WILLIAM WADE, et al.,

Grievants,

v. DOCKET NO. 00-DOL-164

DIVISION OF LABOR,

Respondent .

D E C I S I O N

This grievance was filed by Grievants, William Wade, Steve Davis, Sammy Boggs, Lee Powell, Danny Mitchell, Dusty Perdue, and Dawn Nevel, against Respondent, the Division of Labor ("DOL"), challenging the manner in which merit increases were awarded, alleging that the evaluations used in awarding merit increases were “administered in a way that would give part of the officers an unfair advantage over others,” and that the evaluations appear “to be bias[ed], show favoritism and does [sic] not seem to show the officers[’] job performance.” Grievants initially sought as relief “to be made whole from 1997 forward.” However, at the Level III hearing they limited the relief sought to the full amount of the highest merit raises awarded in November 1999, $900. (See footnote 1)

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievants are employed by DOL as compliance officers in its Wage and Hour Division. They work in different geographic areas of the state.

2. Grievants were evaluated by their supervisors in January 1999, and were provided with their performance evaluations at that time. The performance evaluations covered a six month period of time from July 1, 1998, through December 31, 1998.

3. The performance evaluation form lists three categories, “Exceeds Expectations,” “Meets Expectations,” and “Needs Improvement.” The supervisor takes the number of Exceeds Expectations ratings and multiplies that by three. The number of Meets Expectations ratings is multiplied by two,

and the number of Needs Improvement ratings is multiplied by one. The results of these three calculations are then added together and divided by 23 to get an overall rating. An overall rating of 1.51 to 2.50 Meets Expectations, and an overall rating of 2.51 to 3.0 Exceeds Expectations.

4. Robert Goff, Director of DOL's Wage and Hour Division, compiled employee ratings on the January 1999 performance evaluations for his Division at Commissioner Steven Allred's request. Fourteen employees scored higher than Grievants on their performance evaluations. In addition five other employees received an overall rating of 2.0.

5. In August or September of 1999, at Commissioner Allred's request, Denise Brown, an Accounting Technician IV for DOL, determined how much money was available for merit increases, and provided that information to the Commissioner.

6. Commissioner Allred reviewed the information provided to him by Mr. Goff and Ms. Brown, and determined there was not enough money available to give all employees a merit increase. He set two levels for merit increases based uponperformance evaluation scores, a $504 level and a $900 level, and set the minimum overall rating on the performance evaluations necessary to receive a merit increase at 2.0.

7. DOL awarded merit increases effective November 1, 1999, to employees based upon Commissioner Allred's guidelines. Merit increases appeared in employee pay checks on November 15, 1999.

8. Grievants Wade and Mitchell each received an overall rating of 2.0 on his performance evaluation, and each was awarded a merit increase in the amount of $504, effective November 1, 1999. The remaining Grievants received overall ratings below 2.0 on their performance evaluations, and did not receive merit increases in November of 1999.

9. In past years, DOL had given across the board raises, which were not based upon performance evaluations; that is, all employees received raises in the same dollar amount.

10. Sometime during the last week of November 1999, Grievant Wade learned that some employees had received larger merit increases than he. Grievant Wade filed his grievance on December 1, 1999. He shared this information with the other Grievants and they also immediately filed grievances, on or about December 2, 1999.

11. Respondent did not raise a timeliness defense at Levels I or II. Respondent first raised the timeliness defense at the Level III hearing.

Discussion

DOL argued that Grievants could not challenge the validity of their performance evaluations, completed in January of 1999, in this grievance, because that challenge would be untimely filed. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that heshould be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

The first issue which needs to be addressed is whether this defense was timely raised by DOL. Effective July 1, 1998, W. Va. Code § 29-6A-3 requires the respondent to raise the issue of timeliness at or before the Level II "hearing." However, W. Va. Code § 29-6A-4(b) requires that the employer's administrator or his designee hold a "conference" at level two, not a "hearing." This Grievance Board has previously reviewed this statutory inconsistency and determined, applying principles of statutory construction, that, in cases involving state employees where there is no Level II hearing, the timeliness defense must be raised at or before the Level III hearing. Greathouse v. Dep't of Transp., Docket No. 99-DOH-413 (Aug. 21, 2000). DOL timely raised a timeliness defense for the first time at the Level III hearing.

As to when a grievance must be filed, W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

A grievance must be filed within 10 days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a) provides, in pertinent part:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. . . ..

