THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ANDREW MACDONALD, ET AL.,

Grievants,

v. **Docket No. 04-DOH-372**

Denise M. Spatafore

Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievants (See footnote 1) are employed by the Division of Highways ("DOH") as Transportation Worker 2s in Raleigh County. They filed this grievance on October 2, 2003, claiming discriminatory practices by DOH with regard to the awarding of merit increases. When these grievances were filed, numerous other grievances, raised by the same individuals, were also filed and consolidated for consideration. After a level three hearing conducted on July 19, 2004, a decision was rendered on September 30, 2004, denying the Grievants' requests for merit increases. On October 10, 2004, these grievances were appealed to level four. After several continuances granted for good cause shown, level four hearings were held in the Grievance Board's office in Charleston, West Virginia, on June 28, 2006,and on August 7, 2006. (See footnote 2) This matter became mature for consideration upon receipt of the parties' fact/law proposals on October 11, 2006.

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

Findings of Fact

1. At all times relevant to this grievance, Grievants were employed by DOH in Raleigh County as Transportation Worker 2s (TW2). However, Grievants Robinson, Zaferatos, Adkins, and Smith are no longer employed by DOH.

2. In March of 2003, DOH awarded merit raises to certain employees in Raleigh County, and a list was posted. However, due to some errors, those raises were “frozen,” and the raises did not actually take effect until September 16, 2003.

3. Grievants learned on or about September 30, 2003, “through the grapevine,” that some employees had received merit increases in their paychecks on that date. Accordingly, they filed this grievance shortly after making that discovery, on October 3, 2003.

4. Grievants did not receive merit raises in 2003.

5. A related grievance was decided at level four in 2005, regarding Grievants' allegations that their performance evaluations for the years 2002 and 2003 were unfair. With regard to the 2002 evaluations, Administrative Law Judge Janis Reynolds ordered that any “needs improvement” rating that had not previously been noted on the prior year's evaluation should be removed, and Grievants' evaluation scores recalculated accordingly. *See MacDonald, et al., v. Dep't of Transp.*, Docket No. 05-DOH-069 (July 29, 2005). 6. The 2003 merit raises were based upon the employees' evaluations for calendar year 2002.

7. After the adjustments were made as ordered by Judge Reynolds, the Grievants' corrected evaluation scores for 2002 were as follows:

Larry Smith	2.09
Lloyd Webb	2.05
William Zaferatos	2.00
Andrew MacDonald	2.00
Raymond Adkins	2.00
William Robinson	1.95

8. All of the evaluation scores of employees who received raises in 2003 were higher than Grievants', with the exception of Bob Pachuta, who received a score of 2.04, and still received a merit increase.

9. Jeff Lilly is the Administrator for the DOH in Raleigh County. He directly supervises two

foremen, who supervise four crew chiefs. DOH workers, like Grievants, work directly under the supervision of their assigned crew chiefs.

10. When merit increases are to be distributed, each county organization is notified that a certain number of raises are forthcoming, and administrators must determine which employees will receive them. Mr. Lilly meets with the foremen to discuss who should receive raises, then makes recommendations to Bill Bennett, District Engineer.

11. Grievant William Robinson was employed by DOH for approximately seven years as a craft worker. His evaluation scores were consistently below 2.0 during his employment, and he received one merit raise in 2000. Mr. Robinson admitted that he frequently had conflicts with his supervisors, because he spoke his mind. He was perceived by his superiors as complaining frequently about his assignments. 12. Grievant William Zaferatos was also employed as a craft worker for approximately seven years. His main function was to operate a boom mower (a large lawn mower), which is a very dangerous machine which many workers cannot operate. Mr. Zaferatos had a history of using excessive sick leave. He received a merit raise in 2000. Mr. Zaferatos' supervisors praised his work and described him as doing a very good job with the boom mower.

13. Grievant Lloyd Webb is employed by DOH as an equipment operator. He has worked for DOH for 11 years and has not received a merit raise since 1995. Mr. Webb is assigned to the Bolt substation in Raleigh County, so his direct supervisor is different from the rest of the Grievants. Three employees at Bolt received merit increases, and their evaluation scores were higher than Mr. Webb's.

14. Grievant Larry Smith was employed by DOH for approximately 7 years as an equipment operator. (See footnote 3) An incident occurred in December of 2001, the nature of which was not revealed in the record, for which he was suspended in 2002. Mr. Smith's evaluations were not introduced as evidence, so it is unknown whether the incident was documented in an evaluation or, if so, in what year. However, throughout his employment, Mr. Smith's performance evaluation scores improved, and Mr. Lilly recommended him to receive a merit raise in 2003. Mr. Bennett, the District Engineer, rejected this proposal, because of Mr. Smith's prior discipline.

15. Grievant Andrew MacDonald is employed by DOH as an equipment operator, and the length of his tenure is not contained in the record. He has never received a meritraise. Mr. MacDonald has a history of being late for work and complaining about assignments.

16. Mr. Pachuta was given a raise in 2003 over Grievants Webb and Smith, despite his lower evaluation score, because he was perceived to be a hard worker with a good attitude. Mr. Pachuta also received a merit raise in 2000.

17. The general evaluation process in 2002 and 2003 was challenged in the previous grievance filed by the current Grievants. *See MacDonald*, *supra*. In that case, specific allegations were made regarding unfairness of the evaluation process. It was noted by Judge Reynolds that Grievants' evaluations had varied very little over the years, and also that, in 2003 when a new system of evaluating employees by a committee composed of the crew chiefs and foremen (at the employees' request) was implemented, most employees' scores actually went down.

