VINCENT COGAR,

Grievant,

v. **Docket No. 01-DOH-520**

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Vincent Cogar, filed this grievance against his employer, the Division of Highways ("DOH") on March 21, 2001. The Statement of Grievance reads:

> **Discrimination of unequal pay[,] have been passed several times by employees that has (sic) less years of service.**
>
> **RELIEF SOUGHT: Make equal or greater than younger employees and never pass again without good reason.**

This grievance was denied at all lower levels. Grievant appealed to Level IV on September 26, 2001, and a Level IV hearing was held in the Grievance Board's Elkins office on November 15, 2001. This case became mature for decision on that date as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant argued it was discrimination for him not to receive a merit increase from July 1, 1996, until July 1, 1998, the first two years of his employment. (See footnote 2) **He asserted he had to wait more than three years for a merit increase, and no other employee had to wait thatlong for a merit increase, and less senior employees received merit increases before he**

did.

Respondent maintains the merit increase guidelines were followed, and there was no violation of any of their requirements. Respondent did not raise a timeliness objection to this grievance.

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

Findings of Fact

1. Grievant has been employed as an Equipment Operator II since August 20, 1996.

2. He received his first merit increase on October 1, 1999, approximately three years and two months after his hire date. This merit increase was based on his 1998 evaluation.

3. Some employees, who were hired later, waited less time for their first merit increase.

4. Some employees who were hired earlier waited the same or a greater period of time for their first merit increase.

5. The dates of merit increases for many of Grievant's fellow employees were unknown. (See footnote 3)

6. The earliest Grievant could have been eligible for a merit increase would be first merit increases awarded after February 20, 1997, and the first date Grievant couldhave received a merit increase was August 1, 1997, the first of the quarterly merit increases based on the 1996 evaluations, after he was off probationary status. Grievant was not employed until August 20, 1996, and he was not eligible for a merit increase during the first six months of his employment, as this was a probationary period.

7. Contrary to Grievant's testimony, he was not the only employee to wait three years before he received a merit increase. The limited evidence of record demonstrates Mr. Charles Smith and Mr. Tim Cogar waited more than three years after hiring to receive a merit increase.

8. Grievant's evaluation for 1996, during his probationary status, rated him with six "satisfactories" and two "exceeds expectations"; his rating for 1997, on which the 1998 merit increases were based, rated him the same. Grievant's evaluation for 1998, on which the 1999 merit increases were based, demonstrated a decline, as he received seven "satisfactories" and one "exceeds expectations." Grievant agreed with all his evaluations and signed the

statement on the form saying so. **(See footnote 4)**

9. The guidelines given to supervisors for the 1999 merit increases indicated a merit increase could not be granted if there was "any documented decline in performance. . . ." Resp. Ex. No. 1, at Level III.

10. The guidelines for merit increases stress performance evaluations and other recorded measures of performance are the "primary basis for recommendations," and equitable pay relationships and length of service may be considered, but only after firstestablishing that the employee's performance warrants consideration. Resp. Ex. No. 1, at Level III.

11. Grievant's supervisor, Jimmy Collins, incorrectly believed that some of the guidelines in place during Grievant's employment required an employee to wait two years before he could be recommended for a merit increase. **(See footnote 5)**

Discussion

As 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 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

I. Merit increase

Merit increases are governed by Division of Personnel Rule ("DOP"), 143 C.S.R. 1 § 5.8(a), "Salary Advancements" which states, "All salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance." See King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). Although not submitted into evidence by the parties, DOH's rules require meritincreases to be based on "meritorious performance while taking into consideration such factors as equitable pay relationships and length of service." DOH Admin. Operating Procedures Vol. IX, Ch. 15. Typically these factors are used as tiebreakers. Morris v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-176 (Aug. 22, 1997). See Ratliff v. W. Va. Dep't of Transp./Div. of Highways, Docket No.

96-DOH-004 (Jan. 31, 1997). Pursuant to the guidelines on merit increases, performance evaluations are the main factor to consider, and equitable pay relationships and length of service are only to be considered after it is demonstrated an employee's work performance deserves a merit increase. Resp. Ex. No. 1, at Level II. The combining of these two sets of rules and guidelines is at times a difficult fit, especially when there are a limited number of raises to be awarded. Ratliff, supra.

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 Serv., Docket No. 89-RS- 051 (May 16, 1989).

"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); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capriciousactions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 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 her judgment for that of [an agency]. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

The testimony revealed the problems created when employees expect a merit increase within a certain time frame regardless of their performance evaluations. Merit increases are just that, a reward for a job well done. 143 C.S.R. 1 § 5.8(a). Seniority is only utilized when comparing similarly rated employees.