Only working days are counted in determining when the 10 day time period runs for filing a grievance. Holidays are not counted. W. Va. Code § 29-6A-2(c).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally

notified of the decision being challenged. Harvey, supra; Kessler v. W. Va.Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). DOL is quite correct in its argument that Grievants cannot challenge the validity of their performance evaluations completed in January 1999, in a grievance filed in December 1999, challenging the award of merit raises which were based upon the performance evaluations. Riffle v. Dep't of Transp., Docket No. 99-DOT-485 (July 19, 2000); Stover v. Dep't of Admin., Docket No. 00-ADMN-024 (Mar. 31, 2000). “Ordinarily, personnel actions, such as annual performance evaluations, which are subject to challenge through the grievance procedure within ten days of the date they are issued, may not later be disputed in a timely grievance challenging a subsequent action. See Cummings v. W. Va. Dep't of Transp., Docket No. 95-DOH-104 (Jan. 12, 1995); Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). See also Vincent v. W. Va. Dep't of Transp., Docket No. 97-DOH-519 (May 13, 1998); Galloway v. Div. of Banking, Docket No. 98-DOB-167 (Sept. 22, 1998).” Stover, supra.

Grievants argued they were not told merit raises would be based upon performance evaluations, and they filed this grievance when they discovered this fact. While this argument may seem incredible on its face, the evidence disclosed that DOL had not in the past utilized performance evaluations in awarding merit increases. The evidence also disclosed, however, that Mr. Goff and Commissioner Allred told employees in late 1997, or at the latest, sometime in 1998, that in the future merit increases would be awarded based upon merit as demonstrated by the performance evaluations.

Even had Grievants demonstrated they were caught by surprise, however, this is not sufficient to excuse their failure to timely grieve the scores they received on their performance evaluations. Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. SyllabusPoint 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." The same discovery rule found in the education grievance procedure is also found in the grievance procedure for state employees at Code § 29-6A-4.

With regard to Grievants' challenge to their performance evaluations, the grievable event occurred when Grievants received their performance evaluations. If their performance evaluations were

incorrect, they had all they information they needed to mount a challenge to the evaluations in January 1999. They did not need to know that their performance evaluations would be used in awarding merit increases in order to evaluate their accuracy. Grievants have not demonstrated a valid excuse to their failure to timely contest their performance evaluations, nor have they demonstrated that their discovery that performance evaluations would be used in awarding merit increases falls within the discovery rule. Grievants cannot contest their evaluations in this grievance. (See footnote 2)

Grievants may, however, challenge their failure to receive a merit increase, even though December 1, 1999, was ten days from the date merit increases appeared in Grievants' pay checks, and one or more of the Grievants did not file their grievance until December 2 or later. Grievant Wade timely grieved the award of merit raises within ten days of the date merit increases appeared in pay checks.

The grievable event in a merit increase grievance is ordinarily the failure to receive a merit increase, not learning that others have received merit increases. Jones v. Div. of Rehabilitation Serv., Docket No. 00-RS-046 (June 22, 2000). In this case, however, except for Grievants Wade and Mitchell, Grievants did not know that merit increases had beenawarded until Grievant Wade put the word out. The grievances were timely filed once this information was made available to Grievants. (See footnote 3)

Grievant Mitchell was not aware that some employees received a larger merit increase than he until late November 1999, and he filed his grievance in a timely manner once this information was discovered. In the past, merit increases were awarded in the same amount to each compliance officer. In this case, Grievant Mitchell had no reason to believe that this was not the case in 1999, and the event triggering the time period for filing a grievance was the discovery of the fact that merit increases had not been awarded in the same amount to each officer. Hammond v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-222 (Nov. 30, 1998); Little v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-092 (July 27, 1998). Until Grievant Mitchell knew of this fact, he had no reason to challenge the award of merit increases. See Short v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-038 (Mar. 25, 1999); Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998). Grievant Mitchell filed his grievance as soon as he found out merit increases were not awarded in equal amounts. The grievances are all timely filed

insofar as they challenge whether Grievants should have received merit increases.

Grievants are cautioned, however, that they may not be able to rely upon this past practice of awarding across the board merit increases in the future to toll the time periodfor filing a grievance now that they are on notice that this is no longer standard operating procedure.

In nondisciplinary matters, grievants have the burden of proving their case by a preponderance of the evidence. Tucci v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995). A grievant seeking a merit increase must prove he is more entitled to the increase than another employee who received such an increase. Tallman v. W. Va. Div. of Highways, Docket No. 91-DOH-162 (Jan. 31, 1992).

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 Administrative Rule, 143 C.S.R. 1 § 5.08(a) (1998). See Morris v. W. Va. Dep't of Transp., Docket No. 97-DOH-167 (Aug. 22, 1997); King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). 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. Little,supra; Morris, supra; Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); 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).

