THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

LORA WITT, et al.,

Grievants,

v. **Docket No. 05-DMV-334**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF MOTOR VEHICLES,

Respondent.

DECISION

Grievants filed this grievance on November 18, 2004, claiming favoritism and discrimination in the distribution of merit raises. The requested relief is a 10% salary increase for employees "who were and are similarly situated and qualified for a merit raise but were denied the equal opportunity for the increase of pay on the basis of favoritism and discrimination." Grievants also want a review of the merit raise policy to ensure a fair and equitable policy that applies to all eligible employees. (See footnote 1)

This case was denied at the lower levels, and on October 19, 2005, a Level IV hearing was held at the Grievance Board's office. Grievants were represented by Norman Henry, Lay Representative, and Respondent was represented by Janet James, Assistant Attorney General.

Procedural History

Because this case is somewhat procedurally different, it is important to provide a procedural history. When this grievance was filed, only two employees were seeking meritraises. Subsequently, other Division of Motor Vehicles ("DMV") employees joined this grievance, making a total of 48 grievants. (See footnote 2)

Upon appeal to Level IV, this case was assigned to ALJ Jacqueline Custer who conducted the

October 19th hearing. At that time, she dismissed all Grievants except Lora Witt, ruling the statement of grievance initiating the Level IV filing only had Lora Witt's name on it, and the other Grievants had a duty to preserve their right to file at Level IV. This decision was rendered over the Grievants' objection. At the conclusion of the hearing, the parties were required to file findings of fact and conclusions of law. (See footnote 3)

Along with the findings of fact and conclusions of law, Grievant Witt filed a Motion for Reconsideration seeking to allow the other 47 Grievants back into the action. Respondent filed a response to the Motion, and a phone conference was held on that issue on January 19, 2006. Because ALJ Custer had resigned from the Grievance Board, the case was reassigned to ALJ Janis Reynolds. During that phone conference, ALJ Reynolds ruled all other Grievants should be allowed back into the action. She explained the other 47 Grievants had preserved their right to appeal at Level IV because the last page of the statement of grievance filed at Level IV entitled “Amended Statement of Grievance and Relief Sought” was clearly styled so as to include all other 47 individuals.

After the phone conference, this case was transferred to the undersigned due to administrative reasons. Upon reviewing the file and listening to the October 19th hearing, the undersigned believed more information was needed because there seemed to be some confusion over job classification. By Order dated February 24, 2006, the undersigned reopened the case for hearing and joined West Virginia Division of Personnel (“DOP”) as an indispensable party for the purposes of receiving testimony about job classifications.

On March 9, 2006, DOP filed a Motion to Dismiss Respondent, Division of Personnel, as an Indispensable Party. They argued this grievance concerned only merit raises, and DOP did not participate in those decisions. In an Order dated March 10, 2006, the undersigned denied that Motion and explained Respondent had submitted testimony at Level III that DMV employees were cross-trained and expected to perform the duties of both Customer Service Representative and Driver Examiner, and it was their willingness to perform the additional duties that resulted in the pay increases. There was no evidence that DOP approved the cross-trained employees to become multi-classified, doing the jobs of both Customer Service Representative and Driver Examiner. Instead, admitted into evidence was a memo dated November 8, 2004, to Tim Basford, Assistant Director of DOP, from Stephen Edens, Director of DMV, requesting a lateral reclassification of DMV Driver License Examiners to Customer Service Representative for only 49 employees. (See footnote 4)

There was no indication these employees were expected to perform the duties of both positions. The request for reclassification was granted by memo dated November 15,2004, to Stephen Edens from Mr. Basford. According to their memo, 49 employees were reclassified, not multi-classified.

By letter dated March 17, 2006, DMV protested the Order to Reopen Grievance, Order of Joinder and Notice of Pre-hearing Conference. It stated both parties agreed to the submission of the case for decision based on the lower level transcript and the Level IV hearing.

A pre-hearing conference was held on April 5, 2006. The undersigned explained the need for testimony on the issue of job classification. However, all parties informed the undersigned no further witnesses would be called. The undersigned explained she had some concerns about testimony referring to cross-training and lateral reclassification, and in the interest of caution, she believed testimony from someone knowledgeable about classification was necessary. Still all parties informed the undersigned they would not call any further witnesses in this action. Therefore, since the undersigned cannot call witnesses on her own motion, the case became mature for decision on April 5, 2006.

Issues and Arguments

Grievants argue the 99 raises given from July 1, 2004, through December 2004, were based on favoritism and were discriminatory. (See footnote 5) They assert Respondent did not follow the merit raise policy established by former Commissioner Roger Pritt. They also assert the merit raises did not comport with DOP policy. Respondents argue 64 of those raises were given to employees who were cross- trained and had combined the jobs of Customer Service Representative and Driver Examiner. By combining these two positions into one, Respondent eliminated 64 positions. Respondent asserts these employees were laterally reclassified, and while their pay grade remained the same, those employees were given a 7% pay increase because they assumed additional duties. Respondent further asserts that 22 of the pay increases were merit raises, and those were given based on the recommendations of the Directors. Respondents argue the Commissioner has broad discretion pursuant to DMV merit raise policy and applicable statutes to award merit raises.

