

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**KATHERINE L. FALLON,
Grievant,**

v.

Docket No. 2021-2469-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF PRISONS AND JAILS/
EASTERN REGIONAL JAIL AND CORRECTIONAL FACILITY and
DIVISION OF PERSONNEL,
Respondents.**

DECISION

Grievant, Katherine L. Fallon, is employed by Respondent, West Virginia Division of Corrections and Rehabilitation, as a Corrections Program Specialist, at the Eastern Regional Jail and Correctional Facility. Grievant filed this action on or about May 27, 2021, in which she states that, “[b]ased on my time in position, a lesser experienced Correctional Counselor II is making more than 20% than my current salary. Administration requested verbally and in writing for a salary increase based on DOP Pay Plan Policy which have all been denied.” Grievant seeks, “[f]or my pay to be equal to the highest paid Correctional Counselor II at MCC/Eastern Regional Jail & Correctional Facility Unit 2. To include back pay form the day of his appointment and for future possible promotions pending during this grievance to reflect the desired salary increase.”

The Division of Personnel was joined as an indispensable party on July 23, 2021. A level two mediation was conducted on October 15, 2021. Grievant appealed to level three. An evidentiary hearing at level three was conducted before the undersigned on March 10, 2022. Grievant appeared *pro se*. Respondent, Department of Homeland

Security/Division of Corrections and Rehabilitation appeared by its Superintendent, Didymus Tate, and by Jodi Tyler, Assistant Attorney General. Respondent, Division of Personnel, appeared by Assistant Director Windy Mays and by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on April 13, 2022.

Synopsis

Grievant was employed the Division of Corrections and Rehabilitation in a position classified as a Correctional Counselor II. Grievant seeks a discretionary pay increase for Internal Equity under the Division of Personnel's Pay Plan Policy. Eastern Regional Jail and Correctional Facility submitted a request for a discretionary pay increase for her to the Division of Corrections and Rehabilitation central office. At that time, the Division of Corrections and Rehabilitation management opted not to pursue such an increase considering existing fiscal constraints. Grievant failed to meet her burden of proof that Respondents misapplied or misinterpreted the Pay Plan Policy concerning Internal Equity or that they abused their discretion in not granting the salary increase. The grievance is denied.

The following Findings of Fact are based on the record of this case.

Findings of Fact

1. At the time of filing this action, Grievant was employed by the Division of Corrections and Rehabilitation as a Correctional Counselor II.
2. Since the filing of this action, Grievant has been promoted into a position classified as a Corrections Program Specialist.

3. Grievant seeks a discretionary pay increase and back pay for Internal Equity under the Division of Personnel's Pay Plan Policy. Grievant seeks to be paid a salary equal to the highest paid Corrections Counselor II at the Martinsburg Eastern Regional Jail and for back pay.

4. The purpose of the Policy is to "establish a uniform policy for the use and application of the salary schedule for the classified service consistent with merit principles." Division of Personnel Exhibit No. 1.

5. As pertaining to discretionary increases, the Policy provides that "appointing authorities have no obligation to pursue and employees have no entitlement to receive them . . . such increases are subject to authorization or limitation by the Governor's Office, appointing authority and/or the State Personnel Board." Division of Personnel Exhibit No. 1.

6. The Internal Equity section reads as follows:

Internal Equity: 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 job 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 20% of 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.

7. The following conditions must be met for an employee to qualify for an internal equity in-range salary adjustment:

1) The employee must be paid at least 20% less than the employee to whom he or she is being compared (no rounding);

2) The employees must be in the same agency-defined organizational unit;

3) The employees must be in the same classification for at least twelve (12) consecutive months at the time of the request;

4) The employees must have comparable education/training, unless the employee being paid 20% less has more education/training;

5) The employees must have comparable experience relevant to the classification unless the employee being paid 20% less has more relevant experience.

6) The employees must have comparable duties and responsibilities;

7) The employee must have comparable performance levels based upon the EPA-3 for the agency's most current established performance review cycle for each employee, meaning both employees must be rated as Meets Expectations, or both employees must be rated as Exceeds Expectations, except where the employee being paid 20% less has a higher EPA-3 score, provided that the employee being paid 20% less has not had any disciplinary action taken in the last twelve (12) months.

