THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CINDY BIRCHFIELD,

Grievant,

v. **Docket No. 05-LC-363**

WEST VIRGINIA LOTTERY COMMISSION,

Respondent.

D E C I S I O N

Grievant, Cindy Birchfield, was employed by the West Virginia Lottery Commission ("LC" or Respondent) as a Controller. She filed a grievance on April 28, 2005, which stated:

> **I have been harassed, discriminated against, defamation of character, concern for personal safety, being retaliated against and discrepancy in pay raises.**
>
> **Relief Sought: Cease and desist from harassing, discriminating, defamation of character, retaliating and correct pay inequities[,] including back pay with interest. Made whole in every way including attorney fees and expenses.**

This grievance was denied at all lower levels, and appealed to Level IV on September 30, 2005. Following numerous continuances, most of which were requested by Grievant, a Level IV hearing was scheduled for April 5, 2007, following a November 2, 2006, pre-hearing conference. This was the first date Grievant's attorney was available. Grievant was represented by Erica Smith, Esq., and Respondent was represented by Ronald Brown, Assistant Attorney General. The Level IV hearing was conducted in the Grievance Board's Charleston office, and the matter became mature for hearing with the submission of the parties' proposals on May 2, 2007.

Background and Synopsis

Grievant filed this grievance in April of 2005, and by the time this grievance arrived at Level IV, she was no longer a LC employee. Accordingly, Respondent filed a Motion in Limine to amend the grievance and remove certain issues. The only issues remaining at the time of the Level IV hearing were whether Grievant should have received a larger merit increase, and whether she should be reimbursed for her attendance at a non-approved course on auditing and payment for a half-hour of overtime. (See footnote 1)

At the Level IV hearing, for the first time, Grievant asserted that because she had not received a performance evaluation she was entitled to a larger merit increase. Grievant did not put Respondent on notice of this new assertion. She also asserted she was not aware that she had any performance problems.

In its proposals, Respondent objected to the assertion that this failure to conduct a performance evaluation should result in a larger merit increase. Respondent maintained this argument could not be raised at Level IV because it was not part of the original grievance, nor was it addressed during any of the lower level proceedings. Respondent also noted Grievant had not received a performance evaluation when she received her prior 10% and 5% merit increases.

The undersigned Administrative Law Judge reviewed the lower level record, and it is clear this issue was not raised until the Level IV hearing. During her Level IV testimony, Grievant stated she filed this grievance about her failure to receive a larger merit increase, not about her failure to receive a performance evaluation. Thus, Grievant has clearlyconceded the performance evaluation issue is not meritorious, and it does not need to be addressed further. The only remaining issues are whether Respondent's decisions not to give Grievant a merit increase and to not allow her to attend an auditing course and pay her for a half hour of overtime were the result of retaliation and/or discrimination.

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 initially employed by Respondent effective January 1, 1998, as an

Internal Auditor. In 2001, she was promoted to Controller, and held this title until her resignation on June 1, 2006.

2. Grievant's starting salary was $34,368.00. She received a 15% increase when she was reallocated from Internal Auditor to Controller on October 16, 2001. She received a 5% merit increase on June 16, 2000, a 5% merit increase on April 16, 2002, and a 10% merit increase December 16, 2003. On April 16, 2005, Grievant received a 2.5% merit increase, and this increase is the source of the grievance. On August 1, 2006, the day she resigned, her salary was $54,288.00, and she was the highest paid employee in the Finance and Administration Section. Grievant's salary increased more than $20,000 during the nine years she was with LC.

3. After Grievant became Controller, she had problems managing her supervisees, and understanding her role within the agency. She was frequently counseled about these shortcomings. (See footnote 2) Testimony Hall, Helton, Musgrave, Level IV Hearing. 4. Grievant continued to have problems in these areas up until the time she resigned.

