WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JERRY L. CONRAD,
Grievant,

v. **Docket No. 2012-0369-DOT**

DIVISION OF MOTOR VEHICLES and
DIVISION OF PERSONNEL,
Respondents.

D E C I S I O N

Jerry L. Conrad, Grievant, filed this grievance against his employer the West Virginia Division of Motor Vehicle (also referenced as "DMV"), Respondent on October 5, 2011, protesting the compensation he is receiving as a Transportation Systems Director 2. Grievant contends that his salary is "out of equity" by 31.23% with other individuals in the same classification. The relief Grievant seeks is to:

> "Receive all differences in pay (back pay) commencing on the promotion date June 1, 2010, with interest at 6.2%, be reimbursed for all costs associated with action, including but not limited to retirement, social security, across the board salary adjustments and other fees and costs.[1] Be placed in a true equity salary position as opposed to ten percent of that earned salary."

On November 17, 2011, a supplement to the grievance statement was filed by Grievant's counsel. The supplement avers that the "Pay Plan Implementation Policy" does not fairly apply to state employees that are in Grievant's position and the policy, as applied

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[1] It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). WEST VIRGINIA CODE § 6C-2-6 is entitled, 'Allocation of expenses and attorney's fees.' It specifically states: "(a) **Any expenses incurred** relative to the grievance procedure at levels one, two or three **shall be borne by the party incurring the expense**." Emphasis added.

to Grievant, was arbitrary and capricious and does not satisfy the statutory equal pay for equal work requirements of a merit based system.

By decision dated November 23, 2011, the DMV Commissioner denied this grievance at level one providing Respondent is without authority to grant the relief requested.[2] Grievant's request to waive level two was denied by Grievance Board Order dated December 16, 2011. In response to Grievant's January 23, 2012 motion, this Grievance Board issued an Order of Joinder dated January 26, 2012, joining the West Virginia Division of Personnel (DOP) as a indispensable party. Mediation sessions were held on April 16, and May 1, 2012. Grievant appealed to level three on May 11, 2012. A level three hearing was held before the undersigned Administrative Law Judge (ALJ) on September 7, 2012, in the Grievance Board's Charleston office. Grievant appeared in person and by counsel, Roger D. Williams of Williams Law Office, PLLC. Respondent Division of Motor Vehicles, was represented by its counsel, Charli Fulton, Senior Assistant Attorney General. Respondent Division of Personnel, was represented by its counsel Karen O'Sullivan Thornton, Assistant Attorney General.

The parties stipulated to certain facts in this grievance. The stipulation was offered as Joint Exhibit 1 and included attachments listed as Exhibits A through G. This case became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about October 5, 2012, the mailing deadline for the submission of the documents.

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[2] The Decision specifically states,"[t]he Commissioner is without the authority to grant the relief requested. The relief requested may only be granted by the Division of Personnel. Accordingly, this grievance is **denied**."

Synopsis

Grievant avers that the West Virginia Division of Motor Vehicles and Division of Personnel, Respondents, have not adequately increased his compensation within the Pay Plan Policies currently in effect. Grievant is protesting salary adjustment(s) which are lower than he believes are appropriate after receiving a promotion to a Director position. Among other contentions, Grievant avers that if merit raises are prohibited by the current administration, and Respondents cannot or will not request or approve merit raises, then the statutorily mandated merit system for civil servants is not being adhered to by Respondents.

Grievant's employing state agency, the Division of Motor Vehicles, is not necessarily opposed to granting Grievant an increase in salary. Nevertheless, relevant rules, regulations and operating directives restrict the amount of salary increases which can functionally be granted to Grievant. There are several different and distinct types of salary increases discussed in the facts of this matter, eg., promotional raise, internal equity pay increase, merit raise and/or discretional salary increases in general. Respondent DMV takes the position it is without authority to grant Grievant any additional salary. Respondent DOP maintains Grievant was granted pay increases in accordance with applicable statutes, rules and regulations.

At all times relevant to this matter, Grievant was both properly classified and paid within the appropriate pay scale for his classification. Grievant did receive pay increases. During a time period relevant to this grievance, a moratorium on discretionary merit salary increases has been in place. There is some imbalance in every system, the current salary scheme for classified state employees is no exception. Grievant did not establish by a

preponderance of the evidence that the State of West Virginia is compelled to increase his salary. Accordingly this grievance is DENIED.

