THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEPHANIE DIONE SHEFFIELD,

Grievant,

v. **Docket No. 2020-0907-MAPS**

DIVISION OF CORRECTIONS AND REHABILITATION/ BUREAU OF JUVENILE SERVICES/ROBERT L. SHELL JUVENILE CENTER,

Respondent.

DECISION

Grievant, Stephanie Dione Sheffield, filed a level one grievance on February 12, 2020, against her employer, Respondent, Division of Corrections and Rehabilitation, Bureau of Juvenile Services, ("DCR"), stating as follows: "I am filing this friendly grievance due to my rate of pay being unequal/less than that of all my co-workers (except for one) who are performing the same job duties as myself. In regards to my education, I have a Master of Science and a Bachelor of Arts in Criminal Justice. I have been with the Bureau for 10 years and prior to my employment, I had 4 ½ years of experience as a Juvenile Probation Officer with the State of North Carolina." As relief sought, the Grievant states, "I am asking for a pay increase that would reflect my educational background and prior work experience, AND/OR an increase in pay to reflect not only that of my coworkers but of those who are performing similar job duties throughout the Bureau of Juvenile Services. I am also requesting that I be given back pay."

A level one conference was conducted on February 27, 2020. A level one decision denying the grievance was issued on March 16, 2020. Grievant appealed to level two on

or about March 27, 2020.[1] A level two mediation was conducted on September 14, 2020. Grievant perfected her appeal to level three on October 29, 2020.

A level three hearing was held on March 11, 2021, via Zoom video conferencing before the undersigned administrative law judge. This ALJ and the parties appeared via Zoom from separate locations. Grievant appeared in person, *pro se*. Respondent appeared by its representative, Lori Lynch, and by counsel, Briana Marino, Assistant Attorney General. This matter became mature for decision on April 8, 2021, upon the receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Corrections Case Manager. Grievant sought an internal equity pay increase pursuant to the Division of Personnel Pay Plan Policy. Respondent reviewed Grievant's request and determined that, while Grievant may have met the criteria set forth in DOP's policy, it would not approve Grievant's pay raise. Grievant appears to argue that Respondent's decision to deny her an internal equity pay increase was incorrect, improper, or unlawful, and should be reversed. Respondent asserts that as internal equity pay increases are discretionary, it was not required to grant Grievant's internal equity pay increase and that the decision to deny the pay increase was lawful and reasonable. Grievant failed to prove her claims by a preponderance of the evidence. Accordingly, this grievance is DENIED.

The following Findings of Fact are based upon a review of the record created in this grievance:

[1] The statement of grievance bears a signature dated March 4, 2020. It appears that Grievant submitted her level two appeal to Respondent by email on March 20, 2020. Respondent forwarded it to the Grievance Board on March 27, 2020.

Findings of Fact

1. Grievant is employed by Respondent as a Corrections Case Manager. Grievant has held this position since her hiring on November 2, 2009.

2. The Corrections Case Manager classification is a pay grade 12 and has a salary range of $27,729.00 to $51,298.00 per year.[2]

3. When Grievant was hired, the pay range for the Corrections Case Manager classification was lower than the current pay range. At that time, Grievant was hired in on the low end of the pay range at approximately $26,160.00.

4. At the time Grievant was hired by Respondent, a "hiring freeze" was in effect. As such, Respondent did not to take into consideration Grievant's education level and outside experience in another state's division of corrections when it set her salary.

5. At some point, the hiring freeze was lifted. Also, over the years since her hiring, Grievant has received some pay increases as a result of "across-the-board" pay increases granted to state employees.

6. Given that the pay range for the Corrections Case Manager classification has increased and the hiring freeze has been lifted, at least some people hired for positions in this classification have been granted a starting base salary that is greater than Grievant's current pay. Also, there are employees who have been working in the classification longer than Grievant who are paid well-above Grievant's rate of pay.[3]

7. At some point before filing her grievance, Grievant learned that she was the lowest paid Corrections Case Manager in "After Care." In an attempt to rectify the pay

[2] *See*, Joint Exhibit 3, Corrections Case Manager classification specification.
[3] *See*, testimony of Que Stephens; testimony of Grievant; testimony of Commissioner Betsy Jividen; Joint Exhibit 2, "Discretionary Pay Increase Request – Data Comparison."

disparity, Grievant requested that she be reviewed for an internal equity pay increase pursuant to the DOP's Pay Plan Policy.[4]

