JAMES SOWARDS,

Grievant,

v. Docket No. 03-HHR-333

DEPARTMENT OF HEALTH & HUMAN RESOURCES

and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

James Sowards ("Grievant"), employed by the Department of Health & Human Resources ("DHHR") as a Programs Coordinator - Senior, filed a level one grievance on May 27, 2003, in which he alleged that his salary did not reflect his training and experience. For relief, Grievant requests a salary increase. Grievant's immediate supervisor lacked authority to grant the requested relief. The matter was denied at levels two and three, and appeal to level four was made on October 28, 2003. Grievant, representing himself, Senior Assistant Attorney General Landon R. Brown, and Karen O'Sullivan Thornton, Esq., counsel for DHHR and the Division of Personnel ("DOP"), respectively, agreed to submit the matter for a decision based upon the lower level record. The grievance became mature for decision upon receipt of Grievant's proposed findings of fact and conclusions of law on December 22, 2003.

The following facts have been derived from the record developed at level three.

Findings of Fact

1. Grievant was employed by DHHR/Bureau for Public Health/Office of Community & Rural Health Services/Office of Emergency Medical Services (OEMS), as a Programs Coordinator, pay grade 13, in March 1996.

2. In April 2003, Nancye Bazzle, Director of the Office of Community & RuralHealth Services, submitted a request to Mark King, Disaster Coordinator and Director of OEMS, that a position of Disaster Services Administrator be created, using the position held by Grievant. The reason given for this request was to allow OEMS to more effectively handle disaster response, terrorism prevention, and threat preparedness.

3. Grievant's position was upgraded to Programs Coordinator - Senior, (with the working title of Disaster Services Administrator), pay grade 15, in May 2003. At that time, Grievant received a 10% salary increase.

4. Although Grievant has completed substantial training, he did not receive an additional salary increase based upon his experience and training at the time his position was upgraded.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his allegations 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 and Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is 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." Hundley v. W. Va. Div. of Corr., Docket No. 98-CORR-218 (1998).

Grievant asserts that DHHR failed to consider his previous Training and Experience Rating, or conduct a new rating, when it determined his salary upon his reallocation to pay grade 15. Grievant notes that while his salary falls within the salary range for pay grade 15, it remains $9,948.00 less than the market rate specified. Grievant argues that denialof credit for his training and experience because he was an incumbent employee at the time of his promotion is discriminatory and arbitrary and capricious because it relates exclusively to the status of the applicant, not to the actual job responsibilities of the position.

DHHR argues that Grievant's salary was properly adjusted one increment per pay grade upon his promotion. DHHR acknowledges that additional increases may be granted if the employee has sufficient qualifications in excess of the minimum required for the new classification, but argues these increases are granted at the discretion of the appointing authority and are not an entitlement.

The follow sections of the Division of Personnel Administrative Rule provide guidance relevant to this issue.

Section 5.4.(b) provides new hires may begin employment above the minimum salary in certain circumstances, stating:

[t]he entry salary for any employee shall be at the minimum salary for the class including any applicable Board approved pay differential. However, an individual possessing pertinent training or experience above the minimum required for the class, as determined by the Director, may be appointed at a pay rate above the minimum, up to the market rate of the salary range, unless otherwise prescribed by the Board. For each increment above the minimum, the individual must have in excess of the minimum requirements at least six months of pertinent experience or equivalent pertinent training. The Director may authorize appointment at a rate above the market rate where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class.

Section 5.4(f) is also relevant in this situation and states: "[w]hen a position is reallocated to a different class, the salary of the incumbent shall be adjusted in accordance with salary regulations for promotion, demotion and lateral class change." Section 5.5 sets forth guidelines for minimum mandatory and additional discretionary salary adjustments pursuant to promotion:

(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 pay grade for the job classification to which the employee is being promoted, whichever is greater. 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.

(c) 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. The employee must possess at least six months of pertinent experience or an equivalent amount of pertinent training for each additional incremental increase granted. In no case shall the additional incremental increase cause the employee's pay to exceed the maximum for the pay

grade to which he or she is being promoted.

The clear and unambiguous language of the Administrative Rule supports Grievant's claim that he could have been given an additional salary increase at the time of his promotion, based upon his experience and training. While he does not dispute the fact that an additional salary increase is discretionary, Grievant argues that Respondent engaged in discrimination because it denied him the increase due to the fact that he was an incumbent, rather than a new employee. W. Va. Code § 29-6A-2(d), defines discrimination 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." In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, a grievants must show:
(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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a *prima facie* case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, *supra*; see Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).
Prior to his promotion, Grievant's salary was $31,824.00, *per annum*. The 10% minimum increase brought Grievant's salary to $35,008.00, well within the $27,252.00 to $50,400.00 pay range for pay grade 15 The market rate, defined by DOP's Pay Plan Implementation Policy as, "a rate within each pay grade range established by the Division of Personnel to approximate the market midpoint pay levels among the southeastern stategovernments," for pay grade 15 is $44,964. Grievant had been considered for a higher than minimum salary when he was first employed by Respondent, and could have been considered for an additional increase upon

his promotion. Because it is within the appointing authority's discretion to award more than the minimum salary required for both new hires and promotions, Respondent's determination in this instance does not constitute discrimination. (See footnote 1)

Grievant next argues that Respondent's action was arbitrary and capricious. 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 inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment . . . . See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). The "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. Adkins v. W. Va. Dep't of Educ., 210 W. Va.105, 566 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)). Because the additional increase is discretionary, Respondent's decision in this case was not arbitrary and capricious.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his allegations 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 and Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. Grievant's position was reallocated to a different class, requiring that his salary be adjusted in accordance with salary regulations for promotion, *i.e.*,a minimum increase of 5% per pay grade.

3. In addition to the minimum salary increases awarded, the appointing authority may

grant additional incremental increases to an employee being promoted, if the employee has sufficient qualifications in excess of the minimum required for the new class.

4. W. Va. Code § 29-6A-2(d), defines discrimination 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."

5. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, a grievants must show:(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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a *prima facie* case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, *supra*; see Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

6. Because the award of higher than minimum salary is discretionary with the appointing authority for both new hires and promotions, Grievant failed to prove that Respondent's decision not to award him an additional incremental salary increase resulted in discrimination, as defined by W. Va. Code § 29-6A-2(d).

7. 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 inquiry into the facts is required to determine if an action is arbitrary and capricious, thescope of review is narrow, and an

administrative law judge may not simply substitute her judgment . . . . See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). The "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. Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105, 566 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

8. Grievant failed to prove that Respondent's decision not to award an additional incremental salary increase in this case was arbitrary and capricious.

Accordingly, the 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, and 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. Theappealing 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.

DATE: JANUARY 29, 2004

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.The testimony of Ms. Bazzle at level three indicated that the additional salary was not awarded because it would be considered a merit raise. This increase would not have been a merit raise; however, notwithstanding this error, the testimony establishes that an additional salary increase was considered.