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

Findings of Fact

1. Jerry L. Conrad (also referenced as "Grievant") is employed by the Division of Motor Vehicles (hereinafter "DMV"), Respondent. Grievant's position is classified as Transportation Systems Director 2 and is paid within the range of the pay grade assigned to the position's classification.

2. Grievant's Statement of Grievance reads as follows:

> In May 2010 I was promoted to the position of Director II at the Division of Motor Vehicles. At that time, then Governor Manchin had a freeze of five percent (5%) on each pay grade increase. Based on my new position my salary was increased by fifteen percent. This pay increase by the admission of the West Virginia Division of Personnel left my salary out of equity by 41.23% with other individuals in the same classification and apparently based on a salary of $70,943. On September 16th the ten percent equity increase became effective increasing my annual salary to four thousand six-hundred and five dollars [sic]. This increase is based on ten percent of my lower salary and not the salary stated as out of equity, which makes an annualized increase of approximately five thousand and twenty three dollars. This creates an additional difference of approximately two thousand and seventy-one dollars due to the fact that the salary increase was based on the already out of equity salary. In addition to this discrepancy back pay to the original date of the position change was not offered or considered by personnel. This by the admission of the salary discrepancy is discriminatory by its very nature due to the substantial (41.23%) variation of salary in the same class.
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> As I have had the equity adjustment explained to me, if your salary was more than twenty percent outside the "average salary" for the same position then there could be an "equity" adjustment. My salary was listed as 41.23% out of equity.

> I have been told there is a possibility the adjustment not only comes with restrictions, but with a pretty severe penalty and that penalty is that if you receive the "adjustment" your salary is frozen for five years from that date. If this is factual, it would appear that any protected class, especially based on age would severely damaged [sic] and since my retirement is close this affects any prospect of receiving the same opportunities as others not affected by any of these restrictions.

See Grievant's *West Virginia Public Employees Grievance Board, Grievance Form for Levels 1, 2, and 3*.

3. On or about November 17, 2011, Grievant's counsel filed a supplement to the grievance form filed by Grievant on October 5, 2011. The supplement states that Grievant's claim was one of equal pay for equal work. Grievant's counsel further clarified at the level three hearing that Grievant sought to be paid the same as an individual employee with the DMV who is the highest paid employee in the same classification as Grievant.

4. Before the level three hearing, Respondent Division of Motor Vehicles, by its counsel, Charli Fulton, and Grievant Jerry L. Conrad, by his counsel, Roger D. Williams, stipulated to certain facts of this grievance. This was without the knowledge of Respondent Division of Personnel, or its counsel Karen O'Sullivan Thorton. At the level three hearing, Respondent Division of Personnel proposed modifications. After some modification, all parties joined in the stipulations. The stipulation was offered as Joint Exhibit 1 and included attachments listed as Exhibits A through G. The stipulated facts are largely incorporated into the findings of fact of this decision.[3]

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[3] Not all of the information contained in the document identified as stipulated facts were necessarily facts. The undersigned ALJ attempted to incorporate a majority of the wording used but did not find it prudent to include argument and posturing language to the degree done so by Joint Exhibit 1.

5. Grievant is employed by Respondent DMV as Director of Management Services. In this position he is responsible for supervising five sections: Budget/Accounting, Purchasing, Receiving/Processing, Warehouse, and Building Management. Altogether, he is responsible for the work of approximately 40 employees under his direct or indirect supervision. See DMV Employee Organizational Chart, Joint Exhibit 1, Exhibit A.

6. Grievant's current civil service position is Transportation Systems Director 2 (hereinafter "Tr. Sys. Dir. II"). Grievant has 19 years of service and 2.2 years tenure in his current position with the West Virginia Division of Motor Vehicles.

