity between DHHR positions with the same classification. Grievant did not prove a 20% pay disparity between any Electrician positions at DHHR. Accordingly, 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. Grievant is employed by DHHR at Sharpe under the DOP classification of Electrician.
2. Grievant’s annual base salary is \$35,829.88.
3. The DOP salary range for the Electrician classification is between \$23,724 and \$43,896.
4. There exists a pay disparity of more than 20% between Grievant and some other State employees classified as Electricians. However, these other employees are

employed with the West Virginia General Services Division and do not work for DHHR.

5. The relevant version¹ of the DOP Pay Plan Policy (“PPP”) at Article III Section E. DISCRETIONARY PAY DIFFERENTIALS, provides:

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 before the appointing authority implements salary adjustments under this section of the policy. . .

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

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.

6. In determining whether to request an “Internal Equity” pay increase, DHHR requires the existence of at least a 20% pay disparity between employees under the same classification across the entire agency.

7. The only Electricians employed through DHHR are located at State health facilities. Grievant is the second highest paid Electrician at the Office of Health Facilities.

8. DHHR compared Grievant’s salary to the salaries of other Electricians at State health facilities and found no pay disparity of more than 20% between Grievant and any other employee classified as an Electrician.

¹December 1, 2017.

Discussion

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.*

Grievant claims he is entitled to a pay increase because there exists a pay disparity of more than 20% between himself and other State employees classified as Electricians. Respondent counters that these other employees are employed with the West Virginia General Services Division and do not work for DHHR. Respondent contends that it only submits a request for an “Internal Equity” pay increase if there is at least a 20% pay disparity between employees in the same classification at DHHR and that there is no such pay disparity between Electricians employed by DHHR.

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.” *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).

Grievant is paid within the appropriate pay grade for his classification. Pursuant to *Largent*, this meets the requirement of “equal work for equal pay” as contemplated by West Virginia Code § 29-6-10. It should also 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). 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).

Grievant did not present any evidence or even argue that Respondent failed to consistently abide by its policy of only seeking an "Internal Equity" pay increase when there is at least a 20% pay disparity between DHHR employees in the same classification. Neither has Grievant presented any evidence of or even alleged the existence of a 20% disparity in pay between himself and any other Electrician employed by DHHR. Thus, Grievant did not prove that Respondent acted arbitrarily and capriciously in not seeking an "Internal Equity" pay increase on his behalf. Accordingly, this grievance is DENIED.

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. 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).

3. “It is not discriminatory for employees in the same classification to be paid different salaries.” *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).

4. “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. Grievant did not prove by a preponderance of the evidence that he is entitled to a salary increase or that Respondent’s decision not to seek an “Internal Equity” pay raise on his behalf was arbitrary and capricious.

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: January 19, 2021

Joshua S. Fraenkel
Administrative Law Judge