"An action is arbitrary and capricious if the agency making the decision 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 is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Servs., 769 F.2d 1071 (4th Cir. 1985). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed 1985). Arbitrary is further defined as being 'synonymous with badfaith or failure to exercise honest judgment.' Id." Trimboli v. W. Va. Dep't of Health and Human Servs./ Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

“A grievant must demonstrate more than a flaw in the merit increase process. As previously stated, a grievant must also demonstrate that, had the process been properly conducted, she would have received a merit increase. Stone v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 97-

ABCA-151 (Aug. 21, 1997)." Karr v. W. Va. Bureau of Employment Programs, Docket No. 98-BEP-145 (Aug. 28, 1998).

Finally,

> This Grievance Board has had several cases in which the employer has limited the pool of applicants based on multiple factors. Roberts v. Dept. of Admin./Div. of Personnel, Docket No. 94-DOP-182 (Dec. 1, 1994) (employees with raises within one year were ineligible, supervisors were directed to pay close attention to equitable relationships among employees and use of leave time); Delauder v. Dept. of HHR/Child Advocate Office, Docket No. 92-HHR-483 (Aug. 31, 1993) (employee who had received any pay raise during past two years not considered); Clemens/Cordray v. Dept. of Highways, Docket Nos. 90-DOH-033, 041 (Sept. 28, 1990) (supervisor did not consider employees awarded a merit increase within the past two years); Osborne v. Div. of Rehab. Serv., Docket No. 89-RS-051 (May 16, 1989) (individuals with previous merit increases were not automatically entitled to merit increase even if performance stayed the same, supervisors directed to check for pay inequity). In Roberts, supra, this Board held that factors that had already been assessed in the evaluation, such as leave time, could not be utilized again to limit the pool of applicants. Other decisions, while noting merit increases had been limited to those who had not had an increase in the prior years, have not found this restriction to violate either DOP's or DOH's regulations.

Tucci v. Dep't of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995) (footnote omitted). DOL's decision to award merit increases only to those who achieved a minimum overall rating on their performance evaluations is not inconsistent with Personnel's Administrative Rules regarding how merit increases are to be awarded.

Grievant Wade offered his opinion that raises should have been given to every compliance officer in the state in the same amount, because they all perform the same duties. Commissioner Allred provided a reasonable basis for his decision not to award merit raises in this manner. He testified that he considered the possibility of givingemployees $200 or $300 merit increases in order to provide each employee with some increase, but decided not to do this because he felt such a small increase would be an insult, and would not be consistent with the merit system. Had Commissioner Allred awarded all employees a merit increase, it appears likely that Grievants Wade and Mitchell would have actually received an increase of less than $504.

Grievant Wade also opined that compliance officers in rural areas must travel twice as far as those in metropolitan areas to write as many violations. This argument relates to the evaluation standards, and is untimely. The undersigned would note, however, that only 3 categories on the performance evaluation form utilized by DOL, out of a total of 23 categories, involve the quantity of work. Further, there was no evidence that the employee has to write a certain number of violations in

order to receive a certain rating.

The only testimony offered with regard to other DOL employees who received merit increases was that one employee had worked with Grievant Mitchell on a prevailing rate project, Grievant Mitchell had more experience than that employee in prevailing rates, but that employee received a higher merit increase than Grievant Mitchell. This other employee's performance evaluation was not placed into evidence, but the list prepared by Mr. Goff shows that this employee received an overall rating of 2.04. The performance evaluation form developed by the Division of Personnel and used by DOL rates employees in areas such as flexibility, credibility, customer service, and availability for work, in addition to quantity and quality of work, so it is entirely possible and proper that an employee working on a project with Grievant Mitchell, with less experience than he, could receive a higher overall rating on his performance evaluation than Grievant Mitchell.

One or more of the Grievants also complained that Mike Sams received a merit increase. Again, Mr. Sams' performance evaluation was not placed into evidence; however, Mr. Goff's list shows he received an overall rating of 2.08 on his performance evaluation. Grievants did not demonstrate this rating was erroneous in any way. The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the party asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

2. Effective July 1, 1998, W. Va. Code § 29-6A-3 requires the respondent to raise the issue of timeliness at or before the Level II “hearing.” However, W. Va. Code § 29-6A-4(b) requires that the employer's administrator or his designee hold a “conference” at level two, not a “hearing.” This Grievance Board has previously reviewed this statutory inconsistency and determined, applying principles of statutory construction, that, in grievances filed by state employees where there is no Level II hearing, the timeliness defense must be raised at or before the Level III hearing. Greathouse v. Dep't of Transp., Docket No. 99-DOH-413 (Aug. 21, 2000). DOL timely raised a timeliness defense for the first time at the Level III hearing.

