STEPHEN ANTOLINI, et al.,

Grievants,

v. DOCKET NO. 03-DNR-094

DIVISION OF NATURAL RESOURCES,

Respondent.

DECISION

Grievants Stephen Antolini, Mickey Sylvester and Roger McClanahan filed separate but essentially identical grievances on or about April 9, 2002, alleging discrimination in pay for Conservation Officers in the Law Enforcement Section at the Sergeant rank, and seeking raises and back pay to August 1, 2000.

Following denials at levels one, two and three, (See footnote 1) a level four grievance hearing was held June 23, 2003, at the Grievance Board's Charleston office. Grievants were represented by Norman Henry of Masters and Taylor, L.C., and Respondent was represented by Kelley Goes, Assistant Attorney General. The parties agreed to submit their proposed findings of fact and conclusions of law by October 15, 2003, whereupon the matter became mature for decision.

Based on a preponderance of the evidence adduced at the hearing and contained in the record, I find the following relevant and material facts have been proven:

FINDINGS OF FACT

1. Grievants are all classified by the Division of Personnel (DOP) as Conservation Officer II's (CO2's), in the Division of Natural Resources' (DNR's) Law Enforcement Section. The DNR uses a paramilitary rank structure within its Law Enforcement Section, and CO2's hold the rank of Sergeant.

2. The DOP Classification Specification for Conservation Officer, Sergeant states, in the "Nature of Work" section:

> Under limited supervision, is assigned to a geographical area, generally encompassing two or more counties, and is primarily responsible for interpreting and

enforcing State Natural Resources Laws, Rules and Regulations provided for in the Code of West Virginia for the purpose of conservation and protection of the natural resources of the state and. [sic] May specialize in a particular program, such as hunter or motorboat safety, and serves as an instructor to the public, as well as, to other officers. Keeps in constant contact with the public in order to carry on a continuous program of education to sporting, civic and community groups and to secure public support of the department's programs.

May supervise subordinate officers with like responsibilities and must apply a personal knowledge of laws and procedures, as well as judgement and tact, in contacts with the public and subordinates.

Sergeant is responsible to Captain and other superior officers for himself/herself and subordinates for enforcement of laws, rules and regulations, submission of reports and records required by regulation or superior officer's request, observance of general and special orders, proper performance of duties and maintenance of discipline by officers under his/her command. May, within geographic area of responsibility, assign subordinates to duty whenever and wherever required by the functions, services and needs of the division.

Periodically attends law enforcement and supervisory management schools, as needed and directed. Responds to any call or report of law violation at any hour of the day or night, and, when necessary, leads special patrols within the assigned area. Subject to duty or seasonal, or undercover or other special assignment, whenever and wherever required by the functions, services and needs of the department. Duties involve an element of personal danger due to the nature of law enforcement work. Work requiresconsiderable travel and outside work under varying weather conditions and difficult terrain.

Special assignments and guidelines are given by superior conservation officer, and work is evaluated on the basis of results obtained and compliance with laws, rules, regulations, and policies. Performs related work as required.

3. The DOP Classification Specification for Conservation Officer, Sergeant states, in the "Distinguishing Characteristics" section:

There are six districts in the Division of Natural Resources. A position in this class typically has responsibility for several counties within a district, and normally supervises Conservation Officers. There are normally three field sergeant positions in each district. Also, there are normally two additional sergeant positions in each district: one serving as district hunter/boating safety education coordinator and one serving as litter control officer.

4. Grievants are all Field Sergeants serving in different districts. In addition to the Field Sergeants, DNR has assigned an additional Sergeant to each district, to serve as a Regional Training Officer (RTO).

5. The RTO positions were created by combining the duties of the district hunter education officer and the duties of training the other officers within the district. The RTO's have no supervisory functions.

6. The RTO positions were originally posted as Hunter Education Coordinators in 1989. At that time, the positions were ranked as Sergeants and filled a need for someone to teach mandatory hunter education classes, as well as boater education classes.

7. At some point in the past, the Chief of the Law Enforcement Section decided to send all the Hunter Education Coordinators to firearms instructor school, and they were then assigned to take over the firearms training and qualification for other officers in theirdistricts. These same officers were later sent to armorer's school, and assigned the duties of armorer for their districts.

