JERRY L. KING, .

FREDERICK W. HANSHAW, JR. .

and LARRY GENE ROUSE, .

Grievants, .

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v. .Docket Number: 94-DOH-340

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WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION / DIVISION OF HIGHWAYS,.

Respondents. .

DECISION

All three grievants are employees of the West Virginia Department of Transportation (hereinafter DOT) at its North Charleston location. They filed the instant grievance against DOT pursuant to West Virginia Code §§29-6A-1 et seq., on February 16, 1994, challenging the fact that they had not received merit raises for the year 1993. Grievants' complaint was denied at the lower three levels of the grievance procedure and they appealed to level four on July 26, 1994. An evidentiary hearing was held at the Grievance Board's office in Charleston, West Virginia, on November 3, 1994. The case became mature for decision after receipt of the parties' post-hearing briefs on December 1, 1994.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. The three grievants work for the DOT out of its North Charleston office. There are twenty other employees at this office.

2. It was determined in January 1994 that merit raises would be given to the DOT's employees. By memorandum dated January 12, 1994, Secretary Charles Miller informed all DOT organizations that merit raises were to be given to "a specific number of your most meritorious employees in each of your subordinate organizations whose current annual salary is $20,000.00 or less." Mr. Miller also limited eligibility for merit raises to those employees who had not received a pay increase in the previous twelve months.

3. Carl Thompson, District One Engineer, made the final merit raise recommendation to Mr. Miller. Mr. Thompson's recommendation was based upon recommendations he received from Johnny Johnson, Maintenance Assistant, and Roger Higginbotham, supervisor at the North Charleston office. Mr. Higginbotham was told that he could recommend a merit raise for seventeen of his twenty eligible employees. Mr. Higginbotham did not recommend that grievants receive merit raises.

4. Ultimately, none of the grievants received a merit raise.

5. At the time the merit raise decision was made, performance evaluations had not been performed for the 1993 rating period.

6. Mr. Higginbotham did not recommend that grievants be given a merit raise because he believed that they had each abused sick leave at least once during 1993 by taking sick leave in place of accepting their daily work assignments. This inference is supported by the North Charleston office's daily work records.

7. Grievants are not the only employees who work at the North Charleston office who have allegedly abused their use of sick leave.

8. Neither Mr. Thompson nor Mr. Miller had reviewed the daily work records of the North Charleston office prior to the merit raises being issued.

9. Also, Mr. Higginbotham did not recommend that Mr. Hanshaw receive a merit raise because he believed that Mr. Hanshaw "could get a raise by other means."

10. During the 1993 evaluation period, grievants worked under three crew leaders. In the opinion of these three forman, all three grievants were as equally deserving of merit raises as the

other employees in the office. These crew leaders were not given input into the merit raise recommendations.

11. None of the three grievants has ever been formally disciplined.

Discussion

Grievants contend that DOT acted arbitrarily in not awarding them merit raises. They contend that they were, at the very least, more deserving of a merit raise than one other employee who received such raise. Further, they contend that DOT violated theWest Virginia Division of Personnel's administrative regulations dealing with the issuance of merit raises because the decisions were not based upon performance evaluations and other written measures or indicators of performance. DOT asserts that grievants failed to prove by a preponderance of the evidence that they were more deserving of a merit raise than any other employee in its North Charleston office.

The Division of Personnel has promulgated legislative rules, 143 CSR 1, governing, among many other topics, its compensation plans and salary guidelines. 143 CSR 1.3.82 defines the term "salary advancement" as "[a] discretionary advancement in salary granted in recognition of the quality of job performance." Salary advancements are generally referred to as merit raises. Further, and more importantly, 183 CSR 1.5.08(a) establishes the basis for which all salary advances are to be awarded, and the language of this section reads "[a]ll salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance."

The merit raises issued to the employees at DOT's North Charleston's office were not awarded consistent with the mandates of the Division of Personnel's regulations because they were not based upon "performance evaluations and other recorded measures of performance." The fact is that grievants were denied merit raises based upon their alleged misconduct on one or more specific day of work. The decision not to award them a merit raise was based not upon a "recognition of the quality of [their] job performance" forthe performance rating period but upon consideration of their respective attitudes and/or for their alleged misconduct for which none of them were ever disciplined. Further, the record indicates that other employees who did receive merit raises had also allegedly abused sick leave in the same manner attributed to grievants. (See footnote 1)

As Mr. Miller noted in his January 1994 memorandum, merit raises were to be given to "a specific number of our [the] most meritorious employees." This was obviously not the case. Mr. Johnson

testified that all seventeen of the employees received the same percentage raise. It appears that the merit raise decisions were not based upon the intent or purpose of Mr. Miller's directives. The sheer fact that eighty-five percent of the eligible employees in this office received a merit raise implies that the raise was less of a merit raise and more of a salary increase based upon factors other than meritorious performance. Given the evidence of record, Grievants have demonstrated that DOT failed to comply with 183 CSR 1.5.08(a). (See footnote 2)

The question as to remedy is the most perplexing in the case. Awarding Grievants the remedy they seek seems, on its face, to also be inconsistent with the goals and purposes of a merit raise system. Arguably, in this factual scenario, the appropriate remedy would seem to be an order rescinding all of the raises in order to allow DOT to comply with Personnel's regulations. However, given that merit raises are discretionary, and also that the other employees were not available to protect their own interests, it seems more unfair to deny Grievants the raises they seek because raises were given to every other eligible employee. Give this Grievance Board's broad discretion to fashion an appropriate remedy, it is determined that Grievants are entitled to the remedy they seek based upon the established violation of Personnel's regulations; to provide otherwise would appear to be an inappropriate substitution of administrative decision-making on behalf of the Undersigned.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Grievants bear the burden of proving their claims by a preponderance of the evidence. W. Va. Code §§29-6A-1 et seq.

2. Pursuant to 183 CSR 1.5.08(a), all salary advances are to be awarded "based on merit as reflected by performance evaluations and other recorded measures of performance."

3. Grievants have established that DOT violated 183 CSR 1.5.08(a) in its issuance of merit raises for the 1993 performance rating period to the employees located in its North Charleston office.

Therefore, this grievance is hereby **GRANTED**. The Department of Highways / Division of Transportation is hereby **ORDERED** to increase each grievant's salary by the same amount or percentage that the other seventeen employees in the North Charleston office received in January 1994 as a result of merit raises having been awarded. This increase in salary is to be made

retroactive to the date of the raises previously issued.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

March 1, 1995

Footnote: 1DOT's issuance of merit raises to employees with a similar history of alleged misconduct to that of grievants could arguably be classified as either discrimination or favoritism as those terms are defined by W. Va. Code §§29-6A-2(d) and (h). Grievants did not raise claims based upon these causes of action.

Footnote: 2There was also an allegation made that DOT did not comply with its own policy on the issuance of merit raises because no performance evaluations had been completed prior to the issuance of the raises; however, no such policy was testified to or admitted into the record at either procedural level. Based upon the holdings herein, it is not necessary to make such a finding. In Roberts v. Personnel, Docket No. 94-DOP-182, (Dec. 1, 94), it was held that "Upon interpreting the provisions of 183 CSR 1.5.08(a),it is determined that merit raises must only be awarded to classified employees based upon the employee's performance evaluation and/or other recorded measures or indicators of performance." id., p. 19. Non-merit factors must not be used in deciding which employees shall recieve merit raises. In the instant case, DOT's formal policy on the issuance of merit raises was not presented to the Undersigned nor was Roberts cited in connection therewith. The holdings in this case, in no way limit or restrict the holdings in Roberts.