JOHN COLLINS,

Grievant,

v. Docket No. 03-DOH-053

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, John Collins, filed this grievance against his employer, the Division of Highways ("DOH"), on May 8, 2002. Grievant alleges, "Favoritism; by District Engineer of District II. Misuse of the merit system." The Relief Sought is, "Same privileges in pay raises as other employees have received in District II. Also any and all costs the grievance may bring upon me."

This grievance was denied at all lower levels. Grievant appealed to Level IV on February 21, 2003, and a Level IV hearing was held on April 14, 2003. (See footnote 1) This case became mature for decision at that time, as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant asserted other employees in District Two had been treated more favorably because, Wilson Braley, the District Engineer, settled a grievance with these other employees by granting them a merit increase. Grievant feels he is being treated differently because he offered to settle two or three grievances for a merit increase, and Mr. Braley did not accept this offer. (See footnote 3)

Respondent asserts Grievant and the employees who received merit increases as the result of filing a grievance were not similarly situated. Additionally, DOH notes the decision to settle a grievance is made on the merits of each one, and there is no requirement to settle a

grievance just because there is an offer to do so or because another grievance was settled.

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

Findings of Fact

1. Grievant is employed by DOH as a Craftsworker II in Lincoln County, District Two.

2. District Two is broken down into multiple subsections, each with different supervisors. These supervisors report to Mr. Braley, the Head Administrator for District Two.

3. In the past year Grievant has filed numerous grievances.

4. At some point, unidentified by Grievant, he offered to settle two or three grievances for a merit increase.

5. Neither Grievant nor his representative remembered what these grievances were about, but they were not about Grievant's failure to receive a merit increase.

6. Grievant was hired on July 16, 2001.

7. He has not received a merit increase.

8. Forty-seven employees were hired in District Two between January 1, 2001, and December 31, 2002.

9. Seventeen of these new employees have received merit increases.

10. Three employees from District Two's Corridor G, Section Two Headquarters, who had been hired on December 11, 2001, filed a grievance because they believed they should have received a merit increase.

11. Their supervisor reviewed these grievances, noted the employees' evaluations were good, and recommended they receive a merit increase.

12. Mr. Braley followed this recommendation, these grievances were settled, and these employees received merit increases.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving this 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met his burden of proof. Id.

Pursuant to West Virginia Division of Personnel Rule 5.9(a), 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. Marcum v. W. Va. Dep't of Transp., Docket No. 00-DOH-155. 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. ofHighways, Docket No. 91-DOH-186 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Serv., Docket No. 89-RS-051 (May 16, 1989).

Grievant asserts other employees have received more favorable treatment than he has received. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." The test to determine whether a grievant has established a prima facie case of favoritism requires a grievant to establish by a preponderance of the evidence:

> **(a) that he is similarly situated in a pertinent way, to one or more other employee(s);**
>
> **(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,**
>
> **(c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.**

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once a grievant establishes a prima facie case of favoritism, the burden shifts to Respondent to demonstrate a legitimate, nondiscriminatory reason for the employment decision. Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has not established a prima facie case of favoritism, as he has not proven he was similarly situated to the employees who received a merit increase, nor has he demonstrated he was deserving of a merit increase. No evaluations of any of theemployees were placed into evidence. Further, Grievant did not file a grievance about his failure to receive a merit increase as the other employees did.

It should also be clarified that pursuant to the Division of Personnel's Rule 5.9(a), "All salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance." Merit increases are not to be used to settle grievances dealing with other matters. Additionally, merit increases are usually given to resolve grievances when these merit increases are deserved under the Division of Personnel's Rules. Indeed, if merit increases were routinely used to settle any and all grievances, the number of grievances would most likely increase.

As for Grievant's assertion that DOH is required to settle his grievance if they settle other grievances, two things should be noted. First, "'[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.' Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968)." Syl. Pt. 1, McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994). Second, and this is the key tenet in this case, "[a]n agency . . . is free to settle one case and not another even if the facts of the two are parallel." Smith v. W. Va. Dep't of Health and Human Resources, Docket No. 90-H-470 (Sept. 30, 1991). See Farley v. Mason County Bd. of Educ., Docket No. 94-26-243 (Dec. 14, 1994).

Further, this Grievance Board has "long recognized the principle that grievance settlements can only be challenged in later grievances when it is proven by a preponderance of the evidence that the settlement was not fairly made or was incontravention of some law or public policy." Myers v. Harrison County Bd. of Educ., Docket No. 01-13-013 (Nov. 21, 20010. See Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23- 190 (Mar. 15, 1996). The decision to settle a grievance is within the discretion of the agency, and this determination is based on each grievance's facts and circumstances. Smith, supra. Grievant has not demonstrated this settlement contravened any of the applicable laws or any public policy, or that the settling of another, different grievance required DOH to settle with him.

Additionally, Grievant has not demonstrated DOH's decision was arbitrary and capricious. "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, 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)).

Grievant has not demonstrated any problem with DOH's treatment of either grievance, nor has he established he was treated unfavorably. Although he feels he hasbeen treated unfairly, this belief may be created by his lack of understanding of the settlement process and the discretion afforded DOH in this practice.

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 § 4.19 (1996); 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. Division of Personnel's Rule 5.9(a) states, "All salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance." See Marcum v. W. Va. Dep't of Transp., Docket No. 00-DOH-155; 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).

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. 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). 4. "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, 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)).

5. Grievant did not demonstrate DOH's decisions were arbitrary and capricious.

6. No employee is entitled to a merit increase at a certain time because of length of

service.

7. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

8. To established a prima facie case of favoritism a grievant must establish by a preponderance of the evidence:

> **(a) that he is similarly situated in a pertinent way, to one or more other employee(s);**
>
> **(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,**
>
> **(c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.**

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). 9. Once a grievant establishes a prima facie case of favoritism, the burden shifts to Respondent to demonstrate a legitimate, nondiscriminatory reason for the employment decision. Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

10. Grievant did not establish a prima facie case of favoritism, as he has not proven he was similarly situated to the employees who received a merit increases, nor has he demonstrated he was deserving of a merit increase.

11. "'The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.' Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968)." Syl. Pt. 1, McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994).

12. "An agency . . . is free to settle one case and not another even if the facts of the two are parallel." Smith v. W. Va. Dep't of Health and Human Resources, Docket No. 90-H-470

(Sept. 30, 1991). See Farley v. Mason County Bd. of Educ., Docket No. 94-26- 243 (Dec. 14, 1994).

13. This Grievance Board has "long recognized the principle that grievance settlements can only be challenged in later grievances when it is proven by apreponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy." Myers v. Harrison County Bd. of Educ., Docket No. 01-13-013 (Nov. 21, 20010. See Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23- 190 (Mar. 15, 1996).

14. Grievant did not prove DOH was required to settle his grievances just because he made an offer to do so, and other grievances have been settled. Smith, supra.

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: July 17, 2003

Footnote: 1

Grievant was represented by Roger Sowards, a co-worker, and Respondent was represented by its Attorney Barbara Baxter.

Footnote: 2

On May 29, 2003, Grievant's representative alleged a default had occurred at Level IV. This motion was denied

by Order dated June 4, 2003.

Footnote: 3

Grievant also wanted the undersigned Administrative Law Judge to change the Division of Personnel's merit increase regulations and make it possible for merit increases to be given for matters other than meritorious performance. i.e., for the settlement of grievances. The undersigned Administrative Law Judge finds the Division of Personnel's regulations are clear and correct. Merit increases are to be given to employees in recognition for quality job performance. See Division of Personnel Administrative Rule 3.85.