BENJAMIN BLAKE, et al.,

Grievants,

v. **Docket No. 05-DOH-054**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS

DECISION

Grievants (See footnote 1) are employed in various capacities by the Division of Highways ("DOH") in District Seven, Lewis County. They initiated this grievance on July 15, 2004, alleging merit raises were awarded unfairly and evaluations were not given pursuant to policy. They seek as relief to be given a 10% pay increase and to have evaluations done fairly. After denials at levels one and two, a level three hearing in this matter was conducted on January 5, 2005. The grievance was denied in a written decision dated February 7, 2005. Grievants appealed to level four on February 14, 2005, and a hearing was held in Westover, West Virginia, on July 6, 2005. Grievants represented themselves, and Respondent appeared by counsel, Barbara Baxter. This matter became mature for consideration upon receipt of the parties' fact/law proposals on August 8, 2005.

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

Findings of Fact

1. Grievants are employed by DOH in District Seven, which is headquartered in Lewis County.

2. On January 12, 2004, DOH entered into a settlement agreement with Cary Williams, also an employee in District Seven. Mr. Williams' grievance alleged that supervisors were not conducting performance evaluations properly. The pertinent terms of that settlement agreement were as follows:

> [Due to irregularities in the 2002 evaluation process], the Division has agreed to follow the policy for evaluations to include specifically the following items, that we will make every effort to ensure continue to occur in the evaluation process with regard to the Lewis County Maintenance Employees.
>
> The first of those is to ensure that each employee is given an opportunity to perform a self-evaluation prior to receiving a formal evaluation from that person's direct supervisor or ultimate supervisor. The second of those conditions is that, at a

> minimum, the foreman who directly supervises the maintenance employees be given an opportunity to have some input into the evaluation process, if that foreman does not himself perform the evaluation. The third of those conditions is that the evaluator provide each employee in that maintenance organization an opportunity to sit down privately to review the evaluation, and, finally, each of the maintenance employees would receive an opportunity to have input from their foreman into areas where improvement could be made in their work[.]

Gr. Ex. 1 at Level III.

3. Gerald Hull became acting Transportation Crew Supervisor in District Seven at the end of 2003. Prior to that time, he had been employed as an Operator III, and he has been assigned to District Seven for approximately 18 years.

4. Mr. Hull was not informed of the settlement agreement between DOH and Mr. Williams prior to performing evaluations for the calendar year of 2003. Therefore, he did not specifically consult each employee's supervisor regarding the evaluations and did not offer employees the option to perform self-evaluations. 5. Mr. Hull conducted performance evaluations on Grievants and other District Seven employees in February of 2004. He assigned ratings to each employee based upon his own knowledge of their work and complaints or observations made by foremen and crew leaders who worked with the employees in the field on a daily basis. Mr. Hull did not compare employees to each other when he assigned their evaluation scores.

6. Grievant Roger Balser represented Cary Williams in the grievance that was settled in January of 2004.

7. When Mr. Hull conducted Grievant Balser's evaluation, Grievant Balser informed him of the details of the Williams settlement agreement and brought it to Mr. Hull's attention that he was not performing the evaluations as agreed.

8. Mr. Hull advised Grievant Balser that he would “look into the matter.” He consulted Lanty Ware, Highway Administrator for District Seven, who stated that, if all the employees had indicated their agreement with their evaluations by signing them, there was no need to take any further action. Mr. Hull did not tell Mr. Balser not to file a grievance, nor did he tell him that the evaluations were going to be redone.

9. Merit raises were granted in July of 2004, based upon the highest evaluation scores in District Seven. Grievants were not among those who received raises, because their evaluation scores were lower than those of employees who were selected for merit raises. It is unclear from the

record exactly how many employees received raises, and, while some names were mentioned, not all of them have been identified.

10. The 2003 evaluation scores of District Seven employees were very similar to those given in 2002, but were slightly higher overall. 11. Grievants initiated this grievance on July 15, 2004, after discovering that they had not been selected to receive merit raises.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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).