Grievants' counter by arguing that nothing in DOP rules allow for a raise based on the assumption of additional job duties. (See footnote 6) Therefore, all the raises given must be merit raises, and they were not given based on evaluations, as required by DOP rules. Grievants also assert seven merit raises were given to individuals who do not have current evaluations on file.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievants are employed by DMV in various positions.

2. Prior to former Commissioner Pritt's departure, he implemented a merit raise policy for DMV. Such policy was never approved by the Secretary of Transportation. Therefore, Commissioner Pritt's replacement, Commissioner Doug Stump, did not give the policy any weight, even though it had not been rescinded, amended or replaced.

3. The DMV merit raise policy discussed above required employees to be certified, permanent employees with three years permanent service with Respondent.

4. While Commissioner Stump (See footnote 7) oversaw the DMV, 64 employees were cross-trained to perform the jobs of Customer Service Representative and Driver Examiner. This allowed him to reduce Respondent's operating budget.

5. DOP approved the lateral transfer of 49 employees from Customer Service Representative to Driver Examiner, at no additional increase in pay. DOP never approved multi-classification of the 49 employees now performing the duties for two positions.

6. Between July 1, 2004, and December 2004, 99 salary increases were given to employees within the DMV. Of those, the 64 employees who had been cross-trained received a 7% increase in their salary, regardless of their performance evaluations. The rest of the raises given were classified by Respondent as merit raises, and the employees received either 5% or 10% increases. The merit raises were given based on the Director's written recommendation. The performance evaluations were not considered.

7. Seven employees who did not have current evaluations on file were given merit raises.

8. Employees who had not been at the DMV for three years were awarded raises based solely on the recommendations of the various directors.

9. Ten Grievants received raises as a result of being cross-trained. 10. Commissioner Stump did not review any employee evaluations in making his determination as to who should receive the raises. Instead, he depended upon the information given to him by the Directors.

11. The Directors recommended employees for merit increases based either on personal knowledge, performance, or because of cross-training. There was no consistency in the rationale for recommending merit increases.

Discussion

Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their 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 Grievants have not met their burden. *Id.*

I. Raises

Clearly, there is confusion and debate over whether the raises given were merit raises or raises for taking on additional job duties. Commissioner Stump testified that regardless of evaluations, individuals who were now doing both the job of Customer Service Representative and Driver Examiner received a raise. However, there is no evidence in this record to show Respondent received approval from DOP to have these 64 individuals classified as both a Customer Service Representative and Driver Examiner. Instead, DOP approved a lateral reclassification from one position to the other for 49 employees not 64.

Further, DOP's Administrative Rule 5.4(d) does not allow for a pay increase for accepting or imposing additional duties on employees. (See footnote 8) Therefore, the 99 raises given to employees had to be merit raises, as there is no other type of increase available.

While it is permissible for agencies to develop their own policy regarding merit increase, that plan must be approved and comport with DOP Rules. Because Respondent's plan was never approved, their merit increases are governed by Division of Personnel Rule, 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). 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); *Yokumv. 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*.

Respondent presented testimony that 64 employees were cross-trained. However, Respondent only requested 49 employees be laterally reclassified. There is no explanation for this inconsistency. In addition, the parties appear to agree a total of 99 raises were given. However, Respondent asserts 64 of those raises were as a result of cross-training and the other 22 were merit raises. Those numbers do not total 99, but instead total 86. This inconsistency was never explained by Respondent.

Also, performance evaluations were not used to determine who deserved to receive a raise. The 64 employees who were cross-trained received 7% raises, regardless of their performance evaluation. Seven individuals received merit raises without having performance evaluations on file, and the other employees who were given raises received the additional money based solely on the recommendation of the various directors. Clearly, there was no fair and consistent method used to determine who should receive additional compensation based on job performance. Instead, these raises were given based on subjective criteria. DOP has structured its rules so as to prevent this type of subjective decision-making.

Therefore, Respondent's rationale for giving raises to certain employees is arbitrary and capricious. Respondent failed to follow any established policy or rule regarding raises, and that is unfortunate for the employees who either accepted additional job duties or worked very diligently and received high scores on their evaluations.

