THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LEANNE OLSON and JANICE RECKARD,
Grievants,

v. **Docket No. 2012-0868-CONS**

MOUNTWEST COMMUNITY AND
TECHNICAL COLLEGE,
Respondent.

DECISION

Grievants, Leanne Olson and Janice Reckard, filed this grievance on February 21, 2012, against their employer, Mountwest Community and Technical College, stating that they have been compensated unfairly for their work. For relief, they seek additional salary compensation. This grievance was denied at level one following a conference by letter dated March 14, 2012, and authored by Keith Cotroneo, Ed.D, President/Examiner of Mountwest Community and Technical College. A level two mediation session was conducted on June 15, 2012. Grievants perfected their appeal to level three on that same date. A level three hearing was conducted before Administrative Law Judge Billie Thacker Catlett on October 15, 2012. The matter was reassigned to Administrative Law Judge Ronald L. Reece on April 8, 2013, for administrative reasons. Grievants appeared in person and by their representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its attorney, Brian L. Lutz, Assistant Attorney General.

Synopsis

Grievants argue that it is unfair that their salaries are not the same as a co-worker, Benjamin Taylor. The basis for the grievance is that they believe that their work is comparable to that of Mr. Taylor and that they should be compensated similarly. Initially, Mr. Taylor was appointed to the College as a tutor with the same pay, position title, and employment terms as Grievants. Subsequently, Mr. Taylor secured another position at the College as an Assistant Professor, and his salary was higher than the pay of the tutor position. Grievants did not meet their burden of proof and establish, by a preponderance of the evidence, that the actions of Respondent were in some way arbitrary and capricious. This grievance is denied.

The following findings of fact are based upon the record developed at level one and level three.

FINDING OF FACTS

1. LeAnne Olson and Janice Reckard, Grievants, are employed as instructional specialists at Mountwest Community and Technical College. In September of 2011, the College received a grant from the U.S. Department of Labor of approximately five million dollars for a job training and workforce development program called the Beacon Project.

2. Respondent College created several new job positions funded by the Beacon Project, including three new positions in the category of academic support.

3. In August of 2011, Grievant Olson applied for a position with Respondent entitled Assistant Director of Study Mentors and Peer Tutoring. At the same time, Grievant

Reckard applied for a position with Respondent entitled Assistant Director of Math Tutoring.

4. Prior to the positions being filled, Respondent chose to withdraw the job positions to make several changes to the job descriptions and job duties. Grievants, along with all other applicants, were notified of this by letter dated September 26, 2011.

5. Three new job positions were posted under the following titles: Coordinator for Peer Tutoring; Math Tutor; and Writing Tutor.

6. Grievant Olson was offered the position of Instructional Specialist - Coordinator of Peer Tutoring, at a salary of $28,600 for a 9-month appointment, by letter dated November 16, 2011. Grievant Olson accepted the offer on November 28, 2011.

7. Grievant Reckard was offered the position of Instructional Specialist - Math Tutor, at a salary of $28,600 for a 9-month appointment, by letter dated November 16, 2011. Grievant Reckard accepted the offer on November 28, 2011.

8. The third position in academic support, Instructional Specialist - Writing Tutor, was filled by Benjamin Taylor at a salary of $28,600.

9. After holding his writing tutor position for approximately four months, Benjamin Taylor applied for and was awarded the position of Assistant Professor - Developmental Writing Instructor.

10. Benjamin Taylor's selection for the position of Assistant Professor, and subsequent pay increase, was in no way related to Grievants' job positions or term of employment.

11. The position of Developmental Writing Instructor is a ranked faculty position that requires a teaching course load. The positions held by Grievants are not ranked

faculty positions and do not require a teaching course load. To the contrary, the main duties of the Grievants' positions are to provide tutoring services.

12. In a May 16, 2012, statement issued by members of the search committee, it was memorialized that the committee had requested a salary of $36,500 for each of the positions in question. The selection of this salary was said to be based on projected duties and workload for each position. This salary amount appears in the original estimates in the Beacon Project cost proposal. Grievant's Exhibit No. 2.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the 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). *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).

Grievants argue that Respondent's decision to treat instructional specialists and developmental faculty disparately, with respect to ranking and salary, has no basis in the Beacon Project budget, and is arbitrary and capricious. Respondent offers a number of arguments in opposition to the granting of this grievance. Respondent argues that the grievances were not timely filed; Grievants have failed to state a claim upon which relief

can be granted; Grievants have not presented a legitimate claim; Grievants are not similarly situated to other employees referenced in the grievance; the Grievance Board cannot grant the relief requested; and Grievants lack standing with respect to any issue concerning salary policy.

The undersigned need not address all of the parties' arguments because, simply put, Grievants have not met their burden of proof and established by a preponderance of the evidence that the actions of Respondent were in some way arbitrary and capricious.[1] It is clear from the record that the Grievants were each presented with employment offers that they chose to accept. In addition, Grievants did not present any evidence of a requirement that all positions funded by the Beacon Project be uniform in regard to salary. The record established that the positions filled by Grievants were not full-time ranked faculty. Grievants were hired as instructional specialists. The main duties of the positions were to provide tutoring services. Unlike ranked faculty positions that they point to in support of their argument, the positions filled by Grievants do not contain a course load or

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[1]"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). A [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." *Ball v. Dep't of Highways*, Docket No. 96-DOH-141 (July 31, 1997); *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997).

teaching requirement. All three similarly situated employees, Instructional Specialists, were all paid the same salary.

Finally, in light of the fact that nothing about the salary scheme was demonstrated to be arbitrary and capricious, the undersigned is without authority to grant the requested relief of a salary increase and back pay. The decision regarding the salary levels at which the Instructional Specialist positions were funded was a policy or budgetary decision. The undersigned is without authority to force the Respondent to fund these positions at the level suggested in Grievant's Exhibit Number two.[2] That Exhibit reflects a recommendation by the search committee that each position in question be budgeted at $36,500. While $28,600 is in the pay grade range for instructor, it is far less than the selection committee requested. In any event, the positions in this grievance were allocated at the appropriate salary range, and the salaries were clearly disclosed to the Grievants before they accepted the positions. In conclusion, Grievants failed to meet their burden of proof and establish by a preponderance of the evidence that the actions of Respondent in this grievance were arbitrary and capricious.

The following conclusions of law support the conclusion reached.

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[2]"The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999)." *Frame v. Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001).

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the 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). *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. 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; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "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 [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

3. Grievants did not establish by a preponderance of the evidence that Respondent's decisions concerning the positions which they accepted were clearly wrong or the result of an abuse of discretion.

Accordingly, this 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 9, 2013

Ronald L. Reece
Administrative Law Judge