WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

NORMA JEAN BRADFORD,

Grievant,

v. Docket No. 2008-0792-DOT

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Norma Jean Bradford ("Grievant") initiated this proceeding on March 24, 2005, requesting a 2.5% merit increase. The grievance was denied at level one on March 30, 2005. Following a level two conference, (See footnote 1) in a decision dated June 2, 2005, Robert Whipp, District Engineer, agreed that Grievant had not been treated fairly by her supervisor and stated that she would be recommended for a 5% merit increase, so the grievance was "conditionally approved" at that level. (See footnote 2) This recommendation was denied by the Human Resources Division, due to the 2005 "Puccio Memorandum," in which the Governor's officeplaced a moratorium upon discretionary pay increases for state employees. Upon learning that the request had been denied, Grievant appealed to level three.

After numerous continuances and an attempt at mediation, prior to a level three hearing, Grievant requested that the grievance be transferred to the "new" grievance procedure. (See footnote 3) A hearing was conducted by the undersigned on May 30, 2008. (See footnote 4) Grievant represented herself, and Respondent was represented by Robert Miller, Esquire. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 15, 2008.

Synopsis

Grievant alleges entitlement to at least two merit increases she believes she should have received between the years 2000 and 2005. Although she alleged unfair treatment by her supervisor regarding her evaluations and the awarding of merit increases within her organization, Grievant did not provide testimonial or documentary evidence to support these claims. Merit increases are to be based upon performance evaluations and other recorded measures of performance, which were not provided in this case. Therefore, Grievant failed to meet her burden of proof, and the grievance must be denied.

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") since 1999 and was classified as an Accounting Technician 3 at all times relevant to this proceeding.
2. Grievant has not received a merit pay increase since August of 2000.
3. Other employees at Grievant's work location received discretionary salary increases during the years of 2001 through 2004.
4. None of the performance evaluations of Grievant or other employees in her office were introduced into evidence in this grievance.
5. In April of 2005, Larry Puccio, Chief of Staff for Governor Joe Manchin III, issued a memorandum to all cabinet secretaries stating that, until further notice, merit increases should not be granted to state employees.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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 evidence introduced before the undersigned at level

three focused almost entirely upon Respondent's refusal to grant the merit increase recommended by the grievance evaluator at level two, due to the moratorium on such pay raises. As this Grievance Board has recognized on several occasions, “unfortunate as it may be, the provisions of the Governor's office edict are clear, and discretionary salary increases are prohibited.” *Toon v. Public Serv. Comm.*, Docket No. 07-PSC-341 (Jan. 4, 2008); *See Ebert Allen v. Dep't of Transp*., Docket No. 06-DOH-224 (Jan. 31, 2007). However, since the instant grievance was filed prior to the issuance of the merit raise moratorium, and the issues complained of also occurred prior to that date, it would appear that Grievant's request for an increase is not necessarily precluded by that edict. Nevertheless, the undersigned finds that Grievant's evidence falls far short of establishing entitlement to a merit increase, even prior to the Governor's freeze.

Merit increases are governed by Division of Personnel Rule ("DOP"), 143 C.S.R. 1 § 5.9(a) (2007), "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 itcannot 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*.

Although Grievant's attachment to her grievance form gives a description of her complaint and discusses her allegations regarding unfair treatment by her supervisor with regard to her evaluations, his lack of knowledge and understanding of her duties, and his refusal to grant her a “turn” in the rotation of merit raise awards, there is no testimonial or documentary evidence in the record to substantiate her claims. Although it does appear that other employees in Grievant's office received raises in the years between 2000 and 2005, neither their performance evaluations nor Grievant's have been provided for comparison. As set forth above, merit increases are to be based upon evaluations and other “recorded measures of performance,” and Grievant has provided no evidence bywhich the undersigned can determine whether or not raises were fairly distributed by her supervisor.

Therefore, in light of the evidence of record in this case, the undersigned concludes that Grievant has failed to prove entitlement to the merit increases she has requested. The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary grievance, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

2. "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 § 5.9(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- 185 (Dec. 30, 1991); *Osborne v. W. Va. Div. of Rehab. Serv.*, Docket No. 89-RS- 051 (May 16, 1989). 4. Grievant has failed to prove entitlement to any merit increases by a preponderance of the evidence.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: August 15, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The level two decision refers to a level two "hearing," but the record contains no transcript of such a proceeding, and the undersigned notes that, under the previous grievance statute, level two was a conference, rather than a recorded hearing.

Footnote: 2

Mr. Whipp apparently realized that he did not have the authority to grant a pay increase to an employee, which is a transaction which must be recommended by Respondent's Human Resources officials (i.e. the "appointing authority") and processed through the Division of Personnel. See Fisher v. Dep't of Administration, Docket No. 98- DOA-492 (Oct. 28, 1999). Therefore, Mr. Whipp only recommended that the increase be granted and was informed by the Human Resources office that the request could not be processed.

Footnote: 3

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Because this grievance has been transferred to the new procedure, it is being decided pursuant to the provisions of W. Va. Code §§ 6C-2-1 to 6C-2-7 (2008).

Footnote: 4

Because Grievant suffers from a medical condition which makes travel difficult for her, the parties were allowed to appear by telephone for this hearing.