JOHN WILLIAMS,

Grievant,

v.

DOCKET NO. 05-CORR-243

WEST VIRGINIA DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

Grievant, John Williams, filed this grievance against his employer, the West Virginia Division of Corrections ("CORR") at the Mount Olive Correctional Center ("MOCC") on May 5, 2005. Grievant's Statement of Grievance stated:

> When I returned to work on the (sic) May 1 2005 from serving my country in Iraq honorably[,] I found out that there were merritt (sic) raises given out. I would like to know where I placed on the list or if I was even considered for one sence (sic) I was gone.
>
> Relief Sought: Do (sic) to the fact that it wasn't done by policy I think I should get the merritt (sic) promotion too.

This grievance was denied at all lower levels, and Grievant filed to Level IV on July 13, 2005. A Level IV hearing was held in the Grievance Board's Beckley office on November 11, 2005. Grievant represented himself, and Corrections was represented by Charles Houdyschell, Senior Assistant Attorney General. During the hearing, Grievant became upset because he was not allowed to present double hearsay and rumors as evidence and gathered his papers to leave. When asked if he wanted to withdraw his grievance, he replied he did not. He was then informed even if he left, Corrections still had the right to present their evidence because he did not wish to withdraw his grievance. Grievant

then left the hearing room. CORR elected not to present any evidence, but made a verbal motion asking Grievant be given an opportunity for another day of hearing. Theundersigned Administrative Law Judge wrote the Grievant on December 7, 2005, repeating what had occurred at hearing and asking him if he wished to have another hearing, and informing him if he did not elect to take this option, the grievance would be decided on the current record. Grievant did not respond. This case became mature for decision on December 21, 2005, the date by which Grievant was to request another hearing.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. The Findings of Fact are derived from the lower level record, the evidence presented at Level IV, and the information in the Level II Decision, as Grievant stated during the Level III hearing that this Decision was accurate.

Findings of Fact

1. Grievant is employed as a Correctional Officer 2 at MOCC.

2. Grievant was on military leave from October 1, 2003, to May 2005. Upon his return to work, Grievant was placed in his prior classification with his former salary.

3. While Grievant was on military leave, MOCC awarded a limited number of merit increases. MOCC decided to award ten percent of these merit increases to Correctional Officer 2's, resulting in only two of the approximately twenty Correctional Officer 2's at MOCC receiving merit increases.

4. Grievant was considered for these merit increases based on his last performance evaluation completed in May 2003. (See footnote 1) His score was a 2.04, which indicatessatisfactory performance. The scores of the two Correctional Officer 2's who received the merit increases were higher than Grievant's.

5. A couple of employees grieved their failure to receive a merit increase and their grievances were settled.

6. Upon his return to work, Grievant heard many rumors from co-workers. These employees told him the merit increases had been done incorrectly, and people were picked at random to receive them.

Issues and Arguments

Grievant asserts he should receive a merit increase because the merit increases were done incorrectly, and W. Va. Code § 15-1F-1 and West Virginia Division of Personnel Administrative Rule 143 C.S.R. 1 § 14.9 require him to receive a merit increase if these increases were given out while he was on leave.

Corrections argues the merit increases were correctly given, Grievant was considered, and the two Correctional Officer 2's who received the merit increases had better evaluations scores than Grievant.

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 (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).

Grievant bases much of his argument on the "Military Leave Fact Sheet for Public Employees" issued by the Division of Personnel. The information provided in this Fact Sheet is based on W. Va. Code § 15-1F-1 and West Virginia Division of Personnel Administrative Rule 143 C.S.R. 1 § 14.9. Section V. of this Fact Sheet, "Pay Increases" states, "You will be entitled to any pay increase(s) for which you are eligible that occur while on active duty upon return to state employment, including any merit raises, increment pay, or other pay increases (e.g., across-the-board) that you would have received normally or that others in the same position received." (Emphasis added).

Merit increases are governed by West Virginia Division of Personnel Administrative Rule 143 C.S.R. 1 § 5.9(a), "Salary Advancements" which states, "[a]ll 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). Pursuant to this guideline on merit increases, the performance evaluations are the main factor to consider. The evidence demonstrates this rule was followed. Grievant, along with other Correctional Officer 2's, was

considered for a merit increase. As Grievant did not have one of the top two scores, he did not receive a merit increase.

The key language of the Fact Sheet in this case is "any merit raise . . . you would have received normally or that others in the same position received." The evidence is clear, even if Grievant had been present at MOCC, he still would not have received a meritincrease because he did not have one of the top two performance evaluation scores given to Correctional Officer 2's. Accordingly, Grievant has not established any violation in the awarding of merit increases.

Further, 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 Rehab. 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 Res., 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." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Grievant has failed to meet his burden of proof and demonstrate MOCC's actions violated any statute, rule, or policy, or that they were arbitrary or capricious. It is clearselecting who will receive merit increases is at times difficult. 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).

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 § 4.21 (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).

2. In accordance with the rules of the West Virginia Division of Personnel, 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 § 5.9(a). 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- 186 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehab. 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 Res., 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." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring

willful and unreasonable action and disregard of known facts.

5. Grievant failed to prove MOCC violated any policy, statute, or rule in the awarding of merit increases.

6. Grievant has failed to meet his burden of proof and demonstrate he was more deserving of a merit increase than the two Correctional Officer 2's that received these increases. 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). 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: March 15, 2006

Footnote: 1

Grievant stated he did not remember getting this evaluation, but he could have received it.