7. Grievant was promoted[4] to his current position on June 1, 2010. Before this promotion, his salary was $3,567 per month, or $42,804 per year.

a. Grievant's previous civil service position, Transportation Services Manager 2, was a pay grade 17 position. His new position, Transportation Systems Director 2, was a pay grade 20 position.

b. At the time of his promotion, Respondent DMV applied to Respondent DOP to grant Grievant a 15% raise.

c. DMV's request for a 15% raise was based on a Pay Plan Implementation Policy that was implemented on May 1, 1994, and revised on July 1, 2005. See West Virginia Division of Personnel Pay Plan Implementation Policy, Joint Exhibit 1, Exhibit B. Under § III.C.2. of that policy, pay raises for promotions are limited to 5% per pay grade for a maximum of three pay grades or to the minimum rate of the higher pay grade, whichever is greater. Under this policy, the maximum raise that Division of Personnel would approve was 15%.[5]

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[4]W. Va. Code R. §143-1-3.70 defines "promotion" as a change in the status of an employee from a position in one class to a vacant position in another class of higher rank as measured by salary range and increased level of duties and/or responsibilities.

[5] W. Va. Code R. §143-1-5.5 (a) Pay on Promotion reads as follows:
Minimum increase- An employee whose salary is at the minimum rate for the pay grade of the current class shall receive an increase to the minimum rate

d. DMV's request also took into consideration an April 29, 2005 Memorandum issued by Larry Puccio, Chief of Staff for then-Governor Manchin. Joint Exhibit 1, Exhibit C. Under that memorandum, Cabinet Secretaries were "requested not to grant merit or salary advancements until further notice."

e. The Division of Personnel approved the raise as requested, which raised Grievant salary to $4,103 per month, or $49,236 per year.

8. On July 1, 2011, a statewide pay increase for all state employees took effect. This raised Grievant's salary to $4,186 per month, or $50,232 per year.

9. On July 18, 2011, DMV submitted a request to DOP for a 10% raise for Grievant. Joint Exhibit 1, Exhibit D.

a. The purpose for seeking the raise was to bring Grievant's salary into equity with persons in his same position with comparable DMV experience and was described in the request as follows: "Employee's current salary is 41.23% below the Transportation Systems Director 2 with comparable DMV experience; therefore, the level of disparity is excessive." Exhibit D, p. 1.

b. The request contained an attached spreadsheet, Discretionary Pay Increase Request – Data Comparison, that compared Grievant's education, state service, duties and responsibilities, training, experience, and salary to that of another employee. Joint Exhibit 1, Exhibit D.

c. The spreadsheet stated that the comparable employee was paid $5,912 per month (equivalent to $70,944 per year) as compared to Grievant's salary of $4,186 per month (equivalent to $50,232 per year).

d. DMV's request for a 10% pay raise was based in part on the Pay Plan Implementation Policy, Joint Exhibit 1, Exhibit B. That policy provides, in pertinent part as follows:

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of the pay grade for the job class to which the employee is being promoted. An employee whose salary is within the range of the pay grade for the current class shall receive an increase of one pay increment as established by the State Personnel board, per pay grade advanced to maximum of 3 pay grades, or an increase to the minimum rate of the pay grade for the job class 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.

> 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 20% less than other employees in the same unit. Internal equity increases shall be limited to once every five years for the same job class in the same organizational unit.

DMV understood Pay Plan Implementation Policy § III.D.3. to mean that the DOP would not approve internal equity pay raises of more than 10%, even though a 10% raise did not bring Grievant into equity with comparable employees. DOP takes the position that it could not approve internal equity pay raises of more than 10%.

e. DMV was aware of the March 29, 2011, memorandum issued by Rob Alsop, Chief of Staff for Governor Tomblin. Joint Exhibit 1, Exhibit E. Under that memorandum, cabinet secretaries were advised that "we would continue the restrictions on discretionary increases imposed by the previous administration. . . We will continue to prohibit discretionary increases based purely on merit." Exhibit E. DMV understood this memo to mean that the Division of Personnel would not approve any merit pay raises and has never received notice that this restriction has been lifted. The Division of Personnel takes the position that it could not approve such merit pay raises.

10. DOP approved the 10% raise for Grievant as requested. See memorandum from Barbara J. Jarrell to Jeff Black, August 26, 2011, including signed Request for Approval, attached to Joint Exhibit 1, Exhibit F. This raised Grievant's salary to $4,605 per month, or $55,260 per year. The raise took effect on September 16, 2011.

