STEPHEN M. HALLER,

Grievant,

v. **Docket No. 06-RJA-027**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY,

Respondent.

DECISION

Stephen M. Haller ("Grievant") initiated this proceeding on December 8, 2005, requesting a 5% merit raise that has customarily been granted to employees selected as "Employee of the Year." The grievance was denied at all lower levels, and appeal to level four was filed on January 16, 2006. A hearing was held in Westover, West Virginia, on March 22, 2006, at which time Grievant represented himself, and Respondent was represented by its counsel, Chad M. Cardinal. The parties elected not to file post-hearing proposals, so this matter became mature for consideration at the conclusion of the level four hearing.

The following material facts are undisputed by the parties.

Findings of Fact

1. Grievant was employed by Respondent at the North Central Regional Jail as a Correctional Officer 2. (See footnote 1) 2. By letter dated June 1, 2005, Grievant was notified that he had been selected as Employee of the Year ("EOY") at the facility. This correspondence, from George Trent, Jail Administrator, also stated that a 5% merit increase would be requested for Grievant.

3. It has been Respondent's past practice to grant all EOYs a 5% merit increase as a reward for their outstanding service. (See footnote 2)

4. On April 29, 2005, a memorandum was issued to all West Virginia Cabinet Secretaries, stating that, pursuant to a directive from Governor Joe Manchin, "merit or salary advancements"

should not be granted "until further notice."

5. Due to the governor's prohibition on merit increases, Grievant did not receive the recommended 5% raise.

6. Grievant retired from his position on December 10, 2005.

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

Grievant argues that it is discriminatory for him not to receive the 5% raise that has been granted to previous EOYs. "'Discrimination' means any differences in the treatmentof employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d). 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.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Lusher v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

Respondent does not dispute that all EOYs in recent years have, indeed, received a 5% merit increase in recognition of this honor. Therefore, it is impossible for Respondent to argue, or the undersigned to conclude, that Grievant is not similarly situated to these past recipients of the raise.

He was selected as EOY, just as they were, and the reason for denying him the raise was based only upon a governmental memorandum, not upon any differences in job duties. Accordingly, it is discriminatory for Grievant not to be granted the 5% raise given to other employees in his exact situation. Regardless of its reason, a gubernatorial directive cannot justify unlawful discrimination.

As defined by the Division of Personnel's Administrative Rule, 143 C.S.R. 1 § 3.85 (2005), a "salary advancement" is "[a] discretionary advancement in salary granted in recognition of the quality of job performance." In addition, the Rule also specifies that "[a]ll salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance." 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). Certainly, the EOY commendation is a "recorded indicator" of Grievant's excellent performance as an employee, and serves as a proper basis for a salary advancement.

The following conclusions of law support this Decision.

Conclusions of Law

1. Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. A grievant must establish a case of discrimination, as defined by W. Va. Code § 29-6A-2(d), 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.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Lusher v. Dep't of*

Transp./Div. of Highways, Docket No. 05-DOH-157 (June 15, 2005).

3. "All salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance." 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). 4. Grievant has proven by a preponderance of the evidence that he was denied a 5% merit raise after being selected as Employee of the Year, resulting in discrimination, as defined by W. Va. Code § 29-6A-2(d).

5. As Employee of the Year, Grievant is entitled to a merit raise, as granted to previous employees who were selected for that honor.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to grant Grievant a 5% salary increase, effective July 1, 2005, to the date of his retirement.

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: April 14, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Although it appears that Grievant has been a long-time employee, there were no specific statements in the record reflecting how long he had been employed.

Footnote: 2

Respondent did adopt a formal policy on June 30, 2005, regarding employee awards and commendations, which does not specifically state that a raise is to be granted to Employees of the Year. However, the governor's directive, not this policy, was the cited reason for denial of Grievant's merit increase.