LAWRENCE LOFTUS,

Grievant,

v.

Docket No. 05-DOH-130

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

The grievant, Lawrence Loftus ("Mr. Loftus"), brought this grievance claiming that he was "bypassed for [a] merit raise" by his employer, the respondent Division of Highways ("DOH"). For relief, he asks for a merit raise, retroactive to October 1, 2004.

This grievance was initiated on October 4, 2004. After it was denied at lower levels, Mr. Loftus appealed to Level Three, where an evidentiary hearing was conducted on January 27, 2005. (See footnote 1) By correspondence, dated April 15, 2005, DOH adopted the recommended Level Three decision denying Mr. Loftus's grievance on the grounds that he failed to prove a case of discrimination. The transcript of the Level Three hearing was expressly incorporated into the Level Four record. (See footnote 2)

On April 22, 2005, Mr. Loftus filed his Level Four grievance with the West Virginia Education and State Employees Grievance Board ("the Grievance Board"). A Level Four hearing was held at the Charleston office of the Grievance Board on May 31, 2005. Mr.Loftus represented himself at the

Level Four hearing. DOH was represented by attorney Barbara Baxter. This grievance matured for decision at the conclusion of the Level Four hearing.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Mr. Loftus is employed by DOH as an Operator 2 in the St. Albans section of District One.

2 2. When Mr. Loftus first came to work for DOH in February 2002, he was told that merit raises were given out on a rotational basis and that he would receive one every two years. (See footnote 3)

3 3. As of the date of the Level Four hearing, Mr. Loftus had not received a merit raise.

4 4. Mr. Loftus received an evaluation score of 2.17 in June 2004. As a result, Mr. Loftus ranked twelfth in the St. Albans organization, which meant that there were eleven coworkers who were in line for merit raises ahead of him.

5 5. The four coworkers who received merit raises October 1, 2004, had evaluation scores of 2.54, 2.52, 2.40, and 2.26. Barbara Engelhardt, who was awarded an equivalent pay increase when she prevailed upon a claim of discrimination at Level Three of her grievance, also had an evaluation score of 2.54.

Discussion

This is not a disciplinary grievance. Therefore, Mr. Loftus bears the burden of proving his grievance by a preponderance of the evidence. W. Va. Code St. R. § 156-1- 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). “The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).” *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

At the Level Four hearing Mr. Loftus made a number of arguments but presented little in the way of evidence. Despite being offered an opportunity to use the telephone to call witnesses and being reminded that there was a potential witness in the hearing room, Mr. Loftus refused to go forward with his case.

Although Mr. Loftus did not use the term discrimination, it is clear that the premise of this grievance is Mr. Loftus's belief that he is being treated differently from his coworkers with respect to merit raises. The grievance evaluator determined that Mr. Loftus failed to establish a *prima facie* case of discrimination at Level Three. He has again failed to sustain his evidentiary burden at Level Four.

West Virginia Code section 29-6A-2 defines discrimination as “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.” This same definition is found in the statutes relating to education employees. W. Va. Code 18-29- 2(m). In discussing a discrimination claim raised by an education employee, the SupremeCourt of Appeals of West Virginia noted that “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004).

Mr. Loftus failed to demonstrate that he was similarly situated to any of the employees who received merit raises on October 1, 2004. To the contrary, all of the employees who received merit raises at that time had higher evaluations than Mr. Loftus.
Because he was not similarly situated to those employees with higher scores who received the merit raises, Mr. Loftus has failed to prove even the initial predicate for a successful discrimination claim.

Pursuant to the applicable West Virginia Division of Personnel policy, and the corresponding DOH policy, “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 Admin. Rule, 143 C.S.R. 1 5.08(a) (1995). See King v. W. Va. Dept. of Transp. , Docket No. 94-DOH- 340 (Mar. 1, 1995).” *Setliff v. Div. of Highways*, Docket No. 97-DOH-262 (July 27, 1998). Seniority is only a factor if two candidates achieve the same evaluation score. Therefore, merit raises should have gone to the four employees with the highest evaluation scores. (See footnote 4) Mr. Loftus, with the comparatively low evaluation score of 2.17, was not one of those employees. Once the omission of Barbara Engelhardt was corrected, the merit raises were properly awarded in accordance with policy. Therefore, it cannot be said that DOH's decision regarding the merit raises awarded October 1, 2004, was “unreasonable, arbitraryand capricious, or contrary to law or properly-established policies or directives.” *Setliff v. Div. of Highways*, Docket No. 97-DOH-262 (July 27, 1998)(citing *Terry v. W. Va. Div. of Highways*, Docket No. 91-DOH-185 (Dec. 30, 1991), *Osborne v. W. Va. Div. of Rehab. Serv.*, Docket No. 89-RS-051 (May 16, 1989)).

Mr. Loftus also argued that, if merit raises are based on evaluations, every employee should be evaluated by the same person. He argued that the evaluation results were skewed and dependent upon who performed the evaluation. However, Mr. Loftus failed to prove that variations in the employees' respective evaluation scores were not related to each employee's performance. Therefore, this argument will not be addressed further. (See footnote 5)

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. In this non-disciplinary grievance, Mr. Loftus bears the burden of proving discrimination by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005). Mr. Loftus has failed to reach this level of proof.

3 3. Pursuant to West Virginia Code section 29-6A-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." According to the Supreme Court of Appeals of West Virginia, "[t]he crux of such [discrimination] claims is that the complainant was treated differently than similarly situated employees[.]" *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004). Because Mr. Loftus cannot establish that he was similarly situated to the employees with higher evaluation scores who were afforded merit raises, Mr. Loftus cannot prove a claim of discrimination.

4 4. Because the merit raises awarded on October 1, 2004, were based on evaluation scores, DOH's decision cannot be deemed "unreasonable, arbitrary and capricious, or contrary to law or properly-established policies or directives." *Setliff v. Div. of Highways*, Docket No. 97-DOH-262 (July 27, 1998)(citing *Terry v. W. Va. Div. of Highways*, Docket No. 91-DOH-185 (Dec. 30, 1991), *Osborne v. W. Va. Div. of Rehab. Serv.*, Docket No. 89-RS-051 (May 16, 1989)).

Accordingly, this grievance is **DENIED**.

Any party 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). Neitherthe 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 West Virginia Code section 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 30, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

An additional grievant, Barbara Engelhardt, prevailed at Level Three.

Footnote: 2

References to pages in the Level Three transcript shall appear as "Tr.__."

Footnote: 3

This practice, which does not comport with the West Virginia Division of Personnel's requirement that merit raises be based on evaluations and other recorded measures of performance, was abandoned.

Footnote: 4

As Barbara Engelhardt established in her grievance, she should have been one of those four.

Footnote: 5

The Grievance Board has previously addressed issues relating to the use of different individuals to conduct evaluations in the context of a merit-based system for distributing a finite number of raises. "[V]ariability is an accepted part of the evaluation process, as the assessment of employee performance is not an exact science." Honaker v. W. Va. Div. of Highways, Docket No. 99-DOH-393 (Apr. 24, 2000)(citing Ratliff v. W. Va. Dept. of Transp., Docket No. 96-DOH-004 (Jan. 31, 1997),Hall v. W. Va. Div. of Highways, Docket No. 96-DOH-035 (Jan. 31, 1997)).