BETTY DOOLEY, ET AL.

v. **Docket No. 94-DOH-255**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS and

DIVISION OF PERSONNEL

D E C I S I O N

Grievants, Betty Dooley (See footnote 1), Joe Hill, Steve Cross, Connie Cochran, and "all other employees adversely hurt over this grievable action" (See footnote 2), grieve the Division of Highways' ("DOH") Employee of the Month ("EOM") program instituted by DOH as a result of the Division's Inspire meetings. The statement of grievance is as follows:

> CHARGES: A CURRENT PROGRAM WHICH WILL LEAD TO FAVORITISM; A SHOW OF DISCRIMINATION AND DISPARATE TREATMENT. THIS PROGRAM VIOLATES PERSONNEL OPERATING PROCEDURES AND CURRENT LAW ON MERIT PAY. SOME EMPLOYEES WERE UNTIMELY NOTIFIED (DENIED DUE PROCESS); (NO GROUP DISCUSSIONS) AND WERE NOT ALLOWED TO NOMINATE ANYONE TO START THE PROGRAM OFF PROPERLY CAUSING CONFUSION.

The relief sought:

1. The PROGRAM needs to STOP immediately! OR
2. The Program needs readjusted and stayed until employee input is allowed as follows:
   a. Group Discussions to allow due process;
   b. Quality work a must!
   c. Secret Ballot.
   d. Probationary employees have rights to file grievances and should also have the right to be nominated, "Employee of the Month"!

Grievants also grieved at Level III the failure of DOH to hold a timely Level III hearing. (See footnote 3) The Grievants did not submit Level I and II decisions but apparently these levels were waived as all Level I and II activity occurred on the same day.

The three-member board who made the Level III decision stated "the requisite relief should not be granted at this current time," but did recommend the concerns of the Grievants be forwarded to the Inspire group who originally created the EOM Program for evaluative purposes. This board also recommended the program be evaluated after one year and changes be instituted at that time if necessary. As far as the timeliness issue, the DOH board recommended DOH increase the number of Level III evaluators. The parties decidedto submit the case on the record at Level IV, and the case became mature for decision on September 16, 1994, following the submission of findings of fact and conclusions of law. The Division of Personnel ("DOP") initially requested and was granted an extension to file findings of fact and conclusions of law. By letter dated September 15, 1994 Mr. Robert Nunley indicated he had not been asked by DOP to represent them in this matter because "the Division of Personnel has agreed to take no position in the matter."

Background

In July, 1993 an Inspire Program Committee made up of DOH employees created plans for and recommended the implementation of an Employee Recognition Program ("ERP"). This program was endorsed and approved by DOH's Commissioner, and the specific rules and regulations governing the program were set forth in a Commissioner's memo dated January 25, 1994. During the first month of operation, there were some problems in meeting the deadlines spelled out in the memo, but these have been corrected.

This program allows employees to nominate and vote for an EOM. Each designated organizational unit is allowed to nominate individuals who deserve recognition. The "idea of the program was to enhance the development of State Employees" and to give employees some positive reinforcement at work. Level III Trans. at 6. Both employees and supervisors are allowed to nominate and vote. Eligibility is limited to permanent employees. Each EOM is recognized by having their name and photograph posted, receiving acertificate, and being honored at a ceremony. The EOM is usually taken to lunch by the supervisor at his expense.

From the individuals selected as EOM's from each work group, a random selection at the end of

the calendar year, is made to pick one employee to be "Employee of the Year" for this work group. Thus, there are twelve "Employees of the Year" and they are each given a 2% merit increase, unless they have already received a 10% increase by another means. Another random drawing is made from these twelve "Employees of the Year," and one individual is selected to be "Employee of the Year for DOH" and receives a 5% merit increase. There are approximately 5,293 employees in DOH, thus eleven of these receive a 2% increase and one of these receives a 5% increase. Mr. Jeff Black, Director of Department of Transportation, Human Resources Director, stated that in hindsight perhaps it would have been better to have called this award a bonus instead of a merit increase.