3. A grievance must be filed within 10 working days following the occurrence of the event upon

which the grievance is based. W. Va. Code § 29-6A-4(a).

4. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

5. "Ordinarily, personnel actions, such as annual performance evaluations, which are subject to challenge through the grievance procedure within ten days of the date they are issued, may not later be disputed in a timely grievance challenging a subsequent action. See Cummings v. W. Va. Dep't of Transp., Docket No. 95-DOH-104 (Jan. 12, 1995); Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4,1994). See also Vincent v. W. Va. Dep't of Transp., Docket No. 97-DOH-519 (May 13, 1998); Galloway v. Div. of Banking, Docket No. 98-DOB-167 (Sept. 22, 1998)." Stover v. Dep't of Admin., Docket No. 00-ADMN-024 (Mar. 31, 2000).

6. Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." The same discovery rule found in the education grievance procedure is also found in the grievance procedure for state employees at Code § 29-6A-4.

7. Grievants cannot challenge the validity of their performance evaluations completed in January 1999, in a grievance filed in December 1999, challenging the award of merit raises which were based upon the performance evaluations, as such a challenge is not timely. Riffle v. Dep't of Transp., Docket No. 99-DOT-485 (July 19, 2000); Stover, supra.

8. This grievance was filed as soon as Grievants discovered that merit increases were not awarded across the board to all compliance officers in equal amounts, as had been the case in the past. The grievance was timely filed insofar as it challenges the award of merit increases.

9. 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 Administrative Rule, 143 C.S.R. 1 § 5.08(a) (1998). See Morris v. W. Va. Dep't of Transp., Docket No. 97-DOH-167 (Aug. 22, 1997); King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340

(Mar. 1, 1995). 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. Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-092 (July 27, 1998); Morris, supra; Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); 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).

10. "An action is arbitrary and capricious if the agency making the decision 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 is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Servs., 769 F.2d 1071 (4th Cir. 1985). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed 1985). Arbitrary is further defined as being 'synonymous with bad faith or failure to exercise honest judgment.' Id." Trimboli v. W. Va. Dep't of Health and Human Servs./ Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

11. “A grievant must demonstrate more than a flaw in the merit increase process. . . . a grievant must also demonstrate that, had the process been properly conducted, she would have received a merit increase. Stone v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 97-ABCA-151 (Aug. 21, 1997).” Karr v. W. Va. Bureau of Employment Programs, Docket No. 98-BEP-145 (Aug. 28, 1998).

12. Grievants did not demonstrate any flaw in the merit increase awards, or that they were more entitled to merit increases than any other employee.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so that the record

can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: February 2, 2001

Footnote: 1

Grievant Wade filed his grievance on December 1, 1999. The remaining Grievants filed their grievances on or about December 2, 1999. Grievant Wade's supervisor and Grievant Perdue's supervisor responded to their grievances on December 9, 1999, that he was without authority to grant the relief requested. Grievants Wade and Perdue appealed to Level II on that same date. On December 16, 1999, their second level supervisor likewise responded that he was without authority to grant the requested relief. The record does not reflect what occurred at Levels I or II with respect to the remaining Grievants. Grievants appealed to Level III, where the grievances were consolidated, and a hearing was held on February 23, 2000. The grievance was denied at Level III on May 2, 2000, on the merits, and there was also a finding that Grievants did not timely challenge their evaluations. Grievants appealed to Level IV on May 11, 2000. A Level IV hearing was held on October 13, 2000. Grievants were represented by Fred Tucker, and DOL was represented by David Cleek, Esquire. The parties asked to submit written argument, and this matter became mature for decision on December 11, 2000, upon receipt of the last of the parties' written arguments.

Footnote: 2

DOL also asked that Grievant Davis' grievance over his evaluation be dismissed, because it was the same grievance he had filed in January of 1999, which was processed through Level II, and which Grievant Davis then failed to further pursue. As the undersigned has found this grievance to be untimely at this point in time, this argument need not be addressed.

Footnote: 3

Grievants also argued DOL attempted to keep secret the fact that some employees received raises. The only evidence of this was testimony that Grievant Wade's supervisor told him not to tell anyone about the raises. His supervisor, Mr. Compton, admitted he had done so, explaining that Grievant Wade, and other employees, would call him about once a month and ask him if there were going to be any raises. He testified that Grievant Wade "kept aggravating" him, and when he found out there would be raises he told Grievant Wade this just to get him to quit asking, but told him not to tell anyone. He explained that he did not know how much the raises would be, and was worried they might not be awarded at all, and for this reason he did not want this information passed on to all employees.