11. DMV would like to provide a raise to Grievant that will bring him into equity with that of other Transportation Systems Director 2s who allegedly have comparable DMV experience, service, responsibility and tenure. However, administrative personnel of DMV believe that DOP would reject any such request based upon the Pay Implementation Plan

provision at § III.D.3 that limits any such raises to not more than 10% of the salary and not more frequently than once every five years.

12. Respondent DMV has funds available to implement a merit raise for Grievant. Respondent DMV is of the belief and understands that merit increases are prohibited. See March 29, 2011 memorandum of Rob Alsop,Chief of Staff for Governor Tomblin, Joint Exhibit 1, Exhibit E.

13. Respondent has not submitted official documentation requesting a merit raise for Grievant in defiance of what is recognized as a long-standing moratorium on merit raises.

14. Grievant has received a 25% increase in his salary since June 1, 2010. He received both a 15% increase for a promotion and a 10% discretionary increase based on internal equity; both in accordance with the provisions of the DOP's Pay Plan Implementation Policy.

15. The State Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. VA. CODE § 29-6-10. As established and set forth by the WV Division of Personnel Schedule of Salary Grades, effective as of February 1, 2009, the range of salary for Pay Grade 20 is $41,736 to $77,220 annually.

16. Grievant's current salary is $55,260 per year. Grievant's current position is Transportation Systems Director 2, a pay grade 20 classification. At all times relevant to this matter, Grievant was both properly classified and paid within the appropriate pay scale for his assigned classification.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

WEST VIRGINIA CODE § 29-6-10 authorizes the Division of Personnel (DOP) to establish and maintain a position classification plan for all positions in the classified service.[6] This includes salary schedules for the positions. State agencies, such as the Division of Motor Vehicles (DMV), which utilize such positions, adhere to the applicable classification and pay grade. "DOP is primarily concerned with administering a classification and compensation plan that equitably compensates similarly situated employees while maintaining appropriate recruitment and retention, thereby assuring that

[6] Section 5.1 of DOP's Rules notes the purpose and intent of the classification plan is "[t]o attract qualified employees and retain them in the classified service" and the State Personnel Board "shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various agencies and on comparability to pay rates established in other public and private agencies and businesses."

each state agency has sufficient qualified personnel to perform its assigned governmental function." *Travis v. Dep't of Health & Human Res.*, Docket No. 96-HHR-518 (Jan. 12, 1998). Also, the rules promulgated by the State Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Moore v. W. Va. Dep't of Health & Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). *See Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980).

It is well established that employees in the same classification, who are performing the same duties, need not be paid the same salary, as long as they are paid within the pay range for the pay grade to which their classification is assigned. The analysis of the concept of equal pay for equal work for a state employee involves a limited inquiry. "The West Virginia Equal Pay Act, W. VA. CODE § 21-5B-1 [1965], does not apply to the State or any municipal corporation so long as a valid civil service system based on merit is in effect." Syl. Pt. 2, *Largent v. W. Va. Div. of Health and Div. of Pers.*, 192 W. Va. 239, 452 S.E.2d 42 (1994). "'[E]mployees who are performing the same tasks with the same responsibilities should be placed within the same job classification,' but a state employer is not required to pay these employees at the same rate. *Largent* at Syl. Pts. 2 & 3. The requirement is that all classified employees must be compensated within their pay grade. *See Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26, 1997); *Brutto v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-076 (July 24, 1996); *Salmons v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-435 (Feb. 28, 1995); *Tennant v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord*

v. W. Va. Dep't of Health & Human Res., Docket No. 91-H-177 (May 29, 1992). *See AFSCME v. Civil Serv. Comm'n,* 181 W. Va. 8, 380 S.E.2d 43 (1989)." *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006).

Further, while agencies have in the past had some discretion to grant confined increases in employees salaries, in limited circumstances, it is highlighted that such option was not fully available to the instant Respondent(s). For state agencies under the direct supervision of the Governor, discretionary pay increases are approved through the Governor's Office and during a time period relevant to this grievance such authorization was not being readily granted referencing the March 29, 2011, memorandum issued by Rob Alsop, Chief of Staff for Governor Tomblin, Joint Exhibit, Exhibit E and the April 29, 2005 memorandum issued by Larry Puccio, Chief of Staff for then-Governor Manchin, Joint Exhibit 1, Exhibit C. Discretionary merit increases have been frozen by the current and former administration.

