YOLONDA TYLER, et al.,

Grievants,

v.

Docket No. 00-DOA-291

DEPARTMENT OF ADMINISTRATION/
PUBLIC EMPLOYEES INSURANCE AGENCY
and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This grievance was filed by Grievants, Yolonda Tyler, Marie Terry, Bernadette Curry, Barbara Beane, Vivian Roberts, Margo Perkins, Nancy Lynch, and Ruth Perry, against their employer, Respondent, Department of Administration/Public Employees Insurance Agency ("PEIA"). The Division of Personnel ("Personnel") appeared as a party at Level III. Grievants believe they should have received a 7% increase in pay when their classifications were placed in a higher pay grade. As relief Grievants asked for a 7% increase in pay, and back pay to August 1, 1999. (See footnote 1)

The following Findings of Fact are made based upon a preponderance of the evidence presented at Level III.

FINDINGS OF FACT

1. Grievant Terry is employed by PEIA as a Supervisor II. She has been employed by PEIA for 24 years. She was notified in July 1999, by Joseph Marcus, Secretary of the Department of Administration, that effective August 1, 1999, the pay grade for her classification would be changed from a pay grade 10 to a pay grade 11, but she would not receive a salary increase. Her annual salary on August 30, 2000, the date of the Level III hearing, exceeded $36,000.00.

2. Grievant Beane is employed by PEIA as a Supervisor II. She has been employed by PEIA

for 16 years, and has been an employee of the State of West Virginia for 20 years. She was notified in July 1999, by Mr. Marcus that effective August 1, 1999, the pay grade for her classification would be changed from a pay grade 10 to a pay grade 11, but she would not receive a salary increase. Her annual salary on August 30, 2000, was $33,700.00.

3. Grievant Lynch was employed by PEIA as an Office Assistant III. She was notified in July 1999, by Mr. Marcus that effective August 1, 1999, the pay grade for her classification would be changed one pay grade, but she would not receive a salary increase. Since this grievance was filed, Grievant Lynch has retired. Her annual salary when she retired was $32,000.00.

4. Grievant Tyler is employed by PEIA as an Office Assistant III. She has been employed by PEIA for 20 years. She was notified in July 1999, by Mr. Marcus that effective August 1, 1999, the pay grade for her classification would be changed from a pay grade 6 to a pay grade 7, but she would not receive a salary increase. Her salary on August 1, 1999, was $1,869.00 per month, $22,428.00 annually. 5. Grievant Roberts is employed by PEIA as an Office Assistant III. She has been employed by PEIA for four years. She was notified in July 1999, by Mr. Marcus that effective August 1, 1999, the pay grade for her classification would be changed from a pay grade 6 to a pay grade 7, but she would not receive a salary increase. Her annual salary on August 30, 2000, was $25,000.00.

6. Grievant Curry is employed by PEIA as an Office Assistant III. She has been employed by PEIA for nine years. She was notified in July 1999, by Mr. Marcus that effective August 1, 1999, the pay grade for her classification would be changed from a pay grade 6 to a pay grade 7, but she would not receive a salary increase. Her annual salary on August 30, 2000, was $23,400.00.

7. Grievant Perkins is employed by PEIA as an Office Assistant III. She has been employed by PEIA for nine years. She was notified in July 1999, by Mr. Marcus that effective August 1, 1999, the pay grade for her classification would be changed from a pay grade 6 to a pay grade 7, but she would not receive a salary increase. Her annual salary on August 30, 2000, was $25,000.00.

8. Grievant Perry was employed by PEIA as a Customer Service Representative. She was employed by PEIA for 10 years, and by the State of West Virginia for 15 years. She was notified in July 1999, by Mr. Marcus that effective August 1, 1999, the pay grade for her classification would be changed from a pay grade 6 to a pay grade 7, but she would not receive a salary increase. Grievant Perry has retired since this grievance was filed. Her annual salary when she retired was $26,604.00.

