JAMES M. TUCCI

v. **Docket No. 94-DOH-592**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS

D E C I S I O N

Grievant, James Tucci, is a Bridge Inspector II ("BI-II") with the Division of Highways ("DOH"). He grieves his non-selection for a merit increase in 1994. This case was denied at all lower levels. Grievant appealed to this Board and a Level IV hearing was scheduled for December 15, 1994. The parties continued that hearing and asked that the case be submitted on the record below. Following the submission of proposed findings of fact and conclusions of law this case was to become mature for decision on January 20, 1995. (See footnote 1)

Grievant's statement of grievance states the following:

A disproportionate amount of merit raises continue to be used to show favoritism thus continuing the personnel description "Inequities of the 1980's". I have been excluded from merit pay in a most discriminatory fashion as I have never received a district level merit raise in 16 years, although I continue to maintain above average evaluations and a good work record.

According to the Policy Procedure Manual Volume IX, Chapter 15, pages 1 of 1 and 2 of 6, I feel I should have been included in the recently given merit raises for the following reasons:

1.

EQUITABLE PAY RELATIONSHIPS - (Never received District level merit raise).

2.

LENGTH OF SERVICE - (16 Years)

3.

PERFORMANCE APPRAISAL - (Better Appraisal)

The relief requested was "a pay adjustment of ten percent for past inequities." This request of relief has changed somewhat. In his proposed findings of fact and conclusions of law Grievant states: We pray the WV Education and State Employees Grievance Board grant the relief sought by [Grievant]. At least, [Grievant] should be granted a 3-1/2 percent raise effective February, 1994. However a more equitable remedy would be a one-step increase (5%).

Respondent argues that since Grievant did not meet the guidelines established by Mr. Charles Miller, Secretary of the Department of Transportation ("DOT"), to receive a raise, he was not in the pool of eligible employees. Further, Respondent arguesDivision of Personnel's ("DOP") and DOH's guidelines demonstrated Grievant did not merit a raise.

Grievant also alleged favoritism and discrimination, but since he never testified in this case, there is no record, except his statement of grievance about what he views as discriminatory treatment, other than some individuals received merit increases and he did not. Thus, other than these conclusory statements on his grievance form, the evidence of favoritism and discrimination is very limited.

Findings of Fact

The following findings of fact are derived from the record.

1. Grievant is a sixteen-year employee of DOH and is currently classified as a BI-II.

2. On January 12, 1994, Secretary Miller wrote all departments informing them a modified merit pay plan would shortly be approved by the Legislature as it had been recommended by the Executive Branch. In anticipation of this approval, Secretary Miller requested the various departments begin the selection process and listed the following guidelines:

1.

Limit those recommended for merit raise to those whose annual salary is $20,000 or less, and to the number of such individuals shown by the attached list for each organization.

2.

Give appropriate consideration to those employees who have not had the opportunity to receive an increase in pay in the past twelve months.

3.

Return the attached listing of employees with those to be considered, observing the above guidelines, marked in the space provided, by January 20, 1994.

3. Six employees were recommended for a merit increase from Grievant's division. Five were approved.

4. Grievant's supervisor, Richard White, did not consider Grievant for a merit increase because he had received merit increases in 1992 and 1993, thus he was not within the guidelines established by Secretary Miller.

5. Grievant's two pay increases discussed in Finding of Fact 4 were not recommended at the District level as Grievant's evaluation scores were consistently lower than the other employees in his division. Testimony at Level III reveals that no one at the District level knew how or why Grievant received these two raises. Also, at least one of the raises was a half percent greater than the merit raises given other employees at that time.

6. Mr. White stated that while Grievant's evaluations were "good" they were in the lower 50% of his division's employees and at times had been in the lowest 20%. Grievant's rankings for the last six years were: (See footnote 2)

1992 - 21 of 25

1991 - 24 of 28

1990 - 18 of 27

1989 - 17 of 28

1988 - 20 of 28

1987 - 14 of 27

7. Grievant's 1992 evaluation score was a 9 and consisted of seven "satisfactory" ratings and one "exceeds expectations" rating in the area of work place presentability. Grievant marked the areaon the back of this evaluation form which stated: "I feel that my evaluation was fair and impartial," and signed this evaluation.

Additionally, the following testimony was elicited at the Level III hearing.

1. Mr. White also testified that employees who had worked as long as Grievant usually had higher evaluations. Brief calculations from the exhibits presented demonstrated that employees with fifteen years or more of seniority attained an average rating of 11.4 compared to Grievant's 9. Grievant's Exh. No. 3. (See footnote 3)

2. Grievant presented evidence that another BI-II's annual salary was $2,009 more than his. This individual had slightly more experience and an earlier hire date. Mr. White testified that this individual had passed his Bridge Inspector test before Grievant, had college course work, and had had consistently higher evaluations, and at times much higher evaluations. Thus, he received merit increases frequently. He noted he usually has six to eight merit increases to give to 27-28 people, so only the top performers are rewarded.