18. Mr. Lilly was involved in some local political campaigning sometime in the early 2000s. A few employees who are Mr. Lilly's personal friends helped make signs and put them up. (See footnote 4) These employees also received some of the highest evaluation scores in 2002, but only one of them received a merit raise. However, all of them had consistently received high scores on their evaluations and had received several past merit raises.

Discussion

As a preliminary issue, Respondent argues that these grievances are untimely. Where the employer seeks to have a grievance dismissed on the basis that it was nottimely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of 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).

West Virginia Code § 29-6A-4(a) requires that a grievance be filed “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 . . .” In the instant case, Grievants have established that the 2003 raises did not actually take effect until September 16, 2003, and that they did not know that employees had received them until paychecks were issued on September 30, 2003. Accordingly, this grievance, filed on October 2, 2003, was timely filed.

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). 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). 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 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 mannercontrary 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*, 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*.

Grievants contend that Respondent's overall practices regarding merit raises granted over the past several years have been arbitrary and capricious, contrary to policy, and the result of discrimination and favoritism. "'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." (See footnote 5) "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional oradvantageous treatment of another or other employees." (See footnote 6) A grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Board of Education v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corrections*, Docket No. 04-CORR-278 (2005); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (2004). An employee claiming favoritism must also show he is similarly-situated to another employee. *Kincaid v. Div. of Corrections*, Docket No. 98-CORR-144 (1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (1990).

Based upon the evidence submitted in this case, the undersigned finds that Grievants MacDonald, Zaferatos, Adkins, and Robinson have failed to establish that DOH's failure to award

them merit raises in 2003 was legally improper. All employees who received merit increases for 2003 had far higher evaluation scores than these Grievants, and the evidence does not establish that they were more deserving of merit raises than those who received them. As to their claims of discrimination and favoritism, specifically regarding Mr. Lilly's “friends” who consistently received higher evaluation scores, the evidence still does not establish that these employees were undeserving of the evaluation scores they received. While it was probably unwise for Mr. Lilly to refer to employees under his supervision as “friends” and allow them to assist him with personal tasks, thereis no evidence indicating that the work performance of these employees was undeserving of the scores received. (See footnote 7) Moreover, only one of these employees actually received a merit increase in 2003. Grievants have failed to establish that they are similarly situated to these employees.

However, Grievants Smith and Webb have, in fact, established by a preponderance of the evidence that Respondent's decision not to award them merit increases in 2003 was arbitrary and capricious and contrary to the policies set forth above. DOH's justification that Mr. Pachuta was a harder worker is not a permissible excuse for granting him an increase over employees with higher evaluation scores. As previously held by this Grievance Board, “perceptions” of an employee's performance is not a permissible basis for awarding or denying a merit increase. *Tallman v. Div. of Highways*, 91-DOH-162 (Jan. 31, 1992). Moreover, if the supervisor's perception or spoken justification for the merit increase is contradictory to the information contained in the employee's written performance evaluation, it is the recorded information which must govern. *See Bittinger v. Bureau of Employment Programs*, Docket No. 98-BEP-164R (April 6, 2001). If Mr. Pachuta's attitude was so much better than Grievants', that should have been reflected in his evaluation, but he still scored lower than they did.

Similarly, DOH's refusal to grant Grievant Smith a raise for 2003, based upon discipline which occurred in 2002, is not a permissible reason for refusing to grant him an otherwise-deserved merit raise. Just as with an employee's attitude, the incident which ledto Grievant's suspension should have been documented in the appropriate section of his performance evaluation for 2002 and factored into his final score. Therefore, it was improper to deny him a merit increase for that reason, when he had a higher evaluation score than an employee who was granted a raise.

The following conclusions of law support this Decision.

Conclusions of Law

1. West Virginia Code § 29-6A-4(a) requires that a grievance be filed "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 . . ."

2. This grievance was filed within the statutory timeframe.

3. In a non-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).

4. "All salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance." Division of Personnel Rule ("DOP"), 143 C.S.R. 1 § 5.8(a); *See King v. W. Va. Dep't of Transp*., Docket No. 94-DOH-340 (Mar. 1, 1995).

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 properlyestablished 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).

6. Grievants MacDonald, Zaferatos, Adkins, and Robinson have failed to establish by a preponderance of the evidence that they were entitled to a merit increase in 2003.

7. Grievants Smith and Webb have proven that the decision to deny them merit raises in 2003 was unreasonable, arbitrary and capricious, and contrary to policy.

Accordingly, this grievance is **GRANTED IN PART** and **DENIED IN PART**. Respondent is **ORDERED** to grant a 2.5% salary increase to Grievants Smith and Webb, retroactive to September 16, 2003. With regard to Grievant Smith, back pay shall be effective up to the date of his resignation. The relief requested by Grievants MacDonald, Zaferatos, Adkins, and Robinson is hereby **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. Theappealing 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: November 15, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants are Andrew MacDonald, Raymond Adkins, Willie Robinson, Lloyd Webb, Bill Zaferatos, and Larry Smith.

Footnote: 2

Grievants were represented by counsel, Jeffrey Blaydes, and Respondent was represented by counsel, Barbara Baxter.

Footnote: 3

Mr. Smith did not testify at either hearing in this matter, so his information is somewhat incomplete.

Footnote: 4

There was also an investigation conducted, although it is unknown by whom, regarding the use of DOH scrap materials to make some of these signs. No one was disciplined as a result of the incident.

Footnote: 5

W. Va. Code § 29-6A-2(d).

Footnote: 6

W. Va. Code § 29-6A-2(h).

Footnote: 7

More importantly, Grievants had a full opportunity to challenge every aspect of the 2002 evaluation process in the prior MacDonald grievance, and the Grievance Board's previous decision is res judicata upon the parties as to any of

those issues.