LEE OURS,

Grievant,

v. Docket No. 03-DOH-097

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Lee Ours ("Grievant") initiated this proceeding on October 7, 2002, alleging he had been "passed up on merit raises." He seeks to have "merit raises given fairly" and "to be treated equal, back pay." The grievance was denied at level one on October 9, 2002, and at level two on October 22, 2002. A level three hearing was held on January 14, 2003, and the grievance was denied in a decision dated March 28, 2003. Grievant appealed to level four on April 2, 2003. A hearing was held in the Grievance Board's office in Westover, West Virginia, on July 16, 2003. Grievant represented himself, and the Division of Highways ("DOH") was represented by counsel, Belinda Jackson. The parties elected not to file post-hearing submissions, so this grievance became mature for consideration at the conclusion of the level four hearing.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant has been employed by DOH since July of 1996, and is currently classified as a Transportation Worker III/Equipment Operator.

2. Grievant received merit raises on October 1, 1998, and October 1, 2000. 3. Pursuant to the Administrative Rule of the Division of Personnel ("DOP"), along with DOH policy, merit increases are to be awarded based upon "performance evaluations and other recorded measures of

performance." DOH policy provides that, in addition, "equitable pay relationships and length of service may be considered as a secondary factor."

4. Prior to the fall of 2002, Gary Kitzmiller, County Highway Administrator for Grant County, distributed merit raises in a rotating order, based upon seniority. He did not use performance as a basis for awarding the increases.

5. Beginning in August of 2002, Mr. Kitzmiller realized that his previous method of granting merit raises was contrary to the applicable regulations and policies. Therefore, he began granting merit raises based upon performance evaluations in September of 2002.

6. Employees who had better overall evaluation scores than Grievant have received merit increases since Grievant's last raise in 2000, even if they had already received a raise within the last calendar year.

7. DOH awards merit raises in two-year "cycles," during which attempts are made to distribute raises as evenly as possible. The current two-year cycle began in September of 2002 and will end in September of 2004.

8. Pursuant to the rotation system previously used by Mr. Kitzmiller, Grievant would have been next in line to receive a raise in September of 2002, if evaluations had not been considered.

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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6.

Grievant contends that he is entitled to a merit raise, pursuant to the rotation system previously used by Mr. Kitzmiller. He believes it is unfair that some employees have received one or more raises since he received his last raise in October of 2000, and that he should have been "next in line" when the last group of raises were granted. However, he does not contend that he has a better performance evaluation than any employee who received a merit increase.

DOP's Administrative Rule states in § 5.9 (2003) that "salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance." 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). In addition, as set forth above, DOH policy

provides that "equitable pay relationships and length of service may be considered as a secondary factor," and these considerations are typically used as tiebreakers. Morris v. W. Va. Dep't of Transp., Docket No. 97-DOH-176 (Aug. 22, 1997). See Ratliff v. W. Va. Dep't of Transp., Docket No. 96-DOH-004 (Jan. 31, 1997).

It is well-settled that 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, 1999). "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 capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 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." Id. (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 [the employer]. See generally, Harrison v. Ginsberg, [168 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

In the instant case, Grievant feels entitled to a merit raise pursuant to a system which was illegal, as Mr. Kitzmiller eventually realized. As observed in Cogar, supra, this is an example of "the problems created when employees expect a merit increase within a certain time frame regardless of their performance evaluations." The previous system utilized by Grievant's supervisor was contrary to DOP and DOH policy, which mandate that performance evaluations be the basis for awarding merit raises. Therefore, Grievant's place in the "rotation" is irrelevant. The only issue to be considered is whether anemployee with a lesser evaluation than Grievant received a merit raise when Grievant did not, and this did not occur. It is unfortunate for Grievant that he was led to believe he was “entitled” to a merit raise at any particular time, but the previous system was clearly contrary to law. Grievant has

not established entitlement to a merit increase.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. "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).

3. 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, 1999).

4. Grievant has failed to establish by a preponderance of the evidence that he was more entitled to a merit raise than other employees who had better performance evaluations.

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, 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: August 8, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge