JOSEPH BARBER

v. Docket No. 94-H-267

DIVISION OF HIGHWAYS

DECISION

Grievant, Joseph Barber, employed by the Division of Highways (DOH or Respondent) as a Transportation Worker II in Morgan County, complains of discrimination in that his supervisor has failed to recommend him for a merit raise since he "blew the whistle" on the supervisor for misappropriating one or more grader tires. (See footnote 1) **A level four hearing was conducted on October 4, 1994, and the matter became mature for decision with the submission of proposed findings of fact andconclusions of law filed on or before November 7, 1994.** (See footnote 2)

The undisputed facts of this matter are as follows:

1. Grievant has been employed by the Division of Highways as a Transportation Worker II (Equipment Operator) in Morgan County for approximately seventeen years.

2. Tom Riggleman is the Maintenance Superintendent in Morgan County. He held that position from 1982 until early 1985 when he was removed by the Moore administration. After prevailing in a lawsuit, Mr. Riggleman was reinstated as Maintenance Superintendent in April or May of 1989 and has held that position to the present time.

3. In 1989 Grievant notified the District Management of the alleged theft of two grader tires. The allegation was investigated and it was concluded that an employee had taken one tire, with Mr. Riggleman's knowledge. The tire was returned and Mr. Riggleman was suspended for a period of three days.

4. Since 1989 Grievant has received only one merit increase which had not been recommended by Mr. Riggleman.

5. Approximately twenty-two employees are assigned to Respondent's Morgan County

facilities. Eleven of the employees are classified as Transportation Worker IIs. The years of service earned by these employees range from two totwenty-four. The salary range begins at $7.25 and ends at $8.60 per hour. **(See footnote 3)**

6. Grievant earns $7.92 per hour.

7. Merit raises have been awarded every year from 1989 through 1994, with the apparent exception of 1993, when a reclassification system was implemented.

In support of his claim, Grievant offered the testimony of several co-workers. Russell Day stated that Mr. Riggleman told him a few years ago "that Joe wouldn't get nothing as long as he was supervisor." Randy Fisher, Todd Statler, and Terry Kirch all testified that when they were hired Mr. Riggleman immediately directed them to stay away from Grievant, otherwise they would be in trouble. Later, they were told by the supervisor that their work was acceptable except when they were with Grievant. All opined that Grievant completed his work in an acceptable, or better, manner.

Grievant recounted the events relating to the missing tire, and Mr. Riggleman's actions since that time, which he believes were retaliation for the "whistle-blowing." In addition to advising other employees to shun him, Grievant notes that Mr. Riggleman has never recommended that he receivea merit raise. The one merit increase Grievant received during Mr. Riggleman's tenure as supervisor, in 1991, was the result of lobbying activities by local citizens who urged the salary enhancements be awarded to four employees, including Grievant.

Grievant also asserts that Mr. Riggleman has had some influence in prohibiting him from receiving additional endorsements on his commercial drivers license, thereby restricting the equipment he may operate at work, which in turn limits his opportunity for promotion. Grievant also believes that Mr. Riggleman has intentionally assured that he was not selected for additional training or instruction provided by DOH.

Grievant argues that the reasons given by Mr. Riggleman for not recommending that he receive a merit raise, i.e., that he was frequently late for work and exhibited a bad attitude, were specious, inasmuch as he rode to work with a co-worker who was also late on the days in question, but who had received a merit raise, and because the examples of a bad attitude given by Mr. Riggleman lacked merit. As relief, Grievant requests that he be awarded a merit

raise equal to that received by other employees, and that his evaluation be completed by anyone other than Mr. Riggleman.

In response, DOH asserts that the "one used tire . . . was taken [by an employee other than Mr. Riggleman] from a pile of tires to be disposed of." The tire was returned andMr. Riggleman was suspended based upon his knowledge of the situation. Since that time, Respondent argues, Mr. Riggleman has not recommended or taken any disciplinary action against Grievant, nor has he ever spoken of the incident with Grievant.

Respondent notes that Grievant was selected by Mr. Riggleman to represent the county organization in the "Inspire Program," and that Grievant had agreed with the performance evaluation for 1993 completed by Mr. Riggleman. Finally, Respondent offers data to establish that Grievant's salary is comparable to other similarly-situated employees, and that Grievant's sole merit raise was not inconsistent with those given to Morgan County employees since 1987. Respondent asserts that Grievant failed to prove retaliation, discrimination, or that he was entitled to a merit raise in 1994.

