DAVID MCGEE,

Grievant,

v. **Docket No. 03-DOH-281**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

David McGee ("Grievant") initiated this proceeding on April 2, 2003, alleging pay inequity with regard to his position with the Division of Highways ("DOH") in District Five. He seeks as relief to be granted a 30% salary increase, plus back pay and interest to March of 1996. The grievance was denied at level one on April 7, 2003, and at level two on April 9, 2003. After a level three hearing was conducted on July 30, 2003, the grievance was denied in a decision dated August 29, 2003. Grievant appealed to level four on September 12, 2003. After numerous continuances were granted (See footnote 1) due to scheduling conflicts, inclement weather, and--most recently--Grievant's failure to appear, the parties elected to submit this matter for a decision based upon the record developed below. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on September 12, 2005. (See footnote 2)

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by DOH since March 22, 1991.

2. For several years, Grievant's immediate supervisor was Jeff Willis. Mr. Willis was known for having difficulty getting along with his subordinates, and he was particularly hard on Grievant. As a result of these problems, Mr. Willis was removed from field operations in early 2003, and those duties were assigned to Steven Keister, Transportation Engineering Technician Senior.

3. During the mid-1990s, Grievant was disciplined on more than one occasion. One of these disciplinary actions was removed from Grievant's record as the result of a grievance granted at level three. The nature of these disciplinary actions is not reflected in the record for this grievance.

4. After his work performance improved, Grievant was granted a 2.5% merit increase on April 1, 2000.

5. On July 1, 2000, Grievant was reallocated to the classification of Transportation Engineering Technician. (See footnote 3)

6. In early 2003, Gary Long, Assistant District Engineer for District Five, recommended that Grievant receive a merit increase. Because his performance had improved, and because his salary was lower than most other employees in his classification, it was recommended that he receive a 5% raise.

7. Due to budget constraints, all DOH administrators were notified on March 13, 2003, that the most recently recommended merit raises would not be granted. Therefore,Grievant did not receive the recommended 5% at that time, prompting him to file this grievance.

8. Grievant did receive a 5% merit increase on September 7, 2003.

9. Grievant's salary has always been within the pay range for his assigned classification.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

This grievance appears to have been prompted by DOH's temporary “freeze” on merit increases that occurred in April of 2003, when Grievant had been recommended for a 5% increase. Consequently, Grievant contends that this was the final occurrence in a continuing “pay inequity” situation that has developed over several years, during which time he only received one merit raise

(in 2000). However, other than providing evidence that Grievant's salary was lower than that of most other employees in his classification--a situation which DOH has made strides in correcting--he has provided little information as to his actual meritorious job performance as compared to other District 5 employees. 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 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). 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. 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 CountyMemorial 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)). " 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.

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). In the instant case, DOH has demonstrated that factors existed which impacted Grievant's previous eligibility for pay raises, including low evaluation scores and disciplinary actions. Nevertheless, in recent years, as Grievant's performance improved, he has been recommended and granted pay raises, with the 2003 pay increase being granted after this grievance was filed. Grievant has failed to demonstrate that, as compared to other employees in District 5, and in light of his job performance, he was entitled to be recommended for previous raises and wasnot so recommended. 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).

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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. "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).

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

4. 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).

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.

Date: September 28, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Obviously, this is an extreme understatement.

Footnote: 2

Grievant filed no proposals. He represented himself at level four, and he was represented by Roann Welch at level three. Respondent was represented by Carrie Dysart, Esquire, at level three, and by Barbara Baxter, Esquire, at level four.

Footnote: 3

The record contains no explanation of what prompted this reallocation.