The Puccio Memorandum issued by then-Governor Manchin's Office to Cabinet Secretaries created a quandary throughout state government. The true weight of this document is much debated.[7] However, as this Grievance Board has previously noted, the

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[7]It is noted that the Governor's Chief of Staff is an employee and not a public official with authority to require the various agencies to abstain from granting discretionary raises. It has been observed that such action would have to be made through an Executive Order by the Governor to be binding on State agencies. As authority for this proposition an *Opinion of the Attorney General* dated July 16, 2008, states in part:

> Because the Governor's freeze policy was contained only in a memorandum authored and signed by an employee, without the issuance of an Executive Order by the Governor, it is of questionable authority and effect.

Whether the Chief of Staff's Memorandum was legally binding is debatable. Nevertheless, the Puccio Memorandum expressed the position of the Governor's Office regarding the issuance of discretionary wage increases and the vast majority of state agencies have adhered to the directive of the memorandum. Discretionary merit increases have effectively been removed from state agencies' purview, since approximately April of 2005.

former Governor's Office moratorium on discretionary salary increases effectively removed merit salary advancement from state agencies' purview. *Chapman, et al., v. WV Lottery Commission*, 2010-1293-CONS (Sept. 27, 2011); *Sayre v. Dep't of Health & Human Res.*, 2010-731-DHHR (Jan. 13, 2011); *Milam v. Div. of Highways*, Docket No. 2009-0478-DOT (Dec. 31, 2009); *Celestine v. W.Va. State Police*, Docket No. 2009-0256-MAPS (May 4, 2009); *Kelly v. Dep't of Health & Human Res.,* 07-HHR-109 (Nov. 14, 2008). "[U]nfortunate as it may be, the provisions of the Governor's Office edict are clear, and discretionary salary increases are prohibited." *Saas v. Dep't of Transp.*, Docket No. 07-DOH-005 (July 25, 2007).

The Governor's Chief of Staff, Larry Puccio, advised that "merit or salary advancements" should not be granted until further notice, but nondiscretionary increases should continue, which would include pay increases associated with promotion, pay differentials, reclassification, reallocation, increment increases and temporary upgrades. The Puccio directive has been revised somewhat by a March 29, 2011, memorandum issued from Governor Earl Ray Tomblin's Office signed by Chief of Staff, Rob Alsop. This memorandum in part states:

> "As a follow up to the Cabinet Secretaries meeting of November 10, 2010, I advised you that <u>*we would continue the restrictions on discretionary increases imposed by the previous administration*</u> while we evaluate the State's current financial condition and revenue projections. <u>*We will continue to prohibit discretionary increases based purely on merit*</u>. Until such time that I can be confident that appropriate evaluations are taking place in every agency, we cannot return to a system that was broken. Nevertheless, there are certain areas that, given our financial condition, we will return to the Pay Plan Implementation Policy, which is attached hereto and which was implemented on May 1, 1994 and last revised on July 1, 2005. Specifically, all portions of the Pay Plan Implementation Policy, *excluding the portion pertaining to merit increases*, that are being reinstated pursuant to this Memorandum…" … "Again, *you are requested not to grant merit or salary advancements until further notice.*" (Emphasis added).

Monica Price, Human Resources Manager, DMV, testified at the level three hearing. She is responsible for administrative oversight over employment processes for Respondent DMV. Ms. Price completes paperwork for any pay increases sought for DMV employees. Ms. Price indicated that Chief of Staff Alsop's memorandum in its entirety actually opened up to State agencies' the ability to provide employees with discretionary increases, as such was not permissible under Governor Manchin's administration. No party of this Grievance identified a discretionary pay raise issued in defiance of either of the Governors' Office directives.

Grievant avers that the West Virginia Division of Motor Vehicles and Division of Personnel, Respondents have not adequately increased his compensation within the Pay Plan Policies currently in effect. Grievant desires to receive a salary increase and back pay with interest dating back to June 1, 2010. Yet, it can not be said that Grievant has been barred from all discretionary salary increases. Grievant received an internal equity increase. For an employee to be eligible to receive an internal equity increase, he must first be 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 tenure. Before receiving the internal equity increase, Grievant was out of equity with other employees identified as similarly situated. It is not clear if Grievant's equity was limited to only one identified Transportation System Director 2. Upon receiving the internal equity increase, Grievant was not eligible for another internal equity increase for a period of five years. *See* DOP Pay Plan Implementation Policy, § III.D.3, Joint Exhibit 1.