9. Grievants' classifications are within the Office Support Administration and Fiscal Services

occupational group, which includes all secretaries, data entry personnel, supervisory positions, and customer service representatives. It is a large occupational group, and is utilized by all state agencies. 10. The average salary for Supervisor II's is $27,888.00. The maximum salary for pay grade 11 is $32,184.00. Grievant Beane's and Grievant Terry's salaries are above the maximum.

11. The average salary for Office Assistant III's is $21,783.00. The maximum salary for pay grade 7 is $24,528.00.

12. The average salary for Customer Service Representatives is $18,265.00.

13. Prior to revising the pay grade assignments for Grievants' classifications, as well as those of other classifications, Personnel sent a letter to all agencies relaying information on market evaluations and the recommendations Personnel was making on changing pay grades of classifications. State agencies were given the opportunity to comment on the recommendations, and to suggest other changes, and they were to certify that they had the funding for any pay increases. The Division of Highways and the Division of Rehabilitation Services asked that the Personnel Board approve a special plan which would allow them to give some employees an increase in pay, with Highways requesting a 7% increase and Rehabilitation Services requesting a 5% increase. The stated justification for these requests was that the agencies were experiencing recruitment and retention difficulties, and they wished to correct some internal equity problems among employees. The State Personnel Board approved these two requests.

DISCUSSION

The West Virginia State Personnel Board was created in 1989 to replace the former Civil Service Commission. W. Va. Code § 29-6-6 (1989). The duties and responsibilities of the former Director of the Civil Service System were also transferred to the Director of Personnel. W. Va. Code § 29-6-9 (1989). Pursuant to W. Va. Code § 29-6-10(1), the State Personnel Board has been delegated the discretionary authority to promulgate, amend, or appeal legislative rules governing the

> preparation, maintenance and review of a position classification plan for all positions within the classified service . . . based upon a similarity of dutiesperformed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class.

The Personnel Board has the same authority and responsibility to establish a pay plan for all

positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2). The Personnel Board has wide discretion in performing its duties although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. Moore v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-126 (Aug. 26, 1994). See, Callaghan v. W. Va. Civil Serv. Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985).

This standard of entitlement to substantial weight applies when a grievant attempts to review Personnel's interpretation of its own regulations to determine if Personnel's decision was arbitrary and capricious or an abuse of discretion. Farber v. W. Va. Dep't of Health and Human Resources, Docket No. 95-HHR-052 (July 10, 1995). “There is no question [Personnel] has the authority to establish pay grades within a pay plan.” Stephenson v. W. Va. Bureau of Employment Programs/Div. of Personnel, Docket No. 92- DOP-447 (Aug. 12, 1993).

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). While a searching inquiryinto 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 Personnel. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Grievants bear the burden of proving, by a preponderance of the evidence, that Personnel's actions were arbitrary and capricious, or in violation of its Rules. This is a difficult undertaking. W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1995); Bennett v. Dep't of Health and Human Resources, Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dep't of Health and Human Resources, Docket No. 94-HHR- 206 (June 15, 1995); Thibault v. Div. of Rehabilitation Services, Docket No. 94-RS-061 (May 31, 1995); Frame v. Dep't of Health and Human Resources,

Docket No. 94-HHR-140 (Nov. 29, 1994). See O'Connell v. W. Va. Dep't of Health and Human Resources, Docket No. 95-HHR-251 (Oct. 13, 1995).

Grievants alleged that other employees had received 7% salary increases as a result of their classifications being placed in a higher pay grade, and concluded they should have received the same increase. Grievants did not identify any other employee who had received a 7% salary increase. PEIA made no argument. Personnel argued that it properly applied its Rules, and Grievants were not entitled to a pay increase because their salaries were already within the salary range for the new pay grades, and in fact in some cases exceeded the maximum salary level for the new pay grade. Personnel acknowledged that some employees received a 7% pay increase, but this too was accomplished within Personnel's Rules.