8. In 1996, a new functional job description was developed for the Hunter Education Coordinators, changing their titles to RTO's, with added training duties.

9. The RTO's complained about the added duties and changes in their jobs, and requested compensation for the additional duties. By this time, the Law Enforcement Section had a new Colonel, who agreed that the changes in their jobs from the original postings was not fair, and he recommended merit increases to compensate the RTO's for the additional duties.

10. The Director of the DNR approved the Colonel's recommendation, and granted the RTO's merit raises in the amount of $1,767.12 per year.

11. Field Sergeants are also required to be hunter education instructors, but are not required to possess certifications in firearms instruction or as an armorer.

12. The DOP Administrative Rule, 143 C.S.R. 1 (2001), in section 5.4(d), stated:

> Additional Pay - Except for authorized overtime, Board approved pay differentials, or other statutorily required and/or authorized payments, appointing authorities shall make no pay additional to the regular salary to any employee. The rates as provided do not include reimbursements for actual and necessary expenses incurred incident to employment such as travel expense. Additional duties imposed or volunteered are not an exception to this rule.

13. The Administrative Rule further stated, in section 5.8:

(a) Basis - All salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance.

(b) Eligibility - Salary advancements are limited to permanent employees.

(c) Amount - Salary advancements are limited to a maximum established and subject to change by the State Personnel Board, and shall not cause the newsalary to exceed the maximum of the pay grade to which the employee's class is allocated. The State Personnel Board shall establish the maximum for salary advancements by policy on implementation of the pay plan [i.e. as of 5/1/94, no more than 10% in any 12-month period] as specified in subsection 5.2. of this rule.

(d) Exceptions - An employee with seven years of total state service who has attained the maximum or above in the range, or for whom a salary advancement would result in his or her salary exceeding the maximum in the range for the class is eligible for a salary advancement. The salary advancement is limited to the difference between two increments [i.e. as of 5/1/94, two increments equal 10%] and the total percentage of all other increases in pay in the immediately preceding twelve month period.

(e) Effective Dates - Salary advancements for permanent employees are effective on or after the date on which the employees become eligible for the salary advancements.

DISCUSSION

Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievants allege discrimination and favoritism in the way merit raises were given to RTOs but not to Field Sergeants. "'Discrimination' means 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." W. Va. Code § 29-6A-2(d). "'Favoritism' means 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).

A grievant, seeking to establish a *prima facie* case of discrimination and/or favoritism under W. Va. Code §§ 29-6A-2(d) and (h), 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).

Grievants are similarly situated to RTO's, in that they are both classified as CO2's and ranked as Sergeants. While there is a difference in the duties assigned to Field Sergeants and RTO's, creating a functional difference, there is no technical difference, as they are all ranked and classified the same. Their actual job responsibilities are defined by their classification specifications, which are identical. Grievants have been treated differently to their detriment by not having been considered for salary increases when other Sergeants were, and Respondent's stated reason for the difference -- merit -- is unrelated to actual job responsibilities. While the changing job responsibilities of the RTO's was used as the justification for the raises, the changes do not account for the difference in treatment of the RTO's and the field sergeants. Although the Field Sergeants and the RTOs have differing duties, their job responsibilities are outlined in their classification specifications, which are the same for both. The actual difference in job duties between a field officer and an RTO does not affect the equation, as these jobs were entirely different when originally posted, but had the same pay grade and base salary. Grievants have proven, *prima facie*, that they have been subjected to discrimination and favoritism.

Once a grievant establishes a *prima facie* case of discrimination and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hendricks v. W. Va. Dep't of Tax& Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Respondent gave the RTO's "merit" raises. Salary advancements based on merit are controlled by the Division of Personnel Administrative Rule, 143 C.S.R. 1 § 5.8 (2000) (See footnote 2) , which states in part, "(a) Basis - All salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance." Respondent, while stating the RTO's performed well, admitted that merit was a pretext for giving the RTO's raises to compensate them for the change in their job duties.

