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JUDY OSBORNE

v.

Docket No. 89-RS-051

W.Va. DIVISION OF REHABILITATION SERVICES

DECISION

Grievant Judy Osborne is employed by Respondent West Virginia Division of Rehabilitation Services (DRS) as Clerk IV, Intake and Dispatch Unit, Disability Determination Section (DDS). In October 1988, she initiated the following grievance:

On 9-30-88 DDS issued merit raises to several employees in Chas. office. On 10-12-88 I became aware of which employees received the raises. It became apparent at that time...that the allocation of merit raises in this office was grossly biased. Further[,] management violated...[its] own criteria in the issuance of said raises. I am grieving the fact that I was inappropriately denied a merit raise. Additionally, I would like to know how the allocation of raises was determined.

In relief I seek to be given a merit raise effective 9-30-88 and to be made whole in all regards pertaining to this grievance.

After denials at Levels I¹, II and III, Grievant advanced her claim to Level IV on February 7, 1989, where a hearing was conducted March 9, 1989. The parties were granted until April 12, 1989, for submission of proposed findings of fact and conclusions of law, and the matter is now mature for disposition.²

At Level IV, Grievant withdrew any claim as to bias and embraced "management violated. . .[its] own criteria in the issuance of. . .[merit] raises" as her only basis for relief. The "criteria" to which Grievant refers were presented in her Exhibit 2, an August 12, 1988, memorandum from DRS' Chief of Personnel Administration and are as follows:

1. Assistant Directors shall solicit recommendations of their subordinate supervisors. As this policy relates to various operational units, due consideration should also be given to input of all line supervisors; e.g., District Supervisors should have input from Branch Office Managers. This concept would apply in like manner to Disability Determination Section and the West Virginia Rehabilitation Center.

2. Performance will be the primary consideration. Employees should compete against a standard rather than against other employees. Use the most recent performance evaluation. An above

¹ More specifically, the Level I evaluator felt "she was not qualified to answer. . .[the] question." See this Decision, infra.

² Relevant to this grievance is merit pay awarded in 1988, which were based on employees' 1987 work performance and two previous occasions, in 1985 and 1987, when certain of Respondent's staff were recommended for merit raises but when such were disallowed due to budget constraints.

average evaluation for the review period is essential (3.0 overall is considered average).

3. Consider present salary and length of service in the position held since the last merit salary advancement. Because of the small number of raises, it is only fair that they be distributed as equally as possible among all higher performers. An employee who has previously received a merit increase is not automatically entitled to a successive award even though performance may continue at the same level. Likewise, an employee whose salary is already significantly higher than others in the same classification should not be recommended.

4. Consider those whom you recommended for implementation in October, 1987, but, due to a moratorium on merit raises, were not acted upon.

5. Equalization of Pay: Consideration may be given for previous inequities wherein an employee's salary is comparatively low to others who have similar job responsibilities, years of service, etc.

6. Attendance Record: Review the attendance record for this calendar year. Employees should not be penalized for bona fide, legitimate use of leave. However, those with patterns of leave abuse should not be rewarded with a salary advancement when evidence indicates the leave abuse has adversely affected job performance.

7. Education/Skills Improvement: Individuals who seek to improve through training the knowledge, skills, and abilities required in their jobs may also be given some consideration, especially if the training was not a requirement of employment and a measurable improvement in job performance is evident.

8. Formal disciplinary actions in the last twelve months (reprimands, warnings, etc.) must also be taken into account when determining eligibility for a merit raise.

This memorandum also provided:

The Agency has determined that funds are available for the submission of a limited number (up to 15% of total staff) of merit raises to the Governor's Office for this quarter.

An effective merit salary increase plan must be performance oriented. A performance oriented plan rewards employees in proportion to their contribution to the work of the Agency. The . . . [above] guidelines, therefore, are to be utilized in recommending those under your supervision for a merit raise.

Grievant's immediate supervisor, Ms. Robin Jennings, answered her complaint at Level I as follows:

In response to your grievance, I was not included in the meetings when the recommendations for merit raises were decided. When I became aware that the meetings were about merit raises, I went and spoke to Victor Clark, Office Manager. I recommended all three girls in the unit for a raise but was told the recommendations had already been presented to administration. I feel I am not qualified to answer your question concerning the reason you did not receive a raise because I had no input into the recommendations.

I went and spoke to Victor Clark on October 25, 1988 concerning your grievance papers and according to him the criteria used for raises was as follows:

1. people cut from the 1985 list should be given consideration
2. tried to give raises at a rate of 50% per unit
3. ratings
4. comparison of salary to other employees in same unit
5. if performing meritorious work

Mr. Clark also said the people who received merit raises in 1985 were considered just the same as everyone else.

Mr. Clark said you were not recommended for a merit raise because your salary exceeded the other employees in the unit and your rating was close to the other employees in the unit.

Grievant's Exhibit 1.

Mr. Clark is employed by DDS as Supervisor of its Charleston office and was the person primarily responsible for forwarding that office's 1988 merit increase

recommendations to DDS' central headquarters. At Level IV, he testified he was "really not sure" whether consideration had been given, when determining which employees would receive 1988 merit increases, that Grievant had been "cut from the 1985 list," i.e., that she had been recommended for a merit raise but was not awarded one due to fiscal constraints.³ He also stated that "50% was never a goal--it just happened," but admitted that merit raises were intentionally distributed among the Charleston DDS' office's seven units⁴ "as equally as possible." He further explained that employees' evaluation ratings were compared only insofar as those workers were performing the same duties, and that ratings between or among units, or within units, were not matched against one another.

The record instructs that Intake & Dispatch has four employees, namely, Grievant, Ms. Jennings, Dianna O'Connor and Jeanine Lynch. The latter two women received merit increases in 1988. For the relevant time period, Ms. O'Connor had an evaluation rating of 4.0 and Ms. Lynch and Grievant both were ranked 3.9. When Mr. Clark was queried about how the committee recommending merit increases had

³ The undersigned has attempted to capture the essence of testimony at Level IV and not necessarily to directly quote it.

⁴ There are actually only six units, but for convenience, three non-unit employees have been considered a seventh unit herein. See Grievant's Ex. 4.

distinguished between Ms. Lynch and Grievant, he agreed that was a "good question." He also admitted "primarily, yes," Grievant's salary, which was \$9.00 higher per pay period than Ms. Lynch's, "was a consideration," and that "Robin felt Judy had a weakness in attendance."

On cross-examination, Mr. Clark stated clearly that "Jeanine Lynch was picked over Judy because Jeanine's salary was less." Clark also claimed neither Grievant nor Ms. Lynch was recommended for merit pay in October, 1987, but Ms. O'Connor was. He admitted that he had not included Robin Jennings, Grievant's immediate supervisor, in the 1988 process and, after the fact, she had told him she would have recommended "all three" for a merit increase. Mr. Clark explained that he, DDS and DRS were under rather strict time constraints in the making and reporting of selections for merit increases. He also indicated he "did the best he could" and made every reasonable effort to be fair to personnel under the circumstances.

Ms. Jennings, who has supervised Grievant directly at all times pertinent hereto, likewise appeared and offered testimony at Level IV. She explained that during 1987, the period for which 1988 merit raises were awarded, the Intake & Dispatch Unit converted from manual typing equipment to computers, with one day to go "live" or implement the changeover. Accordingly, "Judy and Jeanine had to learn receipts from the beginning and Dianna had to learn receipts from the beginning and re-learn dispatches," all with a

manual and no training at that time. Ms. Jennings characterized 1987 as a "very difficult time" for the Unit, "especially in the summer due to vacations, etc."

Ms. Jennings reported that she, Ms. O'Connor and Grievant voluntarily worked lunches and breaks.⁵ She declared that "if I could've recommended 50% of my unit, it would've been Judy and Dianna. . . [because] [t]hey were there when all the changes started and they hung in with me." She confirmed that she was not involved in the recommendations of Ms. Lynch and Ms. O'Connor for merit raises in 1988, not even to the extent of her opinion being solicited. Ms. Jennings explained she learned meetings were being held concerning merit pay, and when she asked Mr. Clark how and when her thoughts on that topic should be submitted, he told her "it's been done." She added this was the first time since becoming a supervisor with DRS that she had not been asked to fill out merit pay recommendation forms. She also said she had never discussed ratings or evaluations of her subordinates prior to rendering them and that Mr. Clark had always approved such reviews without alteration or question.

⁵ While the work was gratis, the three were "told" it was fine "to leave early, etc., but we never did because we didn't have time." Ms. Lynch opted not to perform this extra service, for which she was not penalized in any way.

In Mr. Clark's written evaluation of Ms. Jennings' 1987 work, he noted her "section underwent significant procedural changes. . . which were successfully implemented with minimum problems. . . ."

Grievant's Exhibit 3 was a copy of a form Ms. Jennings said she first saw three or four days after these meetings. She testified that she signed the form, which was an official recommendation for salary increases for Ms. Lynch and Ms. O'Connor, on the line "Immediate Supervisor and Date." She explained that even though she had not prepared or filled out the form, and herself would have recommended Grievant over Ms. Lynch since Grievant carried a heavier workload and "had done harder work" during 1987, she feared not executing the documents might exclude more of her staff from merit pay than would otherwise be true. She stated Mr. Clark had completed the form, evident since he had previously signed on the "Immediate Supervisor and Date" line; his signature had been whited out before the forms were forwarded to Ms. Jennings. Mr. Clark was not in the office when she was asked to sign them, preventing her complaint to him then about the procedure. Ms. Jennings added that in DDS' other West Virginia office, located in Bridgeport, first-line clerical supervisors issued recommendations for the 1988 merit raises. Clark had told her "he felt like he could do everything he needed," however.

Grievant's 1987 evaluation, conducted by Ms. Jennings, reveals a rating of "4" out of a possible "5" in the category "Dependability/Attendance." Ms. Jennings commented at Level IV that Grievant "was there when I needed her" and that she has never, to her knowledge, had problem with leave abuse. She did note that Grievant and Ms. Lynch were

given identical ratings in each category of evaluation for 1987.

Jeanine Lynch testified that in her opinion Grievant deserved the 1988 merit raise over her. She explained that Grievant had to provide training to her related to the transition to computer technology. The unrefuted evidence is that Ms. Lynch and Grievant perform, basically, the same job duties day-to-day, and that this was also true during 1987.

Jane Johnstone, current DDS Administrator, testified that attendance problems were "a possible reason" for Grievant's non-selection for an increase. She could not explain why Ms. Jennings was excluded from the selection process in 1988, since she had been included previously, particularly in September 1987 when the stated procedures were identical to those reproduced supra.⁶ In August 1988, Ms. Johnstone was Deputy to then-DDS Administrator A. J. Allen and in that capacity she worked with him on the merit raises in question. She testified that Mr. Allen received the August 12, 1988, memo on a Monday and that responsive recommendations were due within a couple of days. Mr. Allen directed Ms. Johnstone to compile personnel statistics on the Charleston and Bridgeport regional DDS offices and also

⁶ Those procedures were recorded in an August 1987 memorandum to DDS staff from former DDS Administrator A. J. Allen. Gr. Ex. 7.

