CHUCK REYNOLDS, JOHN PATTON,

BRUCE TRENT and ROGER HAYNES

v. **Docket No. 95-DOA-209**

DEPARTMENT OF ADMINISTRATION/

GENERAL SERVICES DIVISION

D E C I S I O N

Grievants, Chuck Reynolds, John Patton, Bruce Trent and Roger Haynes, are Facilities Equipment Maintenance Technicians ("FEMT's") with the General Services Division ("GSD") of the Department of Administration ("DOA").

Grievants allege DOA engaged in discrimination and unfair labor practices against them because they are members of a union. Specifically, Grievants state DOA engaged in discrimination in awarding merit increases. This grievance was denied at all lower levels. Grievants appealed to Level IV and requested the grievance be submitted on the record. This case became mature for decision on June 12, 1995, the deadline for submission of proposed findings of fact and conclusions of law. (See footnote 1)

Grievants' requested relief has changed during the course of this grievance. Initially, Grievants wanted DOA to "[q]uitdiscriminating against people in the Union when giving Merrit [sic] Raises." Gr. Form. At the Level III hearing Grievants asked "the union people be reviewed and those who compare favorably with the non-union people who got raises be given raises including the Grievants here." Trans., Level III at 8. At Level IV, Grievants made a "Motion for Change of Relief Sought" which stated:

For the Department of Administration to stop any discriminatory treatment of Union members when giving merit raises. Any and all union members found to be victims of discrimination to receive a merit increase.

DOA did not respond to this motion. Since there is no indication this grievance joined all other DOA union members, this "Motion to Change Relief Requested" will be **GRANTED** in part and **DENIED** in

part. The change in relief will be considered to apply only to the named parties in the grievance.

The majority of the facts are not in dispute and are set forth below.

Findings of Fact

1. Grievants are employed as FEMT's by GSD and are supervised by Barry Arthur.

2. On November 5, 1993, Chuck Polan, Secretary of DOA, notified Bill Elswick, the Director of GSD, that he anticipated the possibility of implementing merit raises for a third of his employees. Secretary Polan limited the pool of eligible employees with the following directions:

To be eligible for an increase, employees must have been on the payroll prior to January 1, 1993 and have had continuous service. Please be alert to the fact that any leave without pay is considered a break in service. Also, employees who received any salary increases,regardless of the nature of the increase, since January 1, 1993 are not eligible for consideration if the accumulated amount of the increases is 5% or more.

Limit your recommendations to no more than 33% of your staff, that is 34 persons. You may recommend individual salary increases up to a maximum of 10%. However, you must provide a succinct explanation of the reason for merit increases in excess of 5%. Attach these explanations to the form. If you are imposing any overall guidelines specific to your division, please provide me with a written statement of such guidelines.

In reviewing your recommendations, be advised I will look at the employee's present and proposed salary as compared to peers within the department. You should pay particular attention to an employee's leave usage as I firmly believe that the most talented employee is of marginal value if they are not at work. I am concerned that this increase is truly a merit increase. Therefore, I will review your justification carefully.

If the ranking of an individual on your recommendation for merit increase does not parallel the performance appraisal rating, you must supply an explanation for the variance. Specifically, you must explain why an individual did not receive a recommendation for a merit increase if their performance rating is higher than or equal to the rating of persons who are recommended. "Insufficient Funding" is not an acceptable explanation.

If you feel a need to request an exemption to any of the guidelines in this letter, please feel free to do so but any such request should be accompanied by a detailed explanation.

3. Grievants had received a salary increase in 1993 as a result of an in-house reclassification, and thus were initially ineligible for the proposed merit increase.

4. Mr. Elswick requested all FEMT's be placed in the pool of eligible employees because of their valuable contributions and the current market value of their services. Secretary Polan granted this exemption. Mr. Elswick also requested a $600 increase for allFEMT's with this merit raise, but Secretary Polan denied this request.

5. The performance evaluations utilized in this merit raise covered an evaluation period from April, 1992 to November, 1993. The scoring was as follows: 1 = unsatisfactory, 2 = fair, 3 = satisfactory, 4 = very good, and 5 = excellent.

6. The Grievants' performance evaluations were completed by Mr. Arthur. None of these evaluations were grieved. (See footnote 2)

7. Mr. Arthur had no input on the selection of his employees for this merit increase. These decisions were made by Mr. Elswick.

8. Mr. Arthur testified he was aware some of the Grievants were in a union, but did not know all of them were. He further testified union affiliation had no effect on the evaluations he performed on his employees.

9. Grievant Reynolds received a 2.9, below satisfactory, on his evaluation.

10. Grievant Patton received a 3.22, satisfactory, on his evaluation. He was placed on sick leave restriction from April 1993 to March 1994, because of excessive, undocumented use of sick leave from July 1992 to December 1992. After being placed on restriction Grievant Patton did not take any sick leave from April 1993 to December 1993. He did not grieve this restriction.

11. Secretary Polan's letter would have made Grievant Patton ineligible for the merit raise because of his sick leave status.

12. Grievant Trent received a 3.23 performance rating, or satisfactory. He was placed on sick leave restriction in March 1994, but taken off restriction about one month later, when DOA looked into the matter and found errors. Grievant Trent states he does not know how or when the errors were made as he frequently does not check his "Leave Balance Report", nor report errors as requested by this report. This sick leave restriction letter and its removal took place after merit

increases were given, and thus played no role in Grievant Trent's failure to receive a merit increase.