Lowell D. Basford, Assistant Director of Personnel's Classification and Compensation Section, testified that the pay grade revisions were the result of a joint effort between the Division of Personnel and the Human Resources Subcommittee of the Governor's Cabinet Counsel in Government, which was established by the Governor toevaluate the personnel functions of State Government. He explained that Edison Casto, Director of the Division of Personnel at the time, was the Chairman of the Subcommittee. The other members were Personnel Directors from various state agencies, a representative from the Governor's Office, the State Budget Director, and a representative from the Bureau of Commerce. He testified that Secretary Markus conveyed to the Subcommittee certain guidelines or criteria for the Subcommittee's work. Mr. Basford did not know the origin of these guidelines, but he stated the Subcommittee worked within the guidelines. He stated there were three criteria for the pay grade revisions: any pay grade revisions were to be staggered over a 12 month period; job classifications were to be evaluated in terms of recruitment and retention difficulties; and, the cost of the upgrades had to be implemented within the state agencies' existing personnel budgets.

Mr. Basford stated he met regularly with the Human Resources Subcommittee, and he reported the progress of the project on a regular basis. The Subcommittee would give him direction and guidance if they believed the pace of the project or other factors should be changed. He testified that Personnel developed the recommendations for pay grade revisions, but the Subcommittee had to justify the recommendations to the Governor's Office and the Governor's Cabinet Counsel in Government. Mr. Basford stated Personnel did salary surveys, looking to the private sector, and

provided that information to the Subcommittee, demonstrating that the pay grades were significantly below market. He testified Personnel presented its recommendations for pay grade revisions to the State Personnel Board, and those revisions which were made were approved by the Board.

Mr. Basford explained that the Division of Personnel's Rules do not provide for a salary change when a classification is placed in a higher pay grade, unless the employee's salary is below the minimum salary for the pay grade, in which case, the employee's salary is increased to the minimum salary level for the pay grade. He testified that the great majority of State employees did not see a salary increase with the pay grade changes. The Division of Personnel's Rules at Section 5 address the "Compensation Plan and Salary Administration." These Rules make clear the role of the Governor's Office in the compensation plan. The Rules at Section 5 provide:

> Pursuant to the provisions of the W.Va. Code §29-6-10(2), the following salary regulations in this section apply to classified employees.
>
> 5.1. Purpose and Intent - To attract qualified employees and retain them in the classified service, the Board shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various agencies and on comparability to pay rates established in other public and private agencies and businesses.
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> 5.2. Preparation of the Plan - After consultation with the appointing authorities and State fiscal officers and after a public hearing, the Director and the Board shall prepare and submit to the Governor for his or her approval any revision of the pay plan. The pay plan shall include salary schedules containing multiple pay grades with minimum and maximum rates of pay for each grade and a plan of implementation. The Board may make periodic amendments to the pay plan in the same manner.
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> 5.3. Adoption of the Plan - The plan becomes effective only after it has been approved by the Governor. The approved pay plan constitutes the official schedule of salaries for the classified service.

Further, according to these Rules, as Mr. Basford pointed out, Grievants were not entitled to a salary increase when their classifications were placed in a higher pay grade, unless their salaries were below the minimum salary levels for the higher pay grades. Section 5.4(f)(2) of Personnel's Rules provides in this regard:

2. Pay on Reclassification

a. Higher minimum

1. When a class is reassigned by the Board to a salary range having a higher minimum, the salaries of those incumbents below the new minimum shall be adjusted to the new minimum.

2. Where the salary of the incumbent coincides with a pay rate in the new range, the salary shall remain unchanged.

Except for Grievant Tyler, Grievants presented no evidence regarding their salaries on August 1, 1999, and no evidence was presented as to the minimum salary levels for the pay grades at issue. However, given Grievants' salaries a year later, and the fact that theirsalaries were near the maximum level at that time, and in most cases exceeded the maximum level, it is likely that their salaries were within the pay range of the new pay grade on August 1, 1999. Grievants have not demonstrated they were entitled to a salary increase.

Finally, the Rules provide for modifications to the approved pay plan revisions when recruitment and/or retention difficulties have been documented, or to equalize pay, as Mr. Basford described had been done for the Division of Highways and the Division of Rehabilitation Services. Section 5.4(f)(4) provides:

c. The Board, by formal action, may approve or modify a plan of application on reclassification other than those described in subparagraphs 5.4.(f)2.a. and 5.4.(f)2.b. of this rule based on documented recruitment and/or retention difficulties or consideration of equal treatment in terms of pay for reclassified employees.

There was no evidence that PEIA had requested additional monies for its employees based upon this provision.

Grievants' claim appears to be that they have been discriminated against because some employees received a pay increase when their classifications were placed in a higher pay grade, while Grievants did not. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as:

any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the

employees.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

(a) that he is similarly situated in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. A grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievants have not demonstrated they were discriminated against. They provided no information on the employees they alleged had received 7% pay increases, so it is impossible to compare Grievants to these employees. The employees identified by Mr. Basford who received 7% pay increases were not similarly situated to Grievants, and Personnel provided a legitimate, nondiscriminatory reason for the difference in treatment.

Grievants argued Personnel had produced no evidence of recruitment and retention problems, or pay inequity, at the Division of Highways or the Division of Rehabilitation Services. The State Personnel Board evaluated the requests made by these agencies and deemed them to be valid. This represents a legitimate, nondiscriminatory reason for the difference in treatment, which is all Respondents were required to demonstrate. The undersigned is not going to second guess that decision absent some evidence that this evaluation was not properly made. Mr. Basford's testimony on the matter is sufficient.

The following Conclusions of Law support the decision reached.

CONCLUSIONS OF LAW

1. Grievants have the burden of proof in this case to establish, by a preponderance of the

evidence, that Personnel's action in determining that they were not entitled to a pay increase when their classifications were placed in a higher pay grade, was clearly wrong, arbitrary, capricious, contrary to regulation, or otherwise illegal and improper. W. Va. Code §29-6A-6; Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997); Bennett v. Dep't of Health and Human Resources, Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dep't of Health and Human Resources, Docket No. 94-HHR-206 (June 15, 1995). 2. An action is arbitrary and capricious if the agency making the decision 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 is 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). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id.

3. 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 Personnel. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

4. W. Va. Code § 29-6-10 authorizes the State Personnel Board to promulgate rules for the implementation and administration of the classified State employees' job classification and pay plans for which plans the Personnel Board is responsible. Frame v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-140 (Nov. 29, 1994). 5. The Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2).

6. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985). 7. Personnel's Rules at Section 5 provide that when a classification is placed in a higher pay grade, employees in that classification are entitled to a pay increase only if their salary is below

the minimum salary level for the pay grade. Grievants did not demonstrate that they were entitled to a pay increase when their classifications were assigned to a higher pay grade.

8. A grievant alleging discrimination must establish a prima facie case by demonstrating:

(a) that he is similarly situated in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

9. Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. A grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

10. Personnel's Rules at Section 5 also provide for pay differentials when there is a demonstration of recruitment and/or retention problems, or to equalize pay. Pay differentials were approved for the Division of Highways and Division of Rehabilitation Services based upon the requests of these agencies and a demonstration of recruitment and/or retention problems, and to equalize pay.

11. Grievants were not discriminated against.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 8, 2001

Footnote: 1

Grievants filed individual grievances between August 6 and August 11, 1999. Grievants' supervisors responded that they were without authority to grant the relief requested. Grievants proceeded to Level II. Level II decisions denying the grievances were issued on August 16, 1999, and Grievants appealed to Level III on August 20, 1999. The grievances were consolidated at Level III, where a hearing was held on August 30, 2000. The grievance was denied at Level III on September 5, 2000. Grievants appealed to Level IV on September 12, 2000. After several continuances granted for good cause shown, the parties appeared on June 18, 2001, for a Level IV hearing. After some discussion off the record regarding documents Grievants had requested at Level III, the parties agreed that this grievance could be submitted for decision based upon the record developed at Level III. Grievants were represented by Fred Tucker, Respondent PEIA was represented by B. Keith Huffman, Esquire, and Respondent Personnel was represented by Robert Williams, Esquire. This matter became mature for decision upon receipt of the last of the parties' post-hearing written arguments on July 10, 2001. PEIA declined to submit written argument.