Respondent DOP correctly maintains Grievant was granted pay increases in accordance with applicable statutes, rules and regulations. Grievant received the maximum salary increase allowed under § III.D.3, Internal Equity of the DOP's *Pay Plan Implementation Policy* and has been granted all salary increases requested and processed by Respondent DMV. Grievant has received a 25% increase in his salary since June 1, 2010. He received both a 15% increase for a promotion and a 10% discretionary increase based on internal equity; both in accordance with the provisions of DOP Policy. Grievant testified that he understood the internal equity increase he received was limited to 10%, however, he firmly believes he is or should be entitled to additional compensation. Both internal equity increases and merit increases are capped at 10%, in accordance with the Pay Plan Implementation Policy. Grievant contends this to be an arbitrary and capricious policy that does not provide a complete remedy to his situation.

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). 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 his judgment for that of the authoritarian agency. *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

It is not established to be arbitrary and capricious for an agency to grant employee salary increases in accordance with duly enacted classification rules, regulations and policy. DOP's Pay Plan Implementation Policy is applicable to Grievant's position. State agencies, such as DMV which utilize a position classification plan for positions in the classified service positions, must adhere to the applicable rules, regulations and policy applicable to classified employment. *See eg.,* W. VA. CODE § 29-6-10 Thus, it was not unreasonable, nor unlawful, for Respondents to limit Grievant's salary adjustments to the maximum amount permitted by applicable regulations. The rules and regulations promulgated by the State Personnel Board to govern issues of employment in a classified position are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *See* cites supra.

Further, with regard to the instant grievance, it is strongly generalized that Division of Motor Vehicle wanted to submit Grievant for additional salary increase, however, could not request a merit increase for Grievant because of the directive found in the March 29, 2011, memorandum issued by Governor Earl Ray Tomblin's Chief of Staff Rob Alsop, referencing "Discretionary Salary Increases." Grievant equates "equity" with receiving the same or close to the same salary as the highest paid position with the same classification as his position. He compares his salary to that of another DMV employee, Dave Bolyard. He did not compare himself or his salary to any other DMV employee classified as a Tr.

Sys. Dir. II. Whether employee Bolyard is the proper individual to draw a salary comparison is disputable. Grievant did not know and presented little evidence to establish that he was similarly situated to Mr. Bolyard in any way other than that they occupy positions that are classified the same.[8] It is unknown whether Grievant has received the same number of salary advancements/merit[9] increases over the years as Mr. Bolyard, nor is it known whether the two had received like promotions over the years. Grievant does not have the same experience as the identified comparative employee, nor the same state tenure. Grievant and Mr. Bolyard did not get hired into the DMV initially in the same classification. All of these facts impact and tend to create a justifiable and explainable difference in salaries among employees.

The Supreme Court of Appeals of West Virginia has previously clarified that there is no violation of the statutory "equal pay for equal work" requirement[10] where employees with the same job are paid different salaries as long as those salaries fall within the range established for the applicable pay grade. *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994). The *Largent* Court recognized that the Legislature, of necessity,

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[8] Grievant relies on a July 18, 2011, DMV request submitted to DOP for a 10% raise for Grievant which tends to indicate that employee Bolyard is a Transportation Systems Director 2 with comparable DMV experience. Joint Exhibit 1, Exhibit D.

[9] W. Va. Code R. §143-1-3.78 defines "salary advancement" as a discretionary advancement in salary granted in recognition of the quality of job performance. State employees commonly refer to these as "merit" increases.

[10] W. Va. Code § 29-6-10(2) provides, in pertinent part, that "[t]he principle of equal pay for equal work in the several agencies of the state government shall be followed in the pay plan as established hereby."

built a certain amount of flexibility into the civil service scheme. Specifically, the Court noted that the civil service

> system allows some flexibility in the hiring process and aids the state in attracting quality people to public service. Moreover, this flexibility allows for fluctuations in market conditions allowing the State to take into consideration other factors when hiring new employees such as the applicant's education and work experience. In short, employees who are doing the same work must be placed within the same classification, but within that classification there may be pay differences if those differences are based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other specifically identifiable criteria that are reasonable and that advance the interests of the employer.