Mr. Joe Smith, Assistant Director of Division of Personnel and Employee Relations, was subpoenaed by the Grievants at the Level III hearing. Mr. Smith stated he had not read or even seen the EOM policy but the policy "would have the potential of conflicting" with requirements for a merit increase outlined in the Division of Personnel's Administrative Rules on salary advancement at 5.08a. Level III Trans. at 23-25. He stated "voting by peers does not seem to indicate performance necessarily." Id.

Mr. Black testified the Commissioner had the authority to implement the program under W. Va. Code §17-2A-8 (24, 25, 37) whichgrant the Commissioner the authority to promulgate rules and regulation and administrative practices. He stated this authority included the ability to implement this ERP. He also testified that employees voted as being meritorious by their peers then have been found to be meritorious. He stated that current performance evaluations would be on record to accompany the merit increases that were granted. He did not think that employees would vote for an unqualified employee in order to sabotage the program.

Issues

The focus of this grievance has changed since its initiation. The initial complaints about the program were ones of favoritism, discrimination, or disparate treatment. At Level III and IV the primary issue addressed was "whether DOH can use money from the merit pay system to reward employees chosen as Employees of the Month as part of the Inspire Program's Employee Recognition Program." (See footnote 4) Apparently, Grievants are not opposed to an Employee Recognition Program as long as probationary workers are included, and no merit increases are granted. Respondent argues there is no evidence of favoritism as all employees are treated equally.

Respondent also stated any program such as this may have minor flaws. Additionally, the Respondent argued the Commissioner had the authority to approve and enact the program following the recommendation of the DOH Inspire Committee.

Discussion

Grievants request this Board to terminate an employee recognition program because they believe it will violate Section 5.08 of DOP's Administrative Rules dealing with "Salary Advancement" when the pay raises are granted. This section states "all salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance" and are limited to permanent employees. (See footnote 5)

No merit raises have been granted. How and whether these merit raises will be implemented and what effect they might have on the merit pay system is unknown at this point.

Additionally, DOP's position on whether DOH's policy conflicts with their rules and regulations is not clear. DOP's failure to submit findings of fact and conclusions of law to this Board, and its decision "to take no position on this matter" at Level IV may indicate no strong disagreement with the program. Of course, these statements on what DOP's actions may mean are very speculative.

Given this set of facts, and the Grievance Board's continuous refusal to deal with issues when the relief sought is "speculative or premature, or otherwise legally insufficient," this case must be dismissed from our docket at this time. Pascoli & Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991). Typically, a Grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." Lyons v. Wood County Bd. of Educ., Docket No.89-54-601 (Feb. 28, 1990); Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-87-102-1 (June 30, 1987); see also Shobe v. Latimer, 253 S.E.2d 54 (W. Va. 1979). Since no merit raises have been given, and DOP has not yet had the opportunity to grant or deny these raises based on its interpretation of its rules, it is concluded that this case is not yet ripe for decision.

Accordingly, this grievance is **DISMISSED** from the docket of this Board.

Any party or the West Virginia Division of Personnel may appeal this decision 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. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: November 30, 1994

Footnote: 1*Ms. Dooley withdrew her name from the grievance by letter dated April 13, 1994 saying she did not "want to damage a program that I believe was initially meant for good . . . ." On May 18, 1994 she asked to be reinstated. Apparently this request was granted. Also on March 30, 1994 Ms. Dooley wrote to Mr. Legg, her supervisor, requesting that a letter complaining about being required to retype letters be included in this grievance, stating the letter issue was not a new grievance as "intimidation" was already part of the previously filed grievance. The undersigned finds no evidence of this, thus this issue will not be considered.*

Footnote: 2*There was no discussion in the Level III transcript explaining how employees were "adversely hurt" by the EOM Program, other than the possibility that probationary employees were not allowed to participate. It is unknown if any or all of the Grievants were or are probationary employees.*

Footnote: 3*Since the hearing has been held this issue is moot. Additionally, the Level III decision indicated additional hearing examiners were being added to speed up the grievance process. The DOH Level IV Findings of Facts confirmed hearing examiners have been added, and this fact was also noted in the Grievants' submissions.*

Footnote: 4*It must be noted that the ERP is a DOH program and not an Inspire Program.*

Footnote: 5*DOH's program is limited to permanent employees.*