3. Mr. Lyle Walker, a Bridge Crafts Worker, testified for Grievant. He stated he did not believe the merit raises werefairly distributed, especially since some workers received raises more frequently than others. He also expressed displeasure that one individual, who received a merit increase, was on a crew whose supervisor required them to work less hours on snow removal than his crew was required to work by his supervisor.

4. Respondent's reply to Finding of Fact 10 was that the length of time a crew worked was up to the supervisor.

5. Mr. Don Matthews (See footnote 4), a BI-II, testified on Grievant's behalf. He spoke to Grievant's Exhibit 8, a chart he prepared which listed all of the BI-IIs with their salaries and years of service. This chart indicates BI-II salaries range from $16,230 to $20,340 and the years of experience varied widely within the pay grades. For example, individuals with fifteen to sixteen years of service were in seven of the ten pay grades ranging from lowest to next to the highest. This Exhibit was not explained in any detail and the discrepancies between it and Grievant's Number 3, a list of similar information, were not explained.

6. Mr. Murphy, District Engineer of District 7, testified he had "looked into" an "inequity"

increase for the Grievant as he had promised in his Level II decision. DOP refused to consider a pay raise based upon equitable pay relationships for the Grievant.

7. Mr. Bill Hinter, Grievant's Bridge Inspector Crew Leader, testified he had input into Grievant's evaluation and that it adequately reflected Grievant's work. He also stated Grievant performed Crew Leader duties in his absence. How often these duties were performed was unspecified.

8. Mr. White testified that an employee who received an 8 on his evaluation, compared to Grievant's 9, was recommended for a merit increase because of pay inequity. He also stated this employee met the guidelines outlined by Secretary Miller.

Discussion

The first issue to resolve is whether Secretary Miller could limit the pool of eligible employees to those who had not received a pay increase in the past twelve months. This Grievance Board has had several cases in which the employer has limited the pool of applicants based on multiple factors. Roberts v. Dept. of Admin./Div. of Personnel, Docket No. 94-DOP-182 (Dec. 1, 1994) (employees with raises within one year were ineligible, supervisors were directed to pay close attention to equitable relationships among employees and use of leave time); Delauder v. Dept. of HHR/Child Advocate Office, Docket No. 92-HHR-483 (Aug. 31, 1993) (employee who had received any pay raise during past two years not considered); Clemens/Cordray v. Dept. of Highways, Docket Nos. 90-DOH-033, 041 (Sept. 28, 1990) (supervisor did not consider employees awarded a merit increase within the past two years); Osborne v. Div. of Rehab. Serv., Docket No. 89-RS-051 (May 16, 1989) (individuals with previous merit increases were notautomatically entitled to merit increase even if performance stayed the same, supervisors directed to check for pay inequity). In Roberts, supra, this Board held that factors that had already been assessed in the evaluation, such as leave time, could not be utilized again to limit the pool of applicants. (See footnote 5) Other decisions, while noting merit increases had been limited to those who had not had an increase in the prior years, have not found this restriction to violate either DOP's or DOH's regulations. DOP's regulations on salary advancements are listed below.

5.08. Salary Advancements

(a)

Basis: All salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance.

(b)

Eligibility: Salary advancements are limited to permanent employees.

(c)

Effective Dates: Salary advancements for permanent employees are effective on or after the date on which they become eligible.

(d)

Amount: Salary advancements are limited to no more than two increments in any twelve (12) month period.

This section does not refer to a pool of candidates, only states salary advancements are to be based on merit.

Pertinent sections of DOH's Merit Increase Policy are stated below:

1. Purpose:

The purpose of this policy is to provide for granting merit increases to a limited number of employees (both hourly and salaried) based upon meritorious performance, while taking into consideration such factors as equitable pay relationships and length of service.

9. General Provisions:

A.

Any increase mandated as an across the board adjustment will not count as a merit or promotion, and will not effect implementation of this policy.

B.

> In no way is this policy to be viewed by either the employee or supervisor as automatically granting an increase.

These policies do not speak directly to limiting the pool of eligible candidates, but indicate that while "meritorious performance" is the primary consideration, pay inequity and length of service are to be considered as well.

Since Secretary Miller's memo of January 12, 1994 stated the merit increases would allow the departments to give raises to the "most meritorious employees," obviously the focus of the salary advancements was to reward meritorious performance. By further requesting that departments "give appropriate consideration to those employees who have not had the opportunity to receive an increase in pay in the past twelve months," Secretary Miller obviously wanted to try to achieve some pay equity among meritorious employees. Since all employees who were to be recommended for a merit increase were first required to meet the requirements of quality performance, this limiting of the pool of eligible candidates to those without a recent pay increase cannotbe found to be a violation of DOP or DOH regulations. Thus, DOH can limit a pool in this specific manner without violating DOP's requirement that salary advancements be based on merit.

Even if the undersigned agreed with Grievant and found DOH could not limit the pool of eligible candidates, the Grievant would still not have received a merit increase. There were twenty-eight employees in Grievant's division. If six employees are subtracted pursuant to Direction Number 1 of Secretary Miller's memo, because they make over $20,000, that leaves twenty-two employees eligible for six raises. Seventeen people's performance evaluations were higher than Grievant's. Of the remaining four, two ranked the same as Grievant and one ranked one point below. Accordingly, if Respondent had based its selection for merit increases solely on performance, the Grievant would not have been considered as his performance rating was too low. Roberts, supra. Thus, even if one accepts Grievant's argument, it does not demonstrate he would have received the relief requested.

As for Grievant's arguments of discrimination and favoritism (See footnote 6), these too must fail. W. Va. Code §29-6A-(2)d defines discrimination as "any differences in the treatment of employees

unless such differences are related to the actual job responsibilities of the employee or agreed to in writing." Subsection (h) defines favoritism as "unfair treatment of anemployee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

Grievant did not identify any unfair treatment or differences in treatment other than to say in his statement of grievance that he had been excluded from merit pay increases. In order to make a prima facie showing of discrimination or favoritism the Grievant must establish:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to the] actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant failed to prove a prima facie case by demonstrating that he was "similarly situated to one or more employees." First, Grievant was not similarly situated to the employees selected for merit raises because he was not eligible to be in the pool of candidates. Unrebutted testimony revealed Grievant's supervisor did not consider Grievant for a merit increase because of the guidelines established by Secretary Miller. Second, even if limiting this pool had been found to be incorrect, there is no evidence that Grievant would not have received appropriate consideration in relation to all other employees.

The above discussion is supplemented by the following conclusions of law.

Conclusions of Law

1. Grievant has the burden of proving his case by a preponderance of the evidence in a nondisciplinary matter.

2. Grievant did not demonstrate that limiting the pool to meritorious employees who had not received a salary increase in the past year violated any statute or regulation.

3. If the limiting of the pool of candidates had been found to be unacceptable, Grievant did not demonstrate he would have received a raise because his performance evaluation scores placed him either 19th, 20th or 21st on a list of twenty-two employees of which only the top six were eligible for this merit increase. Roberts, supra.

4. "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-186 (Dec. 30, 1991); Osborne, supra.

5. Grievant failed to establish a prima facie case of either discrimination or favoritism.

Accordingly, this grievance is **DENIED**.

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: February 28, 1995

Footnote: 1Grievant's proposed findings of fact were received January 25, 1995. On January 26, 1995, DOH wrote the undersigned noting that the Grievant had not cited the recent case of Roberts v. Dept. of Admin./Div. of Personnel, Docket No. 94-DOP-182 (Dec. 1, 1994) and noted how this case was relevant to the Grievant's case. On February 5, 1995, Grievant again wrote the undersigned stating that if the late submission by the Respondent was accepted, the Grievant also wanted to restate some information from the Level III hearing. This letter was received February 14, 1995. The undersigned, in the interest of fairness, considered all these submissions, thus the case actually became mature on

February 14, 1995. Additionally, it must be noted that onestatement in Grievant's submission of February 5, 1995 is incorrect in that the Grievant states "a sixth raise was returned to Charleston alleging no one met the criteria." This is not the testimony from the Level III transcript. In fact, Mr. White indicated that six people were recommended for a raise and he did not know why the sixth one was not approved, other than he received a note saying the individual did not meet the criteria.

Footnote: 2*The 1992 ranking was the most recent and the one used for the 1994 merit increase. Mr. White testified the 1987 evaluation was Grievant's best year.*

Footnote: 3*Respondent presented Respondent's Exhibit Number 2 which was a copy of the evaluation forms and employment histories for eight DOH employees. Apparently these forms included the six people who were recommended for a raise and Grievant's form. It is unknown who the eighth form belonged to or why it was submitted. Additionally, as there were no names on these forms, and the eighth person was not identified, these forms were not considered in this decision.*

Footnote: 4*Mr. Matthews also recounted that his supervisor, Mr. Wright, had requested an "inequity" raise for him because his years of service (including non-inspector time) indicated he might be eligible for a salary adjustment. Mr. Matthews received a two-step pay increase after approval by DOP.*

Footnote: 5*In that decision ALJ Dunn questioned whether Secretary Chuck Polan could limit the pool of employees to those who had not had a recent pay increase.*

Footnote: 6*Grievant's allegations of discrimination and favoritism were considered for this merit increase only. No evidence of prior discrimination and favoritism was presented other than statements that one employee had made more money than Grievant for approximately eight to ten years.*