In this specific case, Grievant complains he should have received a merit increase during

the first two years of his employment. First, it is noted there are no provisions for this type of biennial type increase in the merit increase guidelines.

The second action would be to review the performance evaluations, as directed by DOP's and DOH's guidelines, to see if Mr. Collins should have recommended Grievant for a merit increase over those he did recommend in the time period from August 1, 1997, the first merit increase he was eligible for, until July 1, 1998, the time period of Grievant's complaint. This comparison is impossible, as the only evaluations submitted by Grievant were his own. There is no way to assess whether Grievant, as compared to those whoreceived merit increases, was more deserving. Accordingly, Grievant has failed to meet his burden of proof and demonstrate DOH's actions violated any policy or were arbitrary or capricious. See, Setliff v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97- DOH-262 (July 24, 1998).

It is clear selecting who will receive merit increases is at times difficult, especially when numerous employees have demonstrated satisfactory performance, and employees are rated so similarly. Obviously, many employees have good evaluations and would be deserving of a merit increase. Unfortunately, there will always be a limited number of merit increases to award, and management decisions have to be made about who should receive them, utilizing the evaluations and the guidelines. Collins v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 98-DOH-103 (July 27, 1999). See Bittinger v. Bureau of Employment Programs, Docket No. 98-BEP-164 (Dec. 7, 1998).

II. Discrimination

Grievant has also alleged he has been treated differently than other employees, and that no other employee had to wait as long as he for a merit increase. 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 employees or agreed to in writing by the employees." In order to establish a claim of discrimination under W. Va. Code § 29-6A-2(d), an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, a grievant must show:

> **(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 actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); See Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Hendricks, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has failed to make a prima facie case under the standard set forth above for establishing a claim of discrimination under W. Va. Code § 29-6A-2(d). (See footnote 6) **Through the evidence submitted by Grievant, it is clear other employees waited as long or longer for their first merit increase. While it is true some employees waited a shorter period of time, there is no evidence to explain the differences in treatment, other than Mr. Collins' belief that some of the guidelines required a two-year wait. Since others had to wait the same period of time, or longer, some did not, and the wait for the vast majority of employees is unknown, Grievant has failed to demonstrate discrimination. There was no evidence todemonstrate Grievant was more deserving of a merit increase than those who received them.**

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As 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 § 4.21 (2000); Howell v. W. Va. Dep't of

Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

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- 186 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Serv., Docket No. 89-RS- 051 (May 16, 1989).

3. In accordance with the rules of the West Virginia Division of Personnel, salary advancements must be based on merit, as indicated by performance evaluations and other recorded measures of performance, such as quantity of work, quality of work, and attendance. W. Va. Div. of Personnel Admin. Rule, 143 C.S.R. 1 § 5.8(a) (2000). See King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). 4. DOH rules require merit increases to be based on "meritorious performance while taking into consideration such factors as equitable pay relationships and length of service." DOH Admin. Operating Procedures Vol. IX, Ch. 15. Typically these factors are used as tiebreakers. Morris v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97- DOH-176 (Aug. 22, 1997). See Ratliff v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-004 (Jan. 31, 1997).

5. Merit increases are to be given on the basis of job performance as reflected in the performance evaluations.

6. Grievant has failed to meet his burden of proof and demonstrate he was more, or as deserving, of a merit increase as those who received them within the first portion of his employment. Ratliff, supra.

7. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

8. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), must demonstrate the following:

> **(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 actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

9. Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't 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); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

10. Grievant has not met his burden of proof and established a prima facie case of discrimination. Other employees, who were similarly situated, did not receive a merit increase, and no evidence demonstrated Grievant was more deserving of a merit increase than the employees who received them.

Accordingly, this grievance 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: December 20, 2001

Footnote: 1

Grievant represented himself, and Respondent DOH was represented by Attorney Jennifer Francis.

Footnote: 2

Grievant was not employed the first six weeks of this time period.

Footnote: 3

Grievant did not submit the merit increase dates of the majority of his co-workers.

Footnote: 4

No evaluations were submitted for 1999 and 2000.

Footnote: 5

Mr. Collins also explained that recently he had put Grievant in for a merit increase, but this was not allowed as other employees had higher evaluations than Grievant.

Footnote: 6

According to the guidelines in place at the time Grievant received his merit increase, he should not have been eligible as there was a decline his performance. This recommendation for a merit increase, contrary to the guidelines, also does not support Grievant's claims of discrimination.