on DDS' central shop, the idea being that if the Charleston region had X% of overall DDS staff, it should receive X% of available merit raises. The fifteen percent figure mentioned in the August 1988 memo, supra, was construed by Allen to mean 15% per quarter, or 60% of staff, if there were funds to cover that percentage. 52% of Charleston district office employees actually received merit increases based on their 1987 performance. Mr. Allen gave Mr. Clark the figures, i.e., how many Charleston employees were professional staff and how many clerical, but told Mr. Clark he thought it more appropriate to divide available monies among units. Ms. Johnstone concluded by stating she believes some subjectivity is always present when decisions are being made regarding merit pay. She said, however, she did not believe the raises, which all reflected a one-step increase on the salary scale, were granted in an arbitrary or capricious manner. While she conceded the methodology could have been improved, she held that, in her view, no bias or prejudice operated against Grievant in this situation.

Lorraine "Missie" Saunders, a word processing employee for DDS, appeared at Level IV and stated she received a merit raise for 1987. Seventy-five percent of the work processing unit staff were so rewarded, and her evaluation was the lowest of those individuals. She testified that another individual in her unit who got a merit raise had attendance and tardiness problems throughout 1987. On

cross-examination, she admitted this employee had been pregnant and had had her baby in September 1987, but added on redirect that she was still tardy after her pregnancy.⁷

Grievant appeared as a witness and went through each of the exhibits in order. She stated her understanding that only the most recent performance evaluation was to be considered in the merit pay decisionmaking process. She said hers was 3.9 on a 5.0 scale and that she knew of several DDS staffers, including Ms. Sanders, who got merit raises but were rated lower than 3.9 for 1987. Grievant's Exhibit 9 reveals nine employees below 3.9 were so rewarded. She added that it has been "the practice" in her unit that employees are rated identically or nearly so, generally with no more than .1 difference among all personnel.

Grievant identified herself as the most senior employee in Intake/Dispatch and as having more time-in-service than any other non-supervisory clerical staff member in the Charleston DDS office. Within her unit, Ms. O'Connor is second and Ms. Lynch third in seniority, although all three have been employed by the State for roughly the same amount of time. Grievant admitted her salary, prior to the merit raises, was \$563.63 per pay bimonthly payday, while Ms. Lynch's was \$554.63 for the like period, a per annum difference of \$234.00. She also claimed awareness of merit pay

⁷ Other testimony offered by this witness was afforded no weight since she admittedly did not limit it to 1987.

recipients who made significantly higher salaries than others within their units not granted such increases. She added that, to her knowledge, she was not recommended for a merit raise in 1987, although both she and Ms. Lynch were given that consideration before the freeze in 1985.

She went on to explain she had a sinus problem in 1987 that required a doctor's attention and the usage of sick leave, but added she had never been disciplined or even received a hint regarding abuse of leave. She said neither she nor anyone else in her unit has even been the subject of any disciplinary action on the job. Grievant said that none of Ms. O'Connor, Ms. Lynch, or she participated in any job training or skills improvement events during 1987, although at some point she and Ms. Lynch, separately, took courses in word processing. She stated she had no knowledge of the basis upon which the 1988 merit raises were given until Ms. Jennings made her Level I response to the grievance.

In closing, Grievant argued Mr. Clark was not the appropriate person to make recommendations on merit pay for employees, such as Grievant, whom he did not directly supervise; and, that even if he was, his recommendations were inappropriate, since people with lower relevant performance evaluation scores were routinely selected for the increases. Respondent reminded the undersigned that the burden of proof was on the Grievant and that Ms. Lynch and she were ranked identically in all ten categories of the 1987 review. It continued that no impropriety had been

demonstrated and asked that the Level III decision be upheld.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant, an Intake and Dispatch Unit employee of the Disability Determination Section (DDS) of Respondent West Virginia Division of Rehabilitation Services (DRS), was neither recommended for nor granted a merit pay raise in 1988 as were certain other employees. These 1988 increases were based on work performance during calendar year 1987.