Largent, 192 W. Va. at 246, 452 S.E.2d at 49, citing *West Virginia University v. Decker*, 191 W. Va. 567; 447 S.E.2d 259 (1994). Although W. Va. Code § 29-6-10 does require employees who are performing the same responsibilities to be placed in the same classification, the Code section does not require these employees to be paid exactly the same. *Largent* at Syl. pt. 3 and 4. In other words, the only requirement to satisfy the principle of "equal pay for equal work" is that employees performing the same duties be placed in the same classification and that all positions in the classification be assigned to the same pay grade. There is absolutely no requirement by policy, rule or law that the position Grievant occupies must be paid the same amount of money as another position assigned to the same classification.

Grievant claims that DMV Commissioner Joe Miller wants to give him a raise and wants to pay him commensuratly with other DMV employees in positions classified as Tr. Sys. Dir. II s. This is interesting but not decisive with regard to the issue presented by this

grievance.[11] The DMV Commissioner does not have the authority to increase one of his employee's salaries without going through an approval process, which includes several individuals of greater authority than the Commissioner of Division of Motor Vehicles.

Barbara Jarrell, Assistant Director, Classification and Compensation Section, DOP, testified that she and the DOP take direction from the Governor's Office; they must comply with any and all directives issued by the Office of Governor. Ms. Jarrell testified that only merit increases to salaries are restricted at this time; other discretionary salary increases are permissible. She explained that contrary to the Grievant's supposition, the information relating to Discretionary Salary Increases contained in the directive from the Governor's Office as written by Chief of Staff Alsop, came from the DOP*'s Pay Plan Implementation Policy*, DOP-P12 and was not simply made up at the whim of the Chief of Staff. She further explained that it was the DOP and not the Governor's Office who developed and implemented the policy and, that it was the DOP and not the Governor's Office who was responsible for establishing the five-year restriction on receipt of a second internal equity discretionary salary increase. She also clarified that the five-year restriction is only placed

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[11] Monica Price, Human Resources Manager, DMV, responsible for administrative oversight over employment processes for the DMV, testified that under no circumstance may a salary increase be processed for payment without having been requested by the appointing authority or his or her designee. Under no circumstance may a salary increase be processed for payment without having been reviewed and approved by the Director of the DOP. And finally, under no circumstance may a salary increase be processed for payment without having been reviewed and approved by the Governor's Office. As such, any request for a change to the salary of any DMV employee must first be approved by the DMV Commissioner, Mr. Miller. It is then sent to Jeff Black in the Department of Transportation's Human Resource office for review prior to approval by the appointing authority, Cabinet Secretary for the DOT, Secretary Mattox. And, as the final step in the process, the Governor's Office must approve the request. The DMV Commissioner does not have the authority to increase one of his employee's salary without going through this approval process.

on the discretionary increase for internal equity; it does not apply to any of the other discretionary increases.

As established and set forth by the WV Division of Personnel Schedule of Salary Grades, effective as of February 1, 2009, the range of salary for pay grade 20 is $41,736 to $77,220 annually. Grievant's current position is Transportation Systems Director 2, a pay grade 20 classification. Grievant's current salary is $55,260 per year. Grievant does not argue that his position is improperly classified, rather he argues that he should be compensated at a higher rate of pay. The reality is that at all times relevant to this matter, Grievant was both properly classified and paid within the appropriate pay scale for his assigned classification.

Lastly, Grievant believes that if merit raises are prohibited by the current administration, and Respondents cannot or will not request or approve merit raises, then the statutorily mandated merit system for civil servants is not being adhered to by the Respondents in violation of the law. In essence, Grievant argues that the Governors' Office directives to Cabinet Secretaries are contrary to the spirit and rationale of the current classification system. Grievant contends as long as Respondents (or any other state agency) operate under the restrictions of the afore noted memorandums, state employees are denied the protections and safeguards of a civil service system as contemplated by the West Virginia Supreme Court of Appeals in *Largent*.[12] Grievant notes that the Governors'

