THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

KENNETH PATRICK,

Grievant,

v. **Docket No. 05-DOH-060**

Sue Keller

Senior Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Kenneth Patrick ("Grievant"), employed by the Division of Highways ("DOH") as a Transportation Engineering Technologist, filed a level one grievance on June 28, 2004, in which he alleged:
My 2003 evaluation was not done as mandated by DOT Administrative Procedures Volume III, Chapter 8. This is an ongoing problem as the agency did not perform any part of the 2002 evaluation, nor did the agency perform the initial or mid-point counseling session for 2003. Furthermore, the final review session was held almost three months later than allowed by the above referenced policy. The inaccurate score of this 2003 evaluation hampers the possibility of attaining a merit pay increase this year. The agency was remiss in the performance of my 2003 evaluation and denied me any of the mandatory counseling sessions that would provide advance notice of any perceived (valid or otherwise) change in my performance.

For relief, Grievant requested that his 2003 evaluation be declared invalid and replaced with an evaluation equal to or better than his last evaluation issued in 2001. He also requested a merit increase effective July 1, 2004, and to otherwise be made whole.

The grievance was denied at levels one and two. Grievant's AFSCME representative Richard L.

Patrick, filed a written submission at level three in lieu of a hearing. The grievance was denied at level three, and appeal was made to level four on February 18,2005. Grievant, represented himself, and DOH was represented by counsel, Barbara Baxter. The grievance was subsequently transferred to the undersigned on December 4, 2006.

The following facts have been derived from a preponderance of the credible evidence made part of the lower-level record.

Findings of Fact

1. Grievant has been employed by DOH since October 1969, and has held the position of Transportation Engineering Technologist at all times pertinent to this grievance.

2. Grievant, as well as other District Three DOH employees, did not receive a performance evaluation for the calendar year 2002. The failure to complete the evaluations was due to a supervisory change in October 2002.

3. In October 2002 Grievant's position was reallocated from Transportation Engineering Technician-Senior, pay grade 17, to Transportation Engineering Technologist, pay grade 19.

4. Grievant did not receive a mid-point review for the 2003 evaluation year. This may have been due to the fact that he was on leave from July through September of that year.

5. Evaluations for 2003 were completed in mid-June 2004. Grievant's rating of 2.20 was lower than his rating of 2.60 in 2001.

6. Grievant was suspended for three days in February 2004.

Discussion

Grievant argues that DOH's failure to follow evaluation policies issued by DOP and DOH entitle him to a merit increase equal to that received by other employees at the time thegrievance was filed. DOH asserts that the failure to provide a mid-term review was not prejudicial to Grievant, and is therefore harmless error. Because Grievant was suspended without pay early in 2004, DOH argues that Grievant was not eligible for a merit increase.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim 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).

The “West Virginia Division of Personnel Employee Performance Appraisal Policy” states that the purpose of performance appraisal/evaluation is to determine “an employee's strengths and weaknesses, and what can be done to enable the individual to perform more effectively.” The evaluation process is to be implemented in three stages: telling employees what is expected of them during the first thirty days of each performance rating period; providing feedback to the employees regarding how well they are doing near the mid-point of the performance rating; and, a formal evaluation within thirty days following the end of the rating period. DOH concedes that Grievant was not provided a mid-term evaluation, and the evidence establishes that the annual evaluation was not completed within thirty days of the end of the review period. These violations of policy by DOH, while not condoned, did not cause Grievant to suffer any harm relating to merit increases. 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).

Additionally, DOH's Merit Increase Program for the period July 1, 2004 through June 30, 2005, provides that increases shall be based on 2003 performance evaluations and any other recorded measures of performance. Eligibility requirements include: “employees must not have shown a decline in performance since the date of their calendar year evaluations.” Grievant was suspended in February 2004, an action upheld in *Patrick v. Department of Transportation/Division of Highways*, Docket No. 04-DOH-060 (Jan. 31, 2007). Due to this disciplinary action, Grievant was not eligible for merit increases which were awarded in 2004.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following

formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter Grievant has the burden of proving his claim 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.

2. Grievant did not establish that he suffered any harm as the result of DOH's failure to provide him a mid-year performance review, or to complete his annual review within thirty days of the end of the year.

3. Grievant has failed to prove that he met the eligibility requirements for a merit increase in 2004.

Accordingly, the grievance is **DENIED**.

Accordingly, 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.

DATE: JANUARY 31, 2007 _____

Sue Keller

Senior Administrative Law Judge