2. Two staffers in Intake & Dispatch were granted one-step merit raises in 1988, namely, Dianna O'Connor and Jeanine Lynch. Besides Grievant, the only other employee in this Unit is its supervisor, Robin Jennings. No question has been raised concerning the propriety of Ms. O'Connor's raise.

3. Both Grievant and Ms. Lynch were recommended for merit increases in 1985, but no such raises were allowed then due to administrative budget-freezing. Merit increases were again sought by DDS in 1987, but were likewise denied; on that occasion, however, neither Grievant nor Ms. Lynch was on the list of recommended employees.

4. Victor Clark, Supervisor of DDS' Charleston operations, was the primary person who made recommendations for

1988 merit raises. Ms. Jennings, Grievant's immediate supervisor, was not consulted by Mr. Clark; had she been, she would have advised that Grievant and Ms. O'Connor, in her view, were the two in her Unit most deserving of merit pay. This was the first time since becoming a supervisor that Ms. Jennings was denied the opportunity to give input into merit pay decisions.

5. For calendar year 1987, Ms. O'Connor's performance earned 4.0 on a 5.0 scale; Grievant and Ms. Lynch both received a 3.9 score. In each of the ten categories of review, Grievant and Ms. Lynch were identically rated.

6. Prior to the 1988 merit raises, Grievant's salary was only \$9.00 more per bimonthly pay period than Ms. Lynch's.

7. DRS' Chief of Personnel Administration issued criteria for the selection of personnel for merit pay recommendations on August 12, 1988. Significantly, the following standards were to be observed:

- a. the input of on-line supervisors was to be sought;
- b. performance was to be the main factor;
- c. employees "whose salary is already significantly higher than others in the same classification should not be recommended."
- d. individuals "with a pattern of leave abuse should not be rewarded with a salary advancement when evidence indicates the leave abuse has adversely affected job performance."
- e. employees were to be viewed as competing "against a standard rather than against other employees."

8. The primary reason Ms. Lynch was recommended over Grievant was Grievant's higher salary. Another factor was

that "Robin felt Judy had a weakness in attendance," according to Mr. Clark.

9. Ms. Jennings did not believe Grievant had a weakness in attendance or a pattern of leave abuse and, in fact, the record indicates neither.

10. DDS was given very limited time to make its 1988 merit pay recommendations and was not intentionally unfair to Grievant or other personnel.

CONCLUSIONS OF LAW

1. A Grievant must prove the allegations of her complaint by a preponderance of the evidence. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. "An administrative body must abide by the . . . procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

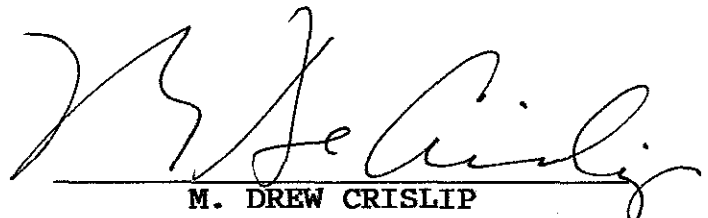
3. An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious, or contrary to law or properly-established policies or directives. See Harvey v. WVGOCID, Docket No. CID-88-061 (Feb. 27, 1989).

3. Respondent, through its agents, did not abide by the criteria promulgated for selection of 1988 merit raise recipients, in that Grievant's immediate supervisor was not consulted; Grievant's pay was inappropriately considered significantly higher than Ms. Lynch's; and Grievant was erroneously labelled as having a problem with leave time.

4. Applying the merit-increase criteria to the evidence in this case concerning Grievant's 1987 performance, Grievant was entitled to a raise for that period.

ACCORDINGLY, this grievance is **GRANTED**. Respondent is **ORDERED** to forthwith take steps to effect Grievant's one-step pay raise, retroactively to the date Ms. Lynch was granted her merit increase for work performed during 1987.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.


M. DREW CRISLIP
HEARING EXAMINER

Dated: May 16, 1989