8. The Internal Equity provisions of the Pay Plan Policy is considered a discretionary pay differential.

9. Grievant made a request to the former Superintendent, Scott Paugh, for a discretionary increase under the Pay Plan Policy. Superintendent Paugh made a comprehensive analysis pursuant to the above conditions and determined that Grievant met the requirements under an Internal Equity increase.

10. On May 7, 2021, Superintendent Paugh sent a memo to Director Mike Martin requesting approval to explore the option of giving Grievant a pay adjustment. The requests were stopped at the agency level of the process and were not submitted to the Division of Personnel for consideration.

11. As the Division of Corrections and Rehabilitation opted not to pursue the original discretionary pay increase request sought by the Eastern Regional Jail, and now that Grievant has been promoted she would have to remain in the same classification as a Corrections Program Specialist for twelve consecutive months to pursue a discretionary pay increase.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, [t]he 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).

Grievant contends that she is entitled to a discretionary pay increase for Internal Equity. The Eastern Regional Jail did submit a request for this increase to the Division of Corrections and Rehabilitation's central office. However, the Division of Corrections and Rehabilitation's management exercised its discretion, pursuant to the Pay Plan Policy, and chose not to pursue the pay increase for Grievant. This is undisputed. The record is absent of any evidence that the discretion exercised by the Division of Corrections and Rehabilitation's central office was inappropriate within the terms of the policy. The Grievance Board's decisions regarding discretionary pay increases establishes that an agency's actions as they relate to these raises are within the discretion of the agency. *Asbury v. Dep't of Health & Human Res./Bureau for Children & Families and Div. of Pers.*,

Docket No. 2011-1551-DHHR (May 17, 2013; *Green v. Health & Human Res./Bureau for Children & Families and Div. of Pers.*, Docket No. 2011-1577-DHHR (Oct. 1, 2012).

“[T]he granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of the Respondent.” *Harris v. Dep’t of Transportation*, Docket No. 06-DOH-224 (Jan. 11, 2007). An agency need not grant the ten percent salary increase referred in the “Internal Equity” portion of the Pay Plan Policy, even if the employee meets the criterion that would allow it. Even if the salaries in Grievant’s unit were inconsistent with the Internal Equity provision, the policy does not confer upon Grievant an entitlement to a salary increase in the event she established that her situation fits within the policy. See *Journell, et al. v. Dep’t of Environmental Protection/Division of Mining and Reclamation*, Docket No. 2008-0609-CONS (Dec. 22, 2008).

In the instant case, Grievant submitted her request for a discretionary increase at the agency level and pursuant to the Pay Plan Policy, was compared to a fellow employee, another Correctional Counselor II, who was making more than 20% of Grievant’s salary. It was appropriately determined by the Division of Corrections and Rehabilitation that Grievant was eligible for an Internal Equity increase; however, her request was ultimately denied at the agency level due to state-wide budgetary concerns.

In conclusion, Grievant failed to prove that the Division of Corrections and Rehabilitation acted erroneously or abused its discretion in choosing not to pursue Grievant’s request for a discretionary pay increase under the Internal Equity provision of the Pay Plan 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 her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, [t]he 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. The Grievance Board's decisions regarding discretionary pay increases establishes that an agency's actions as they relate to these raises are within the discretion of the agency. *Asbury v. Dep't of Health & Human Res./Bureau for Children & Families and Div. of Pers.*, Docket No. 2011-1551-DHHR (May 17, 2013; *Green v. Health & Human Res./Bureau for Children & Families and Div. of Pers.*, Docket No. 2011-1577-DHHR (Oct. 1, 2012).

3. "[T]he granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of the Respondent." *Harris v. Dep't of Transportation*, Docket No. 06-DOH-224 (Jan. 11, 2007).

4. The actions of the Division of Corrections and Rehabilitation cannot be viewed as arbitrary or capricious. The Division of Corrections and Rehabilitation exercised its discretion, as permitted by the Pay Plan Policy, in not pursuing the pay increase for the Grievant. Respondent, Division of Personnel, took no action as it relates to the Pay Plan Policy for Grievant and cannot be found to have acted in an arbitrary or capricious manner.

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* 156 C.S.R. 1 § 6.20 (2018).

Date: May 16, 2022

Ronald L. Reece
Administrative Law Judge