8. Grievant's request for review pursuant to DOP's Pay Plan Policy went to Lori Lynch, Director of Human Resources, to determine whether Grievant was eligible for an internal equity pay increase. Ms. Lynch compared Grievant's rate of pay to two unidentified individuals also working in the Corrections Case Manager classification; however, these two employees had been employed by Respondent in excess of twenty years. Both the individuals were paid more than Grievant. Individual A was paid $47,088.29 per year and had been employed for over twenty-nine years. Individual B was paid $46,092.18 per year and had been employed for over twenty-four years.[5]

9. As of the date Grievant was reviewed for an internal equity discretionary pay increase, Grievant's salary was $37,722.26 per year and she had been in the Corrections Case Manager position for eleven years and nine months.[6]

10. Ms. Lynch's review revealed that Grievant was paid 23.8% less than Individual A. Based upon her review, Ms. Lynch determined that Grievant was eligible for an internal equity pay increase pursuant to the policy. Ms. Lynch forwarded her "Discretionary Pay Increase Request – Data Comparison" and information to Commissioner Jividen for review and decision.

11. Commissioner Jividen reviewed the information provided to her by Ms. Lynch and determined that despite Grievant being eligible for an internal equity pay

[4] *See*, testimony of Lori Lynch; testimony of Grievant; testimony of Commissioner Betsy Jividen; Joint Exhibit 1, DOP "Pay Plan Policy."
[5] *See*, testimony of Lori Lynch; Joint Exhibit 2, "Discretionary Pay Increase Request – Data Comparison."
[6] *See*, Joint Exhibit 2, "Discretionary Pay Increase Request – Data Comparison."

increase, she would not grant the same. Commissioner Jividen was aware of pay inequities within DCR and determined that pay inequities would best be rectified by agency-wide, or "global," changes, not by granting individual pay increases pursuant to the Pay Plan Policy. However, no global solution for the agency-wide pay inequities had been formulated or implemented.

12. The decision to deny Grievant the pay increase had nothing to do with the job performance. Grievant has consistently received "exceeds expectations" in the performance of her duties, and she has no disciplinary history.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 argues that as she meets the requirements for an internal equity pay increase as stated in the DOP Pay Plan Policy, she should be granted the same. Grievant raised no clear claims of discrimination, favoritism, or otherwise, in her grievance. However, in her post-hearing submissions, Grievant argues that the decision to deny her the pay increase was "arbitrary and capricious," "unjustified," "inequitable," and "potentially discriminatory." However, no evidence of discrimination was presented, other than the fact that Individuals A and B, also Corrections Case Managers, are paid more

than Grievant. That alone does not prove discrimination. Respondent notes that Grievant's salary is within the proper pay range for her classification and asserts that the granting of an internal equity pay increase pursuant to the DOP Pay Plan Policy is discretionary, not mandatory. Respondent further argues that Commissioner Jividen, aware of systemic pay inequities among DCR personnel, has determined that such inequities would be better resolved in an agency-wide approach, which she intends to effectuate, and not by granting individual pay increases in a piecemeal manner.

> Employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994); *Nafe v. W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR-386 (Mar. 26, 1997). " "'[E]mployees who are performing the same tasks with the same responsibilities should be placed within the same job classification,' but a state employer is not required to pay these employees at the same rate. *Largent* at Syl. Pts. 2 & 3. The requirement is that all classified employees must be compensated within their pay grade. *See Nafe v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-386 (Mar. 26, 1997); *Brutto v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-076 (July 24, 1996); *Salmons v. W. Va. Dep't of Transp*., Docket No.94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dep't of Transp*., Docket No. 94-DOH- 435 (Feb. 28, 1995); *Tennant v. W. Va. Dep't of Health & Human Res*., Docket No. 92- HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health & Human Res*., Docket No. 91- H-177 (May 29, 1992). *See AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989)." *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006).

Childress v. State Police and Div. of Personnel, Docket No. 2008-0195-MAPS (Nov. 25, 2009), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-201 (Jan. 10, 2011), ***aff'd***, W.Va. Sup. Ct. App. Docket No. 11-0329 (Mar. 9, 2012).

Further, "[a]n agency's decision not to recommend a discretionary pay increase generally is not grievable." *Lucas v. Dep't Health & Human Res.,* Docket No. 07-HHR-141 (May 14, 2008). *See also Morgan v. Dep't Health & Human Res.*, Docket No. 07-HHR-131 (June 5, 2008). However, the word *generally* implies that there may be times when such *is* grievable. In *Moore v. Dep't of Envtl. Protection*, Docket No. 2014-0046-DEP (May 9, 2014), the Grievance Board stated as follows:

> [a]n agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't Health and Human Res.,* Docket No. 07-HHR-141 (May 14, 2008). **However, discretionary decisions must be made in a manner that is reasonable and not arbitrary and capricious. *See [Mihaliak] v. Div. of Rehab. Serv., Docket No. 98-RS-126 (Aug. 3, 1998).*** 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 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Id. (Emphasis added).