5. In December 2004, one of Grievant's supervisees, a 17-year employee, was reallocated and received a salary greater than Grievant's. During the next round of merit increases, Director John Musgrave gave Grievant a 2.5% merit increase so that her salary would be higher than that of this supervisee.

6. While not classified with the same title, there were two other managers, who Respondent considered to have similar managerial responsibilities. (There is only one Controller at the LC.) During the time period at issue, one of these employees received a 5% merit increase, and the other employee received no merit increase.

7. In April 2005, Grievant asked to attend an auditing course in Virginia, and this request was denied because Grievant was no longer the Internal Auditor. Grievant went anyway and spent her own funds. Later that same year, the same course was offered for free in Charleston, and LC wanted Grievant to attend.

8. One day Grievant stayed over approximately one half hour to accept a phone call from the press. She knew she was required to have preapproval to work any overtime, and she also knew she was not to take any phone calls from the media; they were always to go to the director. The next day she told her supervisor about the phone call, requested overtime, and

asked to leave early. This request was denied. Grievant wants compensation for this half hour. 9. Grievant never grieved LC's failure to perform evaluations during her time with Respondent. Grievant did not conduct performance evaluations on her supervisees. (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. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See* W. Va. Code § 29-6A- 6. (See footnote 4) ***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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).**

Grievant's arguments have changed over time. The issue about the failure to conduct a performance evaluation represented a new Statement of Grievance and was notraised until the Level IV hearing. As Respondents objected, these arguments were not allowed pursuant to the West Virginia Supreme Court of Appeals ruling in *Hess v. West Virginia Department of Health and Human Resources*, 189 W. Va. 357, 432 S.E.2d 27 (1993), which states, "the final level of the grievance procedure where alteration of the substance of a grievance under W. Va. Code, 29-6A-3(j), can occur is at Level III." *See Emigh v. Dep't of Health and Human Res.*, Docket No. 99-HHR-408 (May 31, 2000). Respondent did not consent to expanding the scope of this grievance at Level IV. Under these circumstances, the undersigned administrative law judge is constrained by W. Va. Code § 18-29-3(j) to conclude that the issue of performance evaluation should not be heard for the first time at Level IV of the grievance procedure. *Hess*, *supra*; *Wells v. Bd. of Directors W. Va. State College*, Docket No. 94-MBOD-334 (Aug. 22, 1999); *Crawford v. Mercer County Bd. of Educ.*, Docket No. 94-27-958 (Apr. 13, 1995); *Anderson v. Wyoming County Bd. of Educ.*, Docket No. 93-55-183 (Sept. 30, 1993).

I. Merit increase

An employer's decision on merit increases will generally not be disturbed unless shown to

be unreasonable, arbitrary and capricious, or contrary to law or properly established policies or directives. (See footnote 5) *Terry v. W. Va. Div. of Highways*, Docket No. 91-DOH- 185 (Dec. 30, 1991); *Osborne v. W. Va. Div. of Rehab. Serv.*, Docket No. 89-RS-051 (May 16, 1989).

"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 mannercontrary 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 Res.*, 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)). " 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 [an agency]. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra*.

It is clear LC should conduct yearly performance evaluations on all its employees, but the failure of an agency to perform these evaluations does not automatically result in an employee receiving a merit increase. *See Stewart v. Div. of Corr.*, Docket No. 04- CORR-430 (May 31, 2005). This argument about the failure to conduct performance evaluation does not affect the outcome or analysis of the issue before the undersigned Administrative Law Judge, which is whether Grievant was entitled to more than a 2.5% merit increase.

> While an agency is required to abide by its own lawfully established policies, its actions will not always be reversed where it has failed to followits policies. "The grievant must prove that the error was harmful, in that 'a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error.' McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10.