II. Policy

Former Commissioner Pritt drafted a merit raise policy before leaving office, and this policy was distributed to the employees. However, it was never approved by the Secretary of the Department of Transportation, and therefore, Commissioner Stump, who succeeded Commissioner Pritt, did not give the policy any weight, but in Respondent's findings of fact and conclusions of law, DMV argued this same merit raise policy, along with applicable statutes, provided the Commissioner with broad discretion to award merit raises. The merit raise policy distributed to employees was not valid because it was not approved by the Secretary. Accordingly, Commissioner Stump did not have broad discretion under that policy to award merit raises. Further, 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). As previously stated, agencies may develop theirown policy concerning merit increases, but that policy must be approved and comport with DOP rules. Respondent's policy was never approved, and therefore was not in effect.

Merit increases are usually based on performance evaluations. However, as stated above, seven employees received raises without having current evaluations on file. Employees who had been cross-trained received raises regardless of performance evaluations, and the other employees were given raises based on their Directors' recommendations.

Also, it bares repeating that Respondent's evidence was that 64 employees were cross-trained and received raises as a result. However, the information provided to DOP was that 49 employees were being transferred from Customer Service Representative to Driver Examiner. DOP was very clear in the memo admitted into evidence in this matter to clarify this lateral transfer would not result in a pay increase. Yet, DMV not only had employees doing the jobs of two classifications without the appropriate approval, but it also provided additional money to those employees without considering the rules promulgated by DOP.

II. Discrimination/Favoritism

Grievants allege discrimination and favoritism. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, Grievants must show:

(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, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievants have met their burden in this case. Grievants were similarly situated in that they were eligible for merit increases, but were treated differently. Indeed, it is difficult to understand how these raises were given, and why the amounts varied so. Respondent attempted to assert, indirectly, that the difference in treatment was related to actual job responsibilities because some employees were operating as both Customer Service Representative and Driver Examiner. The undersigned has no reason not to believe this statement, but there was no evidence DOP had approved any multi-classification. Absent that evidence, DMV was bound by the rules promulgated by DOP concerning merit raises, and those rules, at the time, prohibited raises for an increase in job duties. Unfortunately for those employees who assumed additional job duties, cross-training does not appear permissible under DOP rules. Therefore, because the 64 cross-trained individuals who received raises were laterally reallocated to Driver Examiner, the difference in treatment was not related to actual job responsibilities. This difference in treatment was not agreed to in writing by the employees.

Grievants also allege they were victims of favoritism as they did not receive merit raises. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *W. Va. Code* § 29-6A-2(h). They have carried their burden by showing the merit raises werenot awarded based on written measures of performance or the criteria established by DOP rules.

The following conclusions of law support this decision:

Conclusions of Law

1. Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their 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 Grievants have not met their burden. *Id.*

2. 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).

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- 185 (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*, 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*.

5. Respondent's method for granting the 99 raises was arbitrary and capricious.

6. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, Grievants must show:

(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, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

7. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *W. Va. Code* § 29-6A-2(h).

8. Grievants have met their burden in this case and shown by a preponderance of the evidence that Respondents engaged in discrimination and favoritism in the allocation of merit raises.

Accordingly, this grievance is **GRANTED**. Respondent is ordered to recalculate the 99 raises and award them to employees who were eligible to receive such raises during the time period of July 1, 2004 to December 2004. The raises must be based on performance evaluations completed at that time or other recorded indicators of performance, pursuant to DOP rules. Also, Respondents are directed to clarify the classification of the cross-trained employees.

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, and 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: July 21, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

From the testimony at Level IV, it appears the parties mediated and as a result, an agreement was reached to draft a new merit pay raise policy for DMV. After that, Respondent withdrew from further mediation.

Footnote: 2

After a review of Grievants' lower level exhibits 1 and 5 it appears as if 10 Grievants received raises as a result of

being cross-trained. The reason these individuals joined the grievance is unclear.

Footnote: 3

Grievants' findings of fact and conclusions of law were to be submitted by November 8, 2005, and Respondent's filing was due to on November 28, 2005. Any rebuttal brief to be offered by Grievant was due on December 8, 2005.

Footnote: 4

The reason Respondent requested only 49 employees be laterally reclassified when Respondent presented testimony that 64 employees total were cross-trained was never addressed in the record, leaving this question unanswered.

Footnote: 5

The parties appear to agree the total number of raises given equaled 99. However, Respondent has asserted that 64 of the raises were as a result of cross-training and the other 22 were merit raises. Those numbers do not add up to equal 99. This is yet another inconsistency that has never been explained. See note 4 infra.

Footnote: 6

DOP's Pay Plan Implemetation was revised July 1, 2005, to allow for salary adjustments based on additional duties/responsibilities. However, this change occurred after these raises were given.

Footnote: 7

Effective October 17, 2005, Joseph Cicchirillo succeeded Doug Stump as Commissioner of the DMV.

Footnote: 8

As stated in footnote 7, DOP's Pay Plan Implementation revision allowing for salary adjustments for additional duties/responsibilities was not in effect at the time these raises were given.