The evidence supports Grievants' contention that the RTO's were improperly given merit raises while the Field Sergeants were not. Since the raises were not really for "merit" as contemplated by the rule on salary advancements, they were essentially unauthorized bonuses, or "Additional Pay." This is something also covered by the DOP Administrative Rule, which further restricts an employer's authority to provide raises in excess of a position's approved salary in section 5.4(d), which states:

> Additional Pay - Except for authorized overtime, Board approved pay differentials, or other statutorily required and/or authorized payments, appointing authorities shall make no pay additional to the regular salary to any employee. The rates as provided do not include reimbursements for actual and necessary expenses incurred incident to employment such as travel expense. *Additional duties imposed or volunteered are not an exception to this rule.*

[Emphasis added.] Respondent advanced the salaries of the RTO's in derogation of the express prohibition of the Administrative Rule, to the detriment of Grievants. In actuality, there are only three ways in which a state employee may receive a raise: on promotion toa position in a different classification with a higher pay grade (§ 5.4), based on merit as shown by recorded measures of performance (§ 5.8) and by earning an annual increment increase (§ 5.9). The raise given to the RTO's does not fall into any of these categories.

Respondent argues that the RTO's did receive valid merit raises because their raises were based on the "way the job was originally written what was added to them" and "the way they performed their jobs." This justification for the salary increase is at direct odds with the requirement that "'[s]alary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance.' DOP Administrative Rule § 5.9 (2003); *See* Cogar v. W. Va. Dep't of Transp., Docket No. 01-DOH-520 (Dec. 20, 2001); King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995)." Ours v. Dep't of Transp./Div. of Highways, Docket No. 03-DOH-097 (Aug. 8, 2003). Respondent's assertion that the increase was based in part on "the way they performed their jobs" was not backed up by any performance evaluations or other recorded indicators of performance.

While Respondent characterizes the issue of one as to whether it has the right to give merit pay increases, Grievants do not dispute it has that right. Grievant contend that when it exercises that right it must do so properly and without favoritism. Grievants are correct. Since the pay raise given to the RTO's was not a merit increase, as evidenced by the fact that it was not based on merit, they were

merely unauthorized pay increases. However, the situation cannot be corrected by granting grievants a similar improper raise. Since no recorded measures of performance were placed in evidence whereby the undersigned could compare the performance of Grievants with the performance of the RTOs at the time the "merit" raises were instituted, I cannot find that Grievants and theRTO's had equally meritorious performance. West Virginia Code § 29-6A-5(b) permits "relief as is determined fair and equitable . . . and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article: *Provided,* That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole. While it would be improper to grant the relief requested by grievants, the disparity created by the improper salary increases may be relieved by recision of the raises. It is strongly suggested that Respondent undertake fair and equal evaluation of the CO2s based on recorded measures of performance to determine whether they should be awarded merit raises. The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92- HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. Id.

2. "'Discrimination' means 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." W. Va. Code § 29-6A-2(d). "'Favoritism' means unfairtreatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h).

3. A grievant, seeking to establish a *prima facie* case of discrimination and/or favoritism under W. Va. Code §§ 29-6A-2(d) and (h), 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).

4. Grievants established a *prima facie* discrimination and favoritism claim by showing that similarly-situated Sergeants received salary increases, not based on merit, and that Grievants were not related to the actual job responsibilities of the other Sergeants.

5. Once a grievant establishes a *prima facie* case of discrimination and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. *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, 179 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).

6. "Salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance.' DOP Administrative Rule § 5.9 (2003); *See* Cogar v. W. Va. Dep't of Transp., Docket No. 01-DOH-520 (Dec. 20, 2001);King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995)." Ours v. Dep't of Transp./Div. of Highways, Docket No. 03-DOH-097 (Aug. 8, 2003).

7. Respondent did not establish a non-discriminatory reason for the difference, and Grievants proved the offered reason, merit, was pretextual.

8. W. Va. Code § 29-6A-5(b) permits "relief as is determined fair and equitable . . . and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article: *Provided,* That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole.

Accordingly, this grievance is hereby **GRANTED IN PART.** Respondent is **ORDERED** to rescind the “merit” raises given to the RTO's.

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, and 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.

Date: October 29, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The Grievance Board issued a level four decision denying Grievants' claim that a default occurred at level three. See, Antolini, et al., v. Div. of Natural Resources, Docket No. 03-DNR- 049D (April 16, 2003).

Footnote: 2

The Administrative Rule was amended effective July 1, 2003. The cited sections are the ones in effect at the times relevant to this grievance. Section 5.4(d) was unchanged, and section 5.8 is now section 5.9, but is otherwise unchanged.