CHARLOTTE WICKLINE,

Grievant,

v. **Docket No. 03-HHR-041**

DEPARTMENT OF HEALTH AND HUMAN SERVICES/BUREAU FOR MEDICAL SERVICES,

Respondents.

D E C I S I O N

Grievant, Charlotte Wickline, filed this grievance against her employer, the Department of Health and Human Resources ("HHR") on or about August 30, 2002. She asserts HHR was should have paid her salary at the market rate when she was promoted. The Relief Sought is to "have [her] salary raised to the original amount at the Market Rate of $32,004.00 and back pay with interest."

This grievance was denied at all lower levels. Grievant appealed to Level IV, on February 11, 2003, and a hearing was held on March 24, 2003. This case became mature for decision on March 26, 2003, when the transcript for the last day of hearing at Level III was received by the Grievance Board. The parties elected not to submit proposed findings of fact and conclusions of law. Grievant represented herself, and HHR was represented by Assistant Attorney General Darlene Ratliff-Thomas.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed as an Office Assistant III in HHR's Bureau of Medical Services.

2. She applied for and received the position of HHR Associate. A review by the Division of Personnel found Grievant met the requirements for this classification at any rate in the pay range. Grt's Level III Exhibit.

3. She discussed the salary she wanted with her supervisors and asked to be paid at the

market rate, $32,004.00. Her supervisor requested this amount for her. (See footnote 1)

4. HHR frequently pays employees who are promoted the average salary for the employees in that position. The average salary for an HHR Associate was approximately $26,784.00, and Grievant's salary was set at that amount.

5. Grievant's pay grade went from a 7 to a 10, and she received a 20.5% pay increase.

6. The increase required on promotion by the Division of Personnel is 5% per pay grade, up to 15%. Many of HHR's employees receive only the Division of Personnel's required increase. Others, like Grievant, received a greater amount. Grt's Exhs. at Levels III and IV.

7. Some individuals have received greater percentage increases than Grievant, and some have received lesser percentage increases. 8. Some of the individuals who received greater percentage increases than Grievant did not reach the average salary, and some attained greater than the average salary. (See footnote 2)

9. There was only one other employee who was recently promoted from an Office Assistant III to an HHR Associate, and this individual received only a 15% increase and was not raised to the average salary.

Issues and Arguments

Grievant asserts she should have received a salary at the market rate because a review by the Division of Personnel stated she "meets the requirements for this classification at any rate in the pay range." Grt's Exh. 1 at Level III. She also argues that HHR has created an "invisible" rule that is only applied when HHR desires, and she has been treated unfairly. HHR maintains it placed Grievant's salary at the average for the other employees in this classification, and this is its typical practice. HHR also notes Grievant received a greater pay increase than required by the Division of Personnel's regulations. (See footnote 3)

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. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the grievant has not met her or her burden. Id.

The following portions of the West Virginia Division of Personnel's Administrative Rules are pertinent to the resolution of this grievance:

5.5 Pay on Promotion - When an employee is promoted, the employee's pay shall be adjusted as follows:

(a) Minimum Increase - An employee whose salary is at the minimum rate for the pay grade of the current classification shall receive an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted. An employee whose salary is within the range of the pay grade for the current classification shall receive an increase of one increment, as established by the State Personnel Board, per pay grade advanced to a maximum of 3 pay grades, or an increase to the minimum rate of the paygrade for the job classification to which the employee is being promoted, whichever is greater, but in no case shall an employee receive an increase which causes the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted;

(b) Additional Increase - The appointing authority may grant additional incremental increases, as established by the State Personnel Board, to an employee being promoted if the employee has sufficient qualifications in excess of the minimum required for the new class. . . .

(Emphasis added).

Although not stated as such, Grievant's contention is she has been subjected to discrimination and/or favoritism, because other individuals were hired at greater than the average salary. She also asserts she should have received additional increases, up to the market rate, which would recognize her experience and abilities.

