WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WILLIAM E. ASBURY,
Grievant,

v. **Docket No. 2011-1551-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES AND DIVISION OF PERSONNEL,
Respondents.

DECISION

Grievant, William Asbury, is employed by Respondent, Department of Health and Human Resources ("DHHR"), as a Contract Specialist in the Health and Human Resources Specialist, Senior classification. Mr. Asbury filed a level one grievance form dated April 21, 2011, alleging:

> Failure to comply with laws and rules pertaining to pay equity for equal work (Internal Equity) and Merit Pay as defined in Title 143 of Legislative Rule West Virginia Division of Personnel Series 1 Administrative Rules, Section 5.9., Salary Advancements.[1]

As relief, Grievant seeks the following:

> Increase my annual wages to eliminate the salary inequity compared to my co-worker and grant me a at least 10% merit raise, plus back pay and any other relief deemed appropriate under the laws & rules of the State of West Virginia.[2]

The DHHR level one grievance evaluator found that she lacked authority to resolve the grievance and it was waived to level two on April 25, 2011. An Order joining the Division of Personnel ("DOP") was entered by the undersigned administrative law judge ("ALJ") on May 2, 2011. A level two mediation was conducted on July 26, 2011,

[1] The statement of grievance is set out herein as written on the grievance form.
[2] The request for relief is set out herein as written on the grievance form.

and an Order placing the grievance in abeyance while the parties worked on a possible settlement was entered on July 27, 2011.[3] An Order concluding level two was entered on March 8, 2012, and Grievant appealed to level three on March 13, 2012.

A level three hearing was held on December 7, 2012, at the Charleston office of the West Virginia Public Employees Grievance Board. Grievant appeared at the hearing with his Representative Gordon Simmons, UE Local 170, West Virginia Public Workers Union.[4] Respondent DHHR was represented by Anne B. Ellison, Assistant Attorney General and Respondent DOP was represented by Karen O'Sullivan Thornton, Senior Assistant Attorney General. All parties submitted Proposed Findings of Fact and Conclusions of Law, the last of which was received on January 23, 2013. This matter became mature for decision on that date.

Synopsis

Grievant claims that he was entitled to an internal equity salary increase of 10% because he made a request for that increase in May 2011, after the issuance of the Alsop Memo. At that time, the highest paid comparable employee in Grievant's unit was paid 20% more thaN Grievant. Respondent argues that the procedures for seeking the increase were not in effect until mid-September 2011, and by that time the highest paid comparable employee in Grievant's unit was not making 20% more in salary than Grievant. Therefore, at the time the request for an increase could be submitted, Grievant was no longer eligible for the internal equity pay adjustment.

Grievant was unable to prove that Respondent DHHR was required to grant him a discretionary internal equity salary increase. Respondent DHHR was not required to

[3] All level two proceedings were conducted by ALJ Jennifer Stollings-Parr.
[4] At the first two levels, Grievant appeared *pro se.*

submit the request prior to completion of its guidelines and procedures. When those procedures were completed, Grievant was not eligible for the discretionary increase. The grievance is DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, William Asbury, is employed by Respondent, DHHR, as a Contract Specialist, in the Health and Human Resources Specialist, Senior classification. He is assigned to the DHHR Bureau for Children and Families (BCF). Grievant has been employed by Respondent for eight years, approximately six of which have been in his present position.

2. On April 29, 2005, Larry Puccio, Chief of Staff for Governor Manchin, issueD a memorandum to all executive branch cabinet secretaries instructing them to not grant any discretionary or merit salary advancements until further notice.[5] The effect of this memorandum was to eliminate most options for salary increases for State employees under the Division of Personnel *Pay Plan Implementation Policy* ("DOP PPI").[6]

3. After the election of Governor Tomblin, his Chief of Staff, Rob Alsop, issued a memorandum on March 29, 2011.[7] In this memorandum, Chief of Staff Alsop instructed the cabinet secretaries that the freeze on most of the discretionary raises available through the DOP PPI was lifted, with the notable exception of merit increases.

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[5] This memorandum became widely known as the "Puccio Memo."

[6] There was some question as to whether this memorandum issued by the Chief of Staff was legally binding. *See Opinion of the Attorney General,* July 16, 2008. However, no cabinet secretary challenged the order. Instead they chose not to grant any of the discretionary raises allowed under the DOP PPI.

[7] Not surprisingly, this memorandum became widely known as the "Alsop Memo."