Kloc v. Bd. of Trustees, Docket No. 96-BOT-507 (Aug. 20, 1997). *See Farley v. Dep't of Health*

and Human Res., **Docket No. 02-HHR-0888D (May 8, 2002)*; Walker v. Dep't of Pub. Safety*, Docket No. 98-DPS-056 (Sept. 11, 1998).**

Ms. Hill and Mr. Musgrave indicated they had discussed with Grievant her weaknesses, and the need for her to improve her skills in the areas of monitoring work product and interpersonal skills several times. They saw little improvement in these areas. Testimony clarified that the reason Grievant received a 2.5% increase was to insure her salary was higher than her supervisee, not for meritorious service during the past year. Accordingly, Grievant has not demonstrated that LC's failure to grant her greater than a 2.5% increase was arbitrary and capricious. Additionally, testimony established Grievant probably would not have received even this increase, but for the reallocation of her supervisee.

II. Discrimination

Grievant also alleged her failure to receive a larger merit increase was an act of discrimination. "'Discrimination' means 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(d). The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish either adiscrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> **(a) that he or she has been treated differently from one or more similarly-situated employee(s);**
>
> **(b) that the different treatment is not related to the actual job responsibilities of the employees; and,**
>
> **(c) that the difference in treatment was not agreed to in writing by the employee.**

Frymier v. Higher Educ. Policy Comm.*, Slip Opinions Nos. 32163 and 33296 (W. Va., Oct. 12, 2007)*; See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005). In *Frymier*, the Court acknowledged what this Board's cases have consistently held, i.e., that the elements of discrimination and favoritism are essentially identical. *See Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004); *Kincaid v. Div. of Corr.*, Docket No. 98-CORR- 144 (Nov. 23, 1998); *Prince v. Wayne

***County Bd. of Educ.*, Docket No. 90-50-281 (Jan. 28, 1990). "[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *White, supra*.**

Grievant has failed to demonstrate discrimination. The only employee to whom she compared herself was her supervisee who was reallocated and in a different classification. Since she is seeking a merit increase, and this employee received an increase based on his reallocation, these two individuals are not similarly situated. Respondent indicated there were two managers who although they had different classifications had similar duties. One had received no merit increase and the other had received a 5% merit increase. Grievant did not equate herself to these employees other than to say they were notcomparable. Accordingly, Grievant did not meet her burden of proof as she did not establish similarly situated employees were treated differently.

III. Retaliation

Grievant also asserts her failure to receive a larger merit increase was in retaliation for her failure to accept the offer to return to being an Internal Auditor at the same rate of pay. Reprisal is defined in W. Va. Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> **1) that he/she engaged in protected activity, *e.g.* filing or participating in a grievance;**
>
> **2) that he/she was subsequently treated in an adverse manner by the employer or an agent;**
>
> **3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;**
>
> **4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or**

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

***See Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251(1986); *Gruen v. Bd. of Directors/Concord College*, Docket No. 95-BOD-281 (Mar. 6, 1997).**

If a grievant establishes a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Webb, supra*.

Grievant has not met her burden of proof on this issue. First, she did not establish that her failure to receive a greater merit increase had anything to do with her prior grievance. This grievance was settled, and Grievant has received a merit increase since that time.

Additionally, Grievant's assertion Mr. Musgrave told her he was going to "make her" take the Internal Auditor position is not believed by the undersigned Administrative Law Judge. Mr. Musgrave credibly testified he offered her the position, with no loss of compensation, because she had served in the position before, and her request to go to the auditing course indicated she was still interested in this area. Additionally, Grievant had served in this position satisfactorily and had either few or no supervisees; thus, one of her problem areas would be resolved. Grievant turned down the position and that was the end of it. As a final observation, it is noted that granting a merit increase is not an adverse action.

As demonstrated by the above-discussion, Grievant also did not establish she had been subjected to discrimination or retaliation by LC's refusal to pay her a half-hour of overtime or LC's refusal to compensate her for a non-approved out-of-state auditingcourse. Grievant did not demonstrate other employees who were similarly situated were treated differently.