13. Grievant Haynes, although present at the second part of the Level III hearing, did not testify. From the exhibits submitted it appears his performance rating was 3.275 or satisfactory. There was no evidence he was placed on sick leave restriction at any time.

14. Four of eleven employees in Grievants' section received merit increases. None of these four belonged to a union. Thirty-four of one hundred people received merit increases.

15. Two of these thirty-four employees had ratings the same as Grievants Patton, Trent, and Haynes. Three employees with ratings lower than Grievants Patton, Trent, and Haynes received merit increases. No employees with a rating lower than a 3.0 received a merit increase, thus no employees who ranked the same or lower than Grievant Reynolds received a merit increase.

16. The recommendations and rankings for merit increases were segregated by supervisor. At times, higher ranked individuals did not receive an increase because of discipline issues, placement on sick leave restriction (See footnote 3), or salary already outside their current pay structure. G. Exh. 5.

Issues

Grievants' argue they were discriminated against when merit raises were given because they are union members. Although no other individuals are named, Grievants also argue other union members were discriminated against as well. Grievants also argue they should receive a raise because other GSD employees with equal performance ratings or below received a merit increase.

Respondent contends the merit increases were given according to the guidelines set forth by Secretary Polan and no discrimination occurred. Indeed, Respondent states DOA does not know which employees are union members, and does not have access to this information. Respondent also argued that even if all the other guidelines given by Secretary Polan were not applied, these Grievants would not have received merit increases because of their low performance evaluation scores.

Discussion

Since this case was submitted on the record, the undersigned had no opportunity to question parties or clarify the exhibits entered into the record. The data in Grievants' exhibits conflicts with

data given in other exhibits and is incomplete. The number of union members varies from exhibit to exhibit and some employees identified as GSD employees or union members are not listed on Grievants' Exhibit One. Further, Respondent supposedly submitted all the performance evaluations of Mr. Arthur's eleven employees, but the packet contained only ten evaluations. Accordingly, this decision is rendered on the data submitted, and attempts to reconcile differences have been made.

W. Va. Code §29-6A-2(d) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employee or agreed to in writing." In order to make a prima facie showing of discrimination a grievant must establish:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to the] actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). If Grievants did not receive merit increasesbecause of their union membership, this would indeed be a case of discrimination.

In Grievants' section, four of eleven employees received merit increases. This percentage matches the percentage recommended by Secretary Polan. Only ten of the eleven employee performance evaluations were submitted, and these were not identified by name. By matching the Grievants' known evaluation scores, it is clear four employees ranked above the four Grievants with performance evaluation scores of 3.75, 3.68, 3.61 and 3.41. No data was submitted to demonstrate they were not the four merit increases recommended by Mr. Elswick and approved by Secretary Polan. This data is further confirmed by other exhibits submitted by Grievants which indicate three of

Mr. Arthur's employees, including Grievant Reynolds, received less than a 3.0, or satisfactory, and thus were not considered for the merit increase. By comparing all the exhibits, that leaves the eleventh employee as a non-union member with a 3.0. He did not receive a merit increase.

183 CSR 1.5.08(a) states "[a]ll salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance." Apparently, the employees in Mr. Arthur's section with the four best performance evaluations received merit increases. Given the data before the undersigned the Grievants have failed to prove a prima facie case of discrimination. As Grievants were not among the top-ranked employees, they are not similarly situated. Steele, supra.

Further, Roberts v. W. Va. Dept. of Administration/Div. of Personnel, Docket No. 94-DOP-182 (Dec. 1, 1994), recognized an employee's work section or assignment area may be utilized to "develop a pool of employees from which the decision to award a merit raise will be based." Id. at 7. Here the pool was Mr. Arthur's employees, and the top four individuals apparently received merit increases. The ratings of other GSD employees who received merit increases is not at issue. Additionally, this method of awarding merit increases resolves the area of difficulty noted in Roberts, evaluator variance. Thus, Grievants have not demonstrated that DOA discriminated against them for their union membership.

The above-stated discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. In a nondisciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Tucci v. Dept. of Transportation/Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995).

2. "An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious or contrary to law or properly established policies or directions." Terry v. W. Va. Div. of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991).

3. "All salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance." (See footnote 4) 183 CSR 1.5.08(a).

4. For purposes of merit increases, an employee's work section or assignment area may be utilized to develop a pool of employees from which to award merit increases. Roberts v. W. Va. Dept.

of Administration/Div. of Personnel, Docket No. 94-DOP-182, (Dec. 1, 1994).

5. Grievants failed to establish a prima facie case of discrimination based on union membership. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Accordingly, this grievance is **DENIED**.

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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 29, 1995

Footnote: 1Neither party elected to submit these proposals.

Footnote: 2Although not specifically stated on the grievance form, Grievants appear to want to attack, collaterally, their performance evaluations. This cannot be allowed as these evaluations should have been grieved when they were received if Grievants thought they did not properly reflect their work.

Footnote: 3Of note here is the holding in Roberts v. Department of Administration/Division of Personnel, Docket No. 94-DOP-182, (Dec. 1, 1994). Roberts held sick leave restrictions should not be a separate measure utilized to evaluate performance for purposes of salary advancement pursuant to 183 CSR 1.5.08(a). As of June 1, 1995, this rule has been clarified and now states "other recorded measures of performance, e.g., quantity of work, quality of work, and attendance may be utilized."

Since this issue plays no part in the final decision in this case, it needs no further discussion.

Footnote: 4See n. 2 at page 6.