MARVIN SWANGER,

Grievant

v. **Docket No. 95-DOH-063**

WEST VIRGINIA DIVISION OF HIGHWAYS,

Respondent

D E C I S I O N

Grievant, Marvin Swanger, employed by the Division of Highways (Respondent) in Monongalia County, filed a level one grievance on June 24, 1994, in which he alleged that "the 80 cent pay raise given to a fellow employee at my worksite constitutes favoritism." As relief, Grievant requested that he be given the same salary increase. Grievant's immediate supervisor lacked authority to grant the grievance at level one, and the matter was denied at level two. The hearing evaluators at level three determined that "grievant showed that a fellow employee did receive a much larger raise than other employees in Monongalia County for the year of 1994 and that the employee who received the raise had a lower employee evaluation than some employees; however, the employee evaluation is not the only factor to be considered when increases are given." The evaluators concluded that Grievant failed to prove that favoritism was the basis for the raise given to his fellow employee, and denied the grievance. A level four appeal was filed on February 8, 1995, and the matter was held in abeyance, at Grievant's request, pending the outcome of a related matter. A level four hearing was conducted on July 29, 1997, and the matter became mature for decision with the submission of proposed findings of fact and conclusions of law by the parties on or before September 15, 1997.

The facts which are dispositive of this grievance are undisputed and set forth as the following formal Findings of Fact.

Findings of Fact

___1. Grievant has been employed by the Division of Highways for approximately twenty- five years, and is presently classified as an Equipment Operator III in Monongalia County.

2. Effective February 1, 1994, merit raises of 3.5% were awarded to employees, including Grievant, who were earning less than $20,000.00 annually.

3. Grievant's 1993 performance appraisal tied him with five other employees for twenty- fourth highest in Monongalia County. Only Albert E. Fiorini, Jr. was ranked lower than Grievant.

4. Mr. Fiorini did not receive the 3.5% merit increase in February 1994, but did receive an $.80, or 10%, increase effective May 1994, after his father called Respondent's then Assistant Commissioner George Sidiropolis to complain about the treatment of his son.

Grievant argues that Respondent's action granting Mr. Fiorini a salary increase nearly three times the amount received by other employees constitutes favoritism, defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” W. Va. Code §29-6A-2(h). Grievant further alleges the action to be in violation of Division of Personnel Rule 5.08(a) which requires that “[a]ll salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance.”

Respondent argues that the salary advancement granted to Mr. Fiorini was not part of a merit increase program applicable to all employees. Because Grievant had received the salary advancement in February 1994, and Mr. Fiorini had not, Respondent asserts that the two employees were not similarly situated, and that Grievant failed to make a prima facie case of favoritism. Respondent finally argues that Grievant failed to demonstrate that he was eligible for, or moredeserving of, the increase granted to Mr. Fiorini in May 1994. (See footnote 1)

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 §4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code §29-6A-6.

In accordance with the rules of the West Virginia Division of Personnel (DOP) in effect in 1994, salary advancements must be based on merit as indicated by performance evaluations and other recorded measures of performance. However, 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 directives. Terry v. W. Va. Div. of Highways, Docket No. 91-DOH-185 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Services, Docket No. 89- RS-051 (May 16, 1989).

In order to establish a prima facie case of favoritism under W. Va. Code §29-6A-2(h), a grievant must demonstrate that:

(a) he is similarly situated, in a pertinent way, to one or more other employees;

(b) the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c) the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Princev. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a grievant establishes a prima facie case of favoritism, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n., 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

In this particular case, it appears that the “merit” increases granted in February 1994, were not based on performance, but rather were awarded in an effort to increase baseline salaries. The fact that Mr. Fiorini was the only employee within the targeted salary range to not receive a merit increase in February 1994, is supportive of his claim that he was the victim of unfair treatment by the county supervisor; however, that is not at issue herein. What is important regarding Mr. Fiorini is that, after a telephone call to an Assistant Commissioner, he received not just the 3.5% increase granted to other individuals, but nearly a 10% salary increase.

Grievant and Mr. Fiorini are similarly situated in that they are employees who received merit raises in 1994. The fact that the raises were effective at different times does not render the employees dissimilarly situated. Certainly, the fact that a co-worker was given a much larger salary increase with no discernable basis constitutes preferential treatment of that co-worker. Finally, the differences in the salary increases were from all appearances unrelated to the actual job responsibilities of the employees, and were not agreed to by Grievant in writing. Therefore, Grievant has made a prima facie case of favoritism. Respondent has not offered any legitimate reason for the

action, and Grievant must prevail in this matter. For relief, Grievant requests a salary increase equal to 10% of his salary, retroactive to May 16, 1994. This request is not reasonable in that it would result in a total salary increase of 13.5% for 1994, much more than that received by any other employees, including Mr. Fiorini. W. Va. Code §29-6A-5(b) authorizes Administrative Law Judges to "provide such relief as is deemed fair and equitable . . . ." In the present matter, fair and equitable relief is to require that Respondent adjust Mr. Fiorini's salary to reflect the same increase granted to the other employees in February.

In addition to the foregoing findings of fact and narration it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 §4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code §29-6A-6.

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 directives." Terry v. W. Va. Div. of Highways, Docket No. 91-DOH-185 (Dec. 30, 1991).

3. Favoritism is defined in W. Va. Code §29-6A-2(h) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

4. In order to establish a prima facie case of favoritism under W. Va. Code §29-6A- 2(h), a grievant must demonstrate the following:

(a) he is similarly situated, in a pertinent way, to one or more other employees; (b) the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c) the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v.

Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Once a grievant establishes a prima facie case of favoritism, the employer may then offer a legitimate reason to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n., 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

6. Grievant established a prima facie case of favoritism under W. Va. Code §29-6A-2(h) in regard to the award of merit raises to employees in Monongalia County during 1994.

7. Respondent failed to offer any legitimate reason for the disparity in the amount of salary increases awarded to Grievant and a co-worker in 1994.

Accordingly, the grievance is GRANTED, and Respondent Ordered to revise the amount of salary increase awarded to Mr. Fiorini in 1994, consistent with this decision.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, 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 LawJudges 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.

DATE: November 19, 1997 _____

SUE KELLER

Senior Administrative Law Judge

Footnote: 1 *Mr. Fiorini testified at level four, and was aware of this grievance, but did not elect to protect his interest by intervening.*