4. One reason for granting employees salary increases is to eliminate inequities in pay between employees working in the same classification of a particular organizational unit. The section of DOP's PPI policy regarding this issue states the following:

> Internal Equity. In situations in which one or more employees are paid at least 20% less than other employees in an agency-defined organizational unit and the same job class who have comparable training and experience, duties and responsibilities, performance level, and years of State/classified service, the appointing authority may recommend an in-range salary adjustment of up to 10% of current salary to each employee in the organizational unit whose salary is at least 20% less than other employees in the unit. Internal equity increases shall be limited to once every five years for the same job class in the same organizational unit.[8]

5. In mid-April 2011, DHHR Cabinet Secretary, Michael Lewis, held a meeting with all of the commissioners for the various DHHR bureaus regarding implementation of the DOP's PPI policy now that the freeze on many discretionary salary adjustments had been lifted by the Alsop Memo. Secretary Lewis charged DHHR Director of Human Resources, Harold Clifton, with establishing standards and procedures for implementing the policy throughout the agency's bureaus in a uniform and equitable fashion.[9]

6. Beginning in June 2011, Director Clifton met with all of the commissioners for the DHHR Bureaus and specified staff to discuss implementation of the PPI policy. He specifically met with the BCF Commissioner and staff in July and August of that

[8] Respondent DHHR's Exhibit 4, the DOP's PPI policy.

[9] Given the fact that the DHHR has five bureaus, containing approximately 6,100 employees, in 283 different classifications, establishing a uniform procedure to cover these various departments was a complex and time consuming task.

year. Since the BCF is the largest DHHR Bureau, it was particularly difficult to define their organizational units for policy implementation.[10]

7. BCF completed and implemented its procedures and guidelines for implementing discretionary pay increases on September 19, 2011. The resulting document was titled *DHHR BCF Guidelines/Clarification for the Internal Equity Portion of the Play Plan Implementation Policy* which contained the procedures for employees and supervisors to follow to receive and process internal equity pay requests. Prior to September 19, 2011, BCF was unable to process such requests.

8. In May 2011, Grievant submitted a request to his immediate supervisor, Gail Totten, for an internal equity salary increase.[11]

9. Gail Totten submitted the request for a 10% internal equity pay adjustment for Grievant to BCF Deputy Commissioner, Douglas Robinson, in July 2011. At that time, the Alsop Memo had been issued, but the BCF had not developed the guidelines for accepting and approving such requests. [12]

10. At the time Grievant made his initial request, the highest paid employee in his classification and organizational unit was Tammy Hoover. Her salary was 19.65% higher than Grievant's. By rounding that number up, Grievant would have meet the requirement in the PPI policy of having a salary 20% less than another employee in his classification and organizational unit.

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[10] The BCF has roughly 2,600 employees, within fifty-four different classifications, working out of fifty-four offices, serving all fifty-five counties.

[11] Grievant's uncontested testimony was that he submitted his initial request in April or May 2011. Given the timing of other events, it appears most likely that the request was made in early May. For purposes of the outcome of this grievance, it makes little difference whether the initial request was made in April or May.

[12] Grievant's Exhibit 3, a memorandum from Deputy Commissioner Robinson to BCF Commissioner, John Najmulski, dated November 3, 2011.

11. By the time the *DHHR BCF Guidelines* were approved in mid-September, Ms. Hoover had left the BCF and the highest paid employee in in Grievant's classification and organizational unit was Mark Lothes. Mr. Lothes' salary was significantly lower than Ms. Hoover's and it was not 20% higher than Grievant's.[13] Consequently, at the time the guidelines and procedures took effect, Grievant no longer met the PPI policy requirements for an internal equity pay increase.

12. BCF Deputy Commissioner Robinson sent a memorandum dated November 3, 2011, to BCF Commissioner John Najmulski requesting a 10% equity salary adjustment for Grievant Asbury. Deputy Commissioner Robinson noted that he received Grievant's request for the increase in July 2011, when there was a staff member who made 20% more than Grievant; however, the process for submitting such requests had not been finalized at that time. Respondent DHHR's Exhibit 2, and Grievant's Exhibit 3.[14]

13. By memorandum dated November 17, 2011, DHHR Human Resources Director Clifton forwarded the request for an internal equity salary increase for Grievant to Sara Walker, Director of the Division of Personnel. Respondent DOP's Exhibit 1.

14. DOP Director Walker sent a letter dated December 14, 2011, to Harold Clifton denying the request for an internal equity salary increase for Grievant Asbury. The request was denied because at the time the request was submitted, the highest paid comparable employee in Grievants' unit was not receiving a salary that was at least 20% higher than Grievant's. Grievant's Exhibit 1.

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[13] The salary for Mark Lothes was only 13% higher than Grievant's.

[14] Grievant's version of this exhibit only contained the cover memorandum from Deputy Commissioner Robinson. Respondent DHHR's exhibit contained the memorandum and the supporting data for the salary increase request.

15. Director Clifton had previously submitted a request of an internal salary increase for Melisa Green who held the same classification in the same unit as Grievant. Ms. Green's salary was 33% lower than Tammy Hoover's and 26% lower than Mark Lothes'. Even after Ms. Hoover left the unit, the highest person in the classification held a salary that was more than 20% higher than Ms. Green's. Grievant's Exhibit 2.

16. By memorandum dated November 14, 2011, Director Clifton was notified that Ms. Green's internal equity salary increase had been granted and her salary was adjusted shortly thereafter. Grievant's Exhibit 2.

Discussion

This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

It is not disputed that Grievant made his initial request for an internal equity salary adjustment in May 2011, after the issuance of the Alsop Memo which authorized agencies to give such discretionary salary adjustments. At the time Grievant made his request, he was eligible for the salary increase under the provisions of DOP's PPI policy.