Discrimination is defined in W. Va. Code § 29-6A-2(d), 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." W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 4) of discrimination and/or favoritism under W. Va. Code § 29-6A-2(d) & (h), must demonstrate the following:

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

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant has failed to establish a prima facie case of discrimination and/or favoritism. She has failed to identify any employees with whom she was "similarly situated," and who were treated differently to her detriment. The only individual she identified who was recently promoted from an Office Assistant III to HHR Associate received only the required 15% increase, and she was not raised to the classification average, while Grievant received a 20.5% increase and was increased to the classification average. The other identified individuals were not within her classification, and thus, were not similarly situated.

Furthermore, while it is true HHR could have increased Grievant's salary, as provided by the

Division of Personnel Rule 5.5(b), these increases are within an agency'sdiscretion, and they are not an entitlement. Test. Basford at Level IV. This decision would be judged by the arbitrary and capricious standard. See Queen v. Dep't of Health and Human Resources, Docket No. 99-HHR-412 (Jan. 28, 2000).

"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)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). 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)).

Grievant has not established her salary was contrary to the provisions of the Administrative Rule regarding salaries, or that HHR's decision to give her a 20.5% increase and raise her salary to the classification average was arbitrary and capricious. Additionally the undersigned Administrative Law Judge finds no violation of any statute, rule, or regulation.

The above-discussion will be supplemented by the following Conclusions of Law.

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. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "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 and Human Resources, Docket No. 92-HHR-486

(May 17, 1993). Where the evidence equally supports both sides, the grievant has not met his or her burden. Id.

2. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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."

3. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

4. A grievant, seeking to establish a prima facie case of discrimination and/or favoritism under W. Va. Code § 29-6A-2(d) & (h), must demonstrate the following:

> (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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

5. Once a grievant establishes a prima facie case of discrimination and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

6. Grievant has not established a prima facie case of discrimination and/or favoritism.

7. Pursuant to the Division of Personnel Administrative Rule 5.5(b), "[t]he appointing authority may grant additional incremental increases, as established by the State Personnel Board, to an employee being promoted if the employee has sufficient qualifications in excess of the minimum required for the new class. . . ." (Emphasis added).

8. Grievant has not proven HHR acted in an arbitrary and capricious manner in the setting of her salary for her new position. See Queen v. Dep't of Health and Human Resources, Docket No. 99-HHR-412 (Jan. 28, 2000).

9. Grievant has not established a violation of any statute, rule, or regulation. Accordingly, this grievance is **DENIED**. Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 8, 2003

Footnote: 1

The market rate is higher than the mid-point.

Footnote: 2

Contrary to Grievant's assertions and tables, where she indicated 10 of 13 employees received an increase greater than the average, a review of the table reveals only 3 out of 13 people received an increase greater than the average salary. The undersigned Administrative Law Judge did not count a couple of employees where the difference was less than fifty dollars on a yearly salary, as this amount is statistically insignificant. Grt's Exhs. at Levels III and IV.

Footnote: 3

At her Level III hearing, Grievant asserted her exact same duties as an Office Assistant III were posted as an Administrative Services Assistant II, and when she found out she would not receive the salary she requested, she asked to return to her former position in the Administrative Services Assistant II classification. HHR requested and was granted an opportunity to review these assertions as Mike McCabe, HHR's Director of Personnel, thought there might have been some incorrect treatment of Grievant. At the second day of hearing, the following facts were revealed: 1) while many of the types ofduties remained the same, the position had been changed and the duties increased; 2) the position now

supervised an Office Assistant III; 3) Grievant had accepted the HHR Associate position; 4) Grievant did not apply for the Administrative Services Assistant II position; and 5) the Administrative Services Assistant II position had been offered to another employee by the time Grievant expressed a desire to return to her former position. Accordingly, there appears to be no problem with the way this series of event was handled, and it will not be discussed further.

Footnote: 4

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).