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[12] The West Virginia Supreme Court's pronouncement in *Largent* that:
"The West Virginia Equal Pay Act, W. VA. CODE 21-5B-1 [1965], does not apply to the State or any municipal corporation so long as a valid civil service system based on merit is in effect." Syl. Pt. 2, *Largent v. W. Va. Div. of Health and Div. of Pers.*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

Chiefs of Staff memoranda require that the portions of Pay Implementation Plan allowing for merit raises be ignored. Theoretically, raising the question does the willful refusal to follow a portion of the pay implementation plan mean the plan is no longer in effect. This was a thought provoking spin on a much maligned issue (equitable compensation for state employees). A second theoretical question Grievant poses (inferred but to date not yet tested) is whether the Pay Implementation Policy, Joint Exhibit 1, Exhibit B, adopted and implemented by the Division of Personnel, and the Alsop memo, Joint Exhibit 1, Exhibit E, are binding on the Division of Motor Vehicles such that it cannot seek or obtain additional salary increases for Grievant.

Officially, Respondent DMV takes the position that it stands silent, highlighting that it is Grievant's burden of proof and ultimately a determination rightfully in the hands of the Division of Personnel, the Governor's Office, and presently the Grievance Board. Simultaneously, it is presented that Respondent DMV wanted to submit Grievant for a merit increase. Respondents, in fact, have not acted in defiance of the directive received from the Governor's office. Respondent DMV has not processed any official documents seeking an increase in Grievant's salary as a merit raise.

It is noted with great interest that Respondent DMV has not submitted documentation requesting a merit raise for Grievant in defiance of what is recognized as a long-standing moratorium on merit raises. Grievant and Respondent DMV seek an opinion or ruling regarding a potential event. Much of the discussion presented regarding Respondent's present ability to grant Grievant a pay increase is hypothetical. This Board is not in the habit of rendering an opinion regarding hypothetical actions. In the facts of this grievance, said action would be an advisory opinion. The afore noted legal question(s) are

not properly before the undersigned. This Grievance Board does not issue advisory opinions. 156 C.S.R. 1 § 6.21 (2008)

The undersigned, as stated earlier, does not rule on the legal weight of the much discussed Governors' Office directives but recognizes and finds that the issuance and moratorium effect of the Puccio and Alsop Memorandums have effectively halted the granting of discretionary merit increases by state agencies under the Governor's purview. Further, this Administrative Law Judge is without sufficient information and/or authority to render a decision as to whether a valid civil service system is currently in effect with regard to state employment. In the end, at all times relevant to this matter, Grievant was both properly classified and paid within the appropriate pay scale for his designated classification. Grievant did not demonstrate a violation of any statute, rule, policy or procedure, or otherwise show that he is entitled to an increase in his salary. A violation of equal pay for equal work has not been established by a preponderance of the evidence. For the reasons discussed above, this grievance must be denied.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In a non-disciplinary case, a Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "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. The State Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. VA. CODE § 29-6-10(2). The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner.

3. "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).

4. "The West Virginia Equal Pay Act, W. VA. CODE 21-5B-1 [1965], does not apply to the State or any municipal corporation so long as a valid civil service system based on merit is in effect." Syl. Pt. 2, *Largent v. W. Va. Div. of Health and Div. of Pers.*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

5. "W. VA. CODE § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but that CODE Section does not require these employees to be paid exactly the same. Syl. Pts. 3 and 4, *Largent v. W. Va. Div. of Health and Div. of Pers.*, 192 W. Va. 239, 452 S. E.2d 42 (1994); *Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26, 1997)." *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006).

6. This Grievance Board does not issue advisory opinions. 156 C.S.R. 1 § 6.21 (2008)

7. Respondents' actions of not increasing Grievant's salary to the amount equivalent to the highest paid employee with the same job classification is not arbitrary and capricious conduct.

8. Grievant is paid within the salary range applicable to his classification.

9. Pursuant to the preponderance of the evidence, Respondent is not required to grant Grievant a pay increase in violation of applicable Division of Personel's rules and regulations governing classified state employees.

10. Grievant did not demonstrate a violation of any statute, rule, policy or procedure, or otherwise show that Respondent is obligated to grant him an increase in his salary.

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: March 18, 2013

Landon R. Brown
Administrative Law Judge