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. *Howell v. W. Va. Dep't of Health & Human Res.*, 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).**

2. "[T]he final level of the grievance procedure where alteration of the substance of a grievance under W. Va. Code, 29-6A-3(j), can occur is at Level III." *Hess v. W. Va. Dep't of Health and Human Res.*, 189 W. Va. 357, 432 S.E.2d 27 (1993) *See Emigh v. Dep't of Health and Human Res.*, Docket No. 99-HHR-408 (May 31, 2000).

3. As Respondent did not consent to expanding the scope of this grievance at Level IV, the undersigned administrative law judge is constrained by W. Va. Code § 18-29-3(j) to conclude that the issue of performance evaluation should not be heard for the first time at Level IV of the grievance procedure. *Hess*, *supra*; *Wells v. Bd. of Directors W. Va. State College*, Docket No. 94-MBOD-334 (Aug. 22, 1999)*; Crawford v. Mercer County Bd. of Educ.*, Docket No. 94-27-958 (Apr. 13, 1995); *Anderson v. Wyoming County Bd. of Educ.*, Docket No. 93-55-183 (Sept. 30, 1993).

4. "An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious or contrary to law or properlyestablished policies or directives." *Terry v. W. Va. Div. of Highways*, Docket No. 91-DOH- 186 (Dec. 30, 1991); *Osborne v. W. Va. Div. of Rehab. Serv.*, Docket No. 89-RS-051 (May 16, 1989).

6. "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 Res.*, 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*, 196 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

6. Grievant did not prove the actions of LC were arbitrary and capricious or an abuse of discretion.

7. "'Discrimination' means 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(d). 8. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> **(a) that he or she has been treated differently from one or more similarly-situated employee(s);**
>
> **(b) that the different treatment is not related to the actual job responsibilities of the employees; and,**
>
> **(c) that the difference in treatment was not agreed to in writing by the employee.**

***Frymier v. Higher Educ. Policy Comm.*, Slip Opinions Nos. 32163 and 33296 (W. Va., Oct. 12, 2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005).**

9. Grievant has not met her burden of proof and established she was discriminated against either in her merit increase or the failure to pay her for a half hour of over time or for a non-approved auditing course.

10. Reprisal is defined in W. Va. Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

11. To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> **1) that he/she engaged in protected activity, *e.g.* filing or participating in a grievance;**
>
> **2) that he/she was subsequently treated in an adverse manner by the employer or an agent;**

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

***See Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Gruen v. Bd. of Directors/Concord College*, Docket No. 95-BOD-281 (Mar. 6, 1997).**

12. If a grievant establishes a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Webb, supra*.

13. Grievant has not met her burden of proof to establish she was retaliated against as she received a merit increase after she filed and settled a grievance.

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. *See* W. Va. Code § 29-6A-7 (repealed, *See Footnote 4, supra)*. Neither the West 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 isrequired 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.

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Janis I. Reynolds

Acting Chief Administrative Law Judge

Dated: January 31, 2008

Footnote: 1

For example, issues of defamation of character and snipers hired to shoot her as she left work were not addressed.

Footnote: 2

At some point Grievant received a written reprimand. This disciplinary action was successfully grieved and was removed from her record. This written reprimand wasdiscussed during the Level IV hearing, but as neither the Statement of Grievance, nor the settlement agreement were placed into evidence it was unclear to the undersigned Administrative Law Judge how this prior grievance related to the current one.

Footnote: 3

Grievant asserted that one time she tried to file a portion of the Division of Personnel's performance evaluation on one employee, but the Human Resources Director, Terry Martin, did not would not accept the paperwork. Ms. Martin stated Grievant wanted to place a letter, not a Division of Personnel evaluation form, in the employee's personnel file, and she told Grievant this letter could not be placed in the personnel file. Grievant never gave Ms. Martin any completed yearly evaluations for any of her employees.

Footnote: 4

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case. Procedural Rules of the Public Employees Grievance Board took effect December 27, 2007, and apply to all cases.

Footnote: 5

The issue of failure to perform performance evaluations using Division of Personnel forms has already been addressed.