"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 & 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 & 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 & 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 employer has discretion in deciding to award these pay increases. However, an employer is prohibited from making such discretionary decisions in a manner that is unreasonable and arbitrary and capricious. Logic then dictates that an employer is prohibited from awarding, denying, or otherwise implementing these discretionary increases in a manner that is contrary to law, rule, or policy. The evidence presented suggests that Commissioner Jividen has granted only one internal equity discretionary pay increase pursuant to the Pay Plan Policy, and that was pursuant to a settlement in an unrelated matter.[7] The facts and circumstances of that matter are unknown, and no witnesses were called to testify about the details of the same. It is true that Commissioner

[7] *See*, Respondent's Exhibit 1, email dated March 12, 2021, submitted following the level three hearing. At the level three hearing, this ALJ directed counsel for Respondent to supplement the record following the hearing by submitting the information contained in the email concerning whether Commissioner Jividen had granted any other internal equity pay increases. This ALJ allowed the record to remain open until close of business March 12, 2021, for its submission.

Jividen testified that the difference in Grievant's pay and that of Individuals A and B was not that great when the difference was about $10,000.00, and that she would not initially admit that Ms. Lynch's own calculations show that Grievant's salary is 23.8% lower than Individual A. However, Commissioner Jividen's dismissive and defensive attitude does not prove that her decision to deny the request was unlawful or improper. It is more likely these comments were indicative of Commissioner Jividen's failure to thoroughly review the documents Respondent's counsel would be presenting as evidence in advance of the hearing. This ALJ cannot find that Commissioner Jividen's reasoning that pay inequities such as the one Grievant presents should be remedied through global, or agency-wide, action is unreasonable.

Grievant presented no evidence to establish by a preponderance of the evidence that Commissioner Jividen denied her request for an internal equity pay increase in a manner that was discriminatory, or otherwise contrary to law, policy, or rule. Further, Grievant did not establish by a preponderance of the evidence that Commissioner Jividen's decision to deny her discretionary internal equity pay increase was arbitrary and capricious, or the result of discrimination, favoritism, or other improper motive. While the Pay Plan Policy can be a tool to remedy situations just like the one Grievant has presented, pay increases permitted by the Pay Plan Policy are discretionary, not mandatory. The evidence presented did not establish that Commissioner Jividen violated any law, rule, or policy in denying Grievant's request for an internal equity pay increase. Accordingly, 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, Grievant has the burden of proving her 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. "Employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994); *Nafe v. W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR-386 (Mar. 26, 1997). '[E]mployees who are performing the same tasks with the same responsibilities should be placed within the same job classification,' but a state employer is not required to pay these employees at the same rate. *Largent* at Syl. Pts. 2 & 3. The requirement is that all classified employees must be compensated within their pay grade. *See Nafe v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-386 (Mar. 26, 1997); *Brutto v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-076 (July 24, 1996); *Salmons v. W. Va. Dep't of Transp*., Docket No.94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dep't of Transp*., Docket No. 94-DOH- 435 (Feb. 28, 1995); *Tennant v. W. Va. Dep't of Health & Human Res*., Docket No. 92- HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health & Human Res*., Docket No. 91- H-177 (May 29, 1992). *See AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989). *Nelson*

v. Dep't of Health & Human Res., Docket No. 05-HHR-315 (May 16, 2006)." *Childress v. State Police and Div. of Personnel*, Docket No. 2008-0195-MAPS (Nov. 25, 2009), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-201 (Jan. 10, 2011), ***aff'd***, W.Va. Sup. Ct. App. Docket No. 11-0329 (Mar. 9, 2012).

3. "An agency's decision not to recommend a discretionary pay increase generally is not grievable." *Lucas v. Dep't Health & Human Res.,* Docket No. 07-HHR-141 (May 14, 2008). *See also Morgan v. Dep't Health & Human Res.*, Docket No. 07-HHR-131 (June 5, 2008).

4. "[D]iscretionary decisions must be made in a manner that is reasonable and not arbitrary and capricious. *See [Mihaliak] v. Div. of Rehab. Serv., Docket No. 98-RS-126 (Aug. 3, 1998)*. 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 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982))." *Moore v. Dep't of Envtl. Protection*, Docket No. 2014-0046-DEP (May 9, 2014).

5. "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 & 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 & 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).

6. "'[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 & 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).

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: May 20, 2021.

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Carrie H. LeFevre
Administrative Law Judge