Respondent DHHR did not complete its guidelines and procedures for considering pay equity requests until September 2011, and by that time Grievant did not meet the requirements for an increase under the PPI policy because the person with the highest pay in Grievant's work unit had left employment with the DHHR. Grievant argues that it is arbitrary and capricious to refuse to grant his increase merely because it took the DHHR more than five months to adopt guidelines for processing such applications.

The management of DHHR seemed sympathetic to Grievant's plight because they forwarded his request for a salary increase to DOP even though they believed the request would not be granted.[15] The Respondents point out that Grievant was not eligible for the pay increase when the DHHR established their process for considering such requests. They argue, since internal equity increases are discretionary and do not have to be granted at all, there is nothing arbitrary or capricious about DHHR waiting to process such requests until the agency had developed guidelines to ensure that all requests were handled uniformly and in a manner that allowed for increases within the agencies budget.

The recent decision in *Green v. Dep't of Health & Human Res./Bureau for Children & Families and Div. of Pers.*, Docket No. 2011-1577-DHHR (Oct. 1, 2012) is instructive. In that case, a different DHHR/BCF employee discovered that the freeze on internal equity raises had been lifted generally, but that it might be months before the DHHR developed guidelines for processing such requests. The grievant filed a grievance in May 2011, believing that when DHHR established their guidelines she

[15] *See* Respondent DHHR's Exhibit 1 and the testimony of Deputy Commissioner Robinson and Director Clifton.

would be entitled to the pay equity raise plus back pay to the date she filed her grievance. The Administrative Law Judge ("ALJ") ruled that the grievant was only entitled to the raise after DHHR had developed the guidelines and began accepting such applications. The ALJ first noted that the granting of internal equity pay increases pursuant to the DOP's PPI Policy is a decision that is within the discretion of the agency to make, and such increases are not mandatory on the part of the Respondent. *Id.* (citing *Harris v. Dep't of Transp*., Docket No. 06-DOH-224 (Jan. 31, 2007)). The ALJ went on to state:

> The Grievance Board's prior decisions regarding discretionary pay increases make clear that the agency's actions with regard to these raises is entirely within the agency's discretion. Grievant is not entitled to a pay raise at all, let alone a retroactive pay raise, from the date of filing her grievance simply because she demonstrated that she was paid twenty percent less than similarly qualified and tenured employees in the same job class and organizational unit. *Green, supra,* (*citing Morgan v. Dep't of Health and Human Res*., Docket No. 07-HHR-131 (June 5, 2008).

The Green ruling is applicable to this case. DHHR was authorized by the Alsop Memo to begin seeking internal equity raises for its employees at the end of March 2011, but it was not required to do so. Instead DHHR decided to establish guidelines for processing these requests so that all applications would be handled in a uniform manner and all employees would be treated the same. Consequently, DHHR did not begin accepting applications until mid-September 2011. Grievant presented no authority to demonstrate that Respondent had an obligation to consider discretionary pay increases before that date. In fact, the agency could have decided not to consider pay equity increases at all.

The only remaining issue is whether it was arbitrary and capricious for Respondent DHHR to decline to seek these increases until it had uniform guidelines and procedures in place. 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 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). 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). It was clearly reasonable for DHHR to develop guidelines to ensure that all requests for equity pay increases in each unit were processed uniformly based upon a specific set of criteria. In fact, it is more likely the individual decisions would have been arbitrary had it failed to do so.

It is certainly unfortunate for Grievant Asbury that he was no longer eligible for an internal equity pay increase at the time the DHHR began seeking such raises. However, DHHR was not obligated to grant the discretionary increases when Grievant was eligible and, Respondent's decision to only seek such raises after it had uniform guidelines in place was not arbitrary or capricious. Accordingly, the grievance is DENIED.

Conclusions of Law

1. Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156

C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

2. Granting of internal equity pay increases pursuant to the DOP's PPI Policy is a decision that is within the discretion of the agency to make, and such increases are not mandatory on the part of the Respondent. *Green v. Dep't of Health & Human Res./Bureau for Children & Families and Div. of Pers.*, Docket No. 2011-1577-DHHR (Oct. 1, 2012); *Harris v. Dep't of Transp*., Docket No. 06-DOH-224 (Jan. 31, 2007).

3. An agency's actions with regard to discretionary raises pursuant to the DOP's PPI Policy are entirely within the agency's discretion. Grievant is not entitled to a retroactive pay raise, from the date he originally applied for one, simply because he demonstrated that he qualified for the increase prior to the agency deciding to seek approval for them. *See Green, supra,* (*citing Morgan v. Dep't of Health and Human Res*., Docket No. 07-HHR-131 (June 5, 2008).

4. 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 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). 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).

5. Grievant did not prove by a preponderance of the evidence that DHHR was obligated to grant him a discretionary internal equity increase when Grievant was eligible, nor that Respondent's decision to only seek such raises after it had uniform guidelines in place was arbitrary or capricious.

Accordingly, the 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 (2008).

DATE: MAY 17, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE