RANDALL PARSONS,

Grievant,

v. **Docket No. 97-DOH-289R**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

This is a grievance by Randall Parsons (Grievant), pursuant to W. Va. Code §§ 29- 6A-1, et seq., alleging that Respondent West Virginia Department of Transportation, Division of Highways (DOH) improperly failed to award him a merit raise in 1997. This matter is before this Grievance Board on remand from the Circuit Court of Kanawha County under an Order from Judge Charles E. King, Jr., dated February 18, 1999. That Order was issued in response to an appeal which Grievant filed contesting this Board's earlier decision in Parsons v. W. Va. Department of Transportation, Docket No. 97-DOH- 289 (Oct. 30, 1997). An evidentiary hearing in this matter was held in the Grievance Board's office in Charleston, West Virginia, on April 26, 1999. (See footnote 1) At the conclusion of thathearing, the parties waived oral or written closing arguments, and this matter became mature for decision at that time.

DISCUSSION

The scope of review in this matter is governed by the Remand Order, which provides as follows:

> This action is before the Court on appeal from a decision of the Education and State Employees Grievance Board.

> The petitioner and a co-worker, Phillip Clemmer, filed grievances contending that they were entitled to receive merit pay raises that were awarded to other employees.

In accordance with its own policy and in accordance with Division of Personnel rules, the Division of Highways determined that it would award the merit raises primarily on the basis of employee evaluations. However, DOH gave preference to crew leaders in awarding the merit raises. Because there was a limited number of merit raises available, the grievants did not receive raises. The grievants contended that their evaluations were superior to those of employees who were awarded merit raises.

The Grievance Board compared the evaluations of the employees who received merit raises and the evaluations of the grievants. The Board held that, with the exception of Ronald Raynes, a crew leader, the evaluations of the other employees were equal to or superior to the grievants' evaluations. [F.N. 1] The Board determined that because the grievants' evaluations were superior to that of Mr. Raynes, DOH should have awarded them merit raises before awarding a merit raise to Mr. Raynes. [F.N. 2]

Since only one merit raise was awarded inappropriately, the Board determined that, as between Mr. Clemmer and the petitioner, Mr. Clemmer was entitled to receive that pay raise. Because their evaluations were equal, it concluded that the merit raise would be awarded to Mr. Clemmer solely because he was senior to the petitioner. It held that Mr. Clemmer was entitled to back pay retroactive to the date that Mr. Raynes received the raise. Since Mr. Clemmer received a 2.5% merit pay raise effective August 1, 1997, and since, under DOH policy, he would not have been eligible for the subsequent 2.5% merit raise if he had been awarded the 5% raise in the first place, the Board held that DOH is entitled to an offset against back payfor the increased wages Mr. Clemmer began receiving effective August 1, 1997. The Court is of the opinion that the analysis of the Board was, to this point, correct.

The petitioner's grievance was also meritorious. However, because only one merit raise was available at the time, he was denied relief. The petitioner also received a 2.5% merit pay raise effective August 1, 1997. However, in view of the Board's decision respecting Mr. Clemmer, the Court is of the opinion that the grievant was entitled to a 5% pay raise effective August 1, 1997.

As noted above, the Board awarded Mr. Clemmer the 5% merit raise effective the date that Mr. Raynes began receiving his merit raise. This rendered him ineligible for the 2.5% raise effective August 1, 1997. DOH received an offset for the 2.5% paid to Mr. Clemmer on or after August 1, 1997. In effect, this negated the 2.5% merit raise awarded to Mr. Clemmer effective August 1, 1997, making those funds available to give a raise to someone else. Since the petitioner was as entitled to a 5% merit raise at the time of the grievance, but none was available, he should have been awarded the additional 2.5% merit raise which became available August 1, 1997. Therefore, the petitioner is entitled to an increase in pay of 2.5% effective August 1, 1997, with back pay, plus interest thereon, effective August 1, 1997.

A 5% pay raise for the petitioner effective August 1, 1997, may have rendered him

ineligible for subsequent merit raises. However, the record does not disclose whether the petitioner was given a subsequent merit raise. If he received a subsequent raise, for which the 5% raise may have rendered him ineligible, DOH may be entitled to an offset against an award of back pay. Because there is no evidence respecting these matters, the Court is reluctant to order an award of back pay from August 1, 1997 to the date of this Order, and to order an increase in pay from the date of this Order. Consequently, this matter must be remanded to the Grievance Board for a determination as to whether and how subsequent events may have affected the relief to which the petitioner is entitled.

Accordingly, the Court does hereby ORDER that the decision of the Education and State Employees Grievance Board is reversed insofar as it denied relief to the petitioner. It is FURTHER ORDERED that this matter is remanded to the Education and State Employees Grievance Board to determine whether or not the petitioner received any merit pay increases subsequent to its October 30, 1997 decision, and, if so, the effect those merit pay increases on his back pay and any increase in pay he would be entitledto from the date of this Order. It is FURTHER ORDERED that a certified copy of this Order be sent to all parties or counsel of record. The objections and exceptions of all parties aggrieved by this Order are hereby preserved.

F.N. 1. Steve Campbell, who was charged with awarding the merit raises, determined that Mr. Raynes' low evaluation resulted from personal animosity between Raynes and his immediate supervisor. He disregarded the evaluation because of this perceived animosity. The Board determined that any problems with the evaluation should have been corrected at the time of the evaluation. Then, when merit raises were awarded, they could have been awarded on the basis of an evaluation that accurately reflected Mr. Raynes' performance.

F.N. 2. The Grievance Board determined that DOH had discriminated against the grievants, in violation of *W. Va. Code* § 29-6A-2(d), applying an adaptation of the *McDonnell-Douglas* test used in traditional discrimination cases.

Because this grievance does not involve a disciplinary matter, Grievant has 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 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

As established at the previous Level IV hearing in this matter on August 12, 1997, Grievant received a 2.5 percent merit raise, effective August 1, 1997. Finding of Fact Number 17 in Parsons, supra. The parties agree that, since that date, Grievant has received no further merit pay increases, only across-the-board salary increases awarded to all eligible state employees. See J Ex 1.

This Grievance Board is bound by the Circuit Court's legal conclusions in this matter as “the law of

the case." Bass v. Kanawha County Bd. of Educ., Docket No. 92-20-214 (Nov. 4, 1994). See Tressler Coal Mining Co. v. Klefeld, 108 W. Va. 301, 24 S.E.2d 98(1943). In accordance with Judge King's Order, the only factual issue to be resolved at this time is whether Grievant received any further merit raises after August 1, 1997, which would entitle DOH to an offset on the back pay which is otherwise owed to Grievant. Inasmuch as Grievant received no further merit raises, he is entitled to the full relief of "an increase in pay of 2.5% effective August 1, 1997, with back pay, plus interest thereon, effective August 1, 1997." Remand Order, Parsons v. W. Va. Dep't of Transp., Civil Action No. 97-AA-140 (Feb. 18, 1999).

During the Level IV hearing on remand, Grievant asked this Grievance Board to award him his costs in pursuing this matter to Circuit Court. Under W. Va. Code § 29-6A-7, this Grievance Board may only allocate costs related to the Level IV hearing when a party acts in extreme bad faith. Cutright v. W. Va. Div. of Natural Resources, Docket No. 98- DNR-270 (Feb. 24, 1999); Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Chafin v. Boone County Health Dep't, Docket No. 95-BCHD-362 (June 21, 1996). In accordance with W. Va. Code § 29-6A-10, any costs incurred in appealing to circuit court must be awarded by the court, not the Grievance Board. Chafin, supra. Accordingly, this Grievance Board is without authority to award Grievant his costs in pursuing this matter beyond the previous Level IV decision.

Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant is employed by Respondent West Virginia Department of Transportation, Division of Highways (DOH), as a Transportation Worker IV, Welder. 2. Subsequent to August 1, 1997, when Grievant received a 2.5 per cent merit pay increase, Grievant has received no further merit pay increases from DOH. J Ex 1.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has 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 § 4.19 (1996); Payne v. W. Va. Dep't of Energy,

Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. In accordance with "the law of the case," Respondent DOH failed to establish any entitlement to an offset of the back pay to which Grievant is otherwise entitled in this matter. Remand Order, Parsons v. W. Va. Dep't of Transp., Civil Action No. 97-AA-140 (Feb. 18, 1999). See Tressler Coal Mining Co. v. Klefeld, 108 W. Va. 301, 24 S.E.2d 98 (1943); Bass v. Kanawha County Bd. of Educ., Docket No. 92-20-214 (Nov. 4, 1994).

3. Under W. Va. Code § 29-6A-10, this Grievance Board does not have authority to award costs incurred by a party in his appeal of a Level IV decision to circuit court. Chafin v. Boone County Health Dep't, Docket No. 95-BCHD-362 (June 21, 1996).

Accordingly, this grievance is **GRANTED** to the extent that Respondent West Virginia Department of Transportation, Division of Highways, is hereby **ORDERED** to increase Grievant's salary by 2.5 percent, retroactive to August 1, 1997, and to pay Grievant back pay, with interest, from August 1, 1997, until this 2.5 percent pay raise is implemented. All other relief is **DENIED**. Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 6, 1999

Footnote: 1

Grievant appeared pro se in that hearing, while DOH was represented by counsel, Krista Duncan, Esq.