As a preliminary issue, DOH argues that Grievant's claims regarding the impropriety of their 2003 evaluations was not timely filed. W. Va. Code § 29-6A-3(2) requires that “any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing.” In the instant case, the timeliness issue was first raised in the level two decision issued by Ronald Smith, District Seven Maintenance Engineer. (See footnote 2) As the appropriate person to handle the level two appeal, Mr. Smith raised the timeliness defense on behalf of Respondent in his written level two decision, which was his first opportunity to do so, thus satisfying the statutory time limit for raising that defense. See Greathouse v. W. Va. Div. of Transp.,Docket No. 99-DOH-413 (Aug. 21, 2000) (aff'd, Circuit Court of Kanawha County, CA No. 00-AA-148, May 16, 2003).

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance o f the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997);

Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

W. Va. Code § 29-6A-4(a) provides:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

Grievants contend that, as testified to by Grievant Balser, they believed that the evaluations were going to be redone in accordance with the Williams settlement agreement and that, in any event, the evaluations would not be the basis for determining who would be granted merit increases. However, while Mr. Hull testified that he told Grievant Balser he was going to “look into” the issue, which he did by inquiring about the same of Mr. Ware, there is no definitive evidence that any Grievant was told that the evaluations were going to be done over again. While Mr. Balser may have been hopeful that Mr. Hull's investigation would lead him to conclude that the evaluations were improper and should be redone, Grievants have failed to point to any specific statements made in that regard. In Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987), it was held that, "An employee who makes a good faith, diligent effort to resolve a grievable matter with [his employer] and relies upon the representations of those officials that the matter will be rectified will not be barred from pursuing the grievance pursuant to W.Va. Code §18-29-1, et seq., upon denial thereof." The West Virginia Supreme Court of Appeals, in Naylor v. W.Va. Human Rights Comm'n, 378 S.E.2d 843 (1989), defined the types of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should

unmistakably have understood would cause the employee to delay filing his charge." The evidence in this case does not support such a conclusion. Accordingly, Grievants' claims regarding the evaluations performed in February of 2004were untimely filed. (See footnote 3) Whether or not Grievants knew the evaluations would be used to award merit raises is irrelevant, because the grievable issue was the propriety of the evaluations themselves, and they were performed in February, while the grievance was not filed until July.

However, Grievants' allegation that merit increases were unfairly awarded was clearly filed in a timely fashion. 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. Resp. Ex. No. 1, at Level II. The combining of these two setsof 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 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)). " 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. Although Grievants' claim regarding the allegedly incorrect performance evaluations has been ruled untimely, it is necessary at this point to consider those evaluations to the extent that the final scores determined which employees would receive merit raises, which claim was timely filed. However, although questioned specifically regarding the evaluation scores given to various employees in various categories, Mr. Hull provided legitimate reasoning for the scores he gave. Grievants have failed to introduce any evidence which would prove that their assigned evaluation scores were erroneous or arbitrary and capricious, nor have they established this with regard to the scores assigned to other employees. Mr. Hull's evaluations were conducted based upon his own personal knowledge of each employee's work and, where necessary, information gleaned from crew leaders or other supervisors. There is insufficient evidence in the record to support a finding that the merit raises, or the evaluation scores upon which they were based, were granted in an arbitrary and capricious manner. 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). Accordingly, Grievants have failed to meet their 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).

___The following conclusions of law support this Decision.

Conclusions of Law

1. A grievance must be initiated within ten days of the event upon which it is based or within ten

days of the grievant's discovery of that event. W. Va. Code § 29-6A- 4(a).

2. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. A grievant is excused for his delay in filing a grievance when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge." Naylor v. W.Va. Human Rights Comm'n, 378 S.E.2d 843 (1989).

4. Grievants' allegation that their 2003 performance evaluations were improperly conducted was not filed within ten days of the grievable event, and Grievants have failed to prove that they were deliberately discouraged from filing a grievance.

5. 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).

6. Grievants have failed to prove by a preponderance of the evidence that merit increases granted in July of 2004 were arbitrary and capricious or granted in violation of law or policy.

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: August 24, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants include Mr. Blake, Jake Heater, Rex Rohrbough, Steve Perry, Sue Teter, Roger Balser, Clint Wiant, Paul Heater, Jr., Ron Beeson, Cary Williams, Terry Messenger, Jeff Heater, Roger Gaines, Eric Cogar and Donald Day.

Footnote: 2

While this issue was raised by Grievants at the level three hearing, but not at level four, it seems appropriate to address it briefly.

Footnote: 3

However, the undersigned does feel compelled to advise DOH to take whatever steps are necessary to ensure that all supervisors conducting performance evaluations are adequately trained and informed regarding the proper procedures for conducting evaluations.