The level three evaluators determined "that Mr. Barber was discriminated against by his supervisor, Mr. Riggleman," when the supervisor encouraged other employees to shun Grievant. Some type of disciplinary action was recommended, and Mr. Riggleman subsequently received a letter of reprimand from Commissioner Fred VanKirk. No further relief was granted at that level because Grievant had been "given a merit raise in 1991 by Mr. Riggleman," other employees had not received merit raises, and no evidence was submitted to compare work performance. These conclusions are all to some degreemisleading. While Grievant did receive a merit raise in 1991, as previously noted, it was not given to him by Mr. Riggleman, but rather was awarded by another administrator. It is accurate that other employees did not receive merit raises in 1994; however, Grievant was the only Transportation Worker II who would not have received a merit raise from 1989-1994, but for his seeking alternative means by which to secure one. It is also correct that no annual evaluations were submitted to compare work performance. Although a comparison of evaluations is generally dispositive of such claims, they are not crucial in this matter because the record establishes they were not available when consideration was given to which employees would receive the merit raises. (See footnote 4)

In response to an inquiry as to how the recipients of the merit raises were selected, Mr. Riggleman stated "I try when I select for merit raises I try to select the key persons, the people that's more helpful to me than anybody else. I shouldn't say more helpful . . . ." (T. p. 43) When asked why Grievant was not recommended for a merit raise, Mr. Riggleman stated "there's so many Operator 2's there just wasn't enough to go around and I thought to keep down agrievance that the next time around the Operator 2's, most of them would all get merit raises." (T. p. 44) **(See footnote 5)**

When specifically asked if he had ever advised Grievant that he was not recommended for a raise because he came to work late and had a bad attitude, Mr. Riggleman recalled that he had mentioned to Grievant that he would "have to change your attitude a little bit. . . you'll have to do something about you coming in late." (T. p.44) On cross examination Mr. Riggleman stated that Grievant "is a good worker." When asked about Grievant's bad attitude, Mr. Riggleman cited a period of time "a couple of years ago" when Grievant was falling asleep at work due to medication he was taking for gout. Another example involved Grievant "hollering" at an office worker regarding money he believed Respondent owed him.

Nine Significant Occurrence forms were completed for Grievant in 1993. Six of the forms noted Grievant had reported to work late. The range of the tardiness was from three to ten minutes. Two of the forms indicated that Grievant was early for work, and one form indicates that he refused to report for work at 1:50 a.m. for snow removal because he had worked all day. The DOH 12 form, "Daily Work Report," contains a section entitled "General Comment." Three reports referred to Grievant. On March 2, 1993, it was noted "Joe Barber came into the office and said Vickie how muchmoney have I got coming." The April 23, 1993, report indicates that Mr. Barber opened the crew bay door, and, at the top of his voice, asked an office worker for the money "he had been beaten out of." A similar report had been filed on January 26, 1993.

W.Va. Code, §§6C-1-1 et seq., known as the "Whistle-blower Law," unquestionably applies to public employees such as Grievant. Code §6C-1-2 defines "employee" as "a person who performs a full or part-time service for wages, salary, or other remuneration under a contract of hire, written or oral, express or implied, for a public body." Further, allegations of unlawful retaliation under the Whistle-blower Law, W.Va. Code §§6C-1-1 et seq., are properly within the

jurisdiction of the West Virginia Education and State Employees Grievance Board. Coddington v. W.Va. Dept. of Health and Human Resources/Weston State Hospital, Docket Nos. 93-HHR-265, 266, 267 (May 19, 1994); Graley v. W.Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). A grievant who alleges discrimination or retaliation in violation of Code §6C-1-3 must establish a prima facie case by proving that (1) he engaged in an activity protected by statute; (2) the employer was aware of the protected activity; (3) thereafter an adverse employment action was taken by the employer; and (4) the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time thatretaliatory motive can be inferred. See Frank's Shoe Store v. W.Va. Human Rights Comm'n, 365 S.E.2d 251 (W.Va. 1986).

By reporting missing inventory, which by all accounts was improperly taken by an employee, Grievant clearly was engaging in an activity protected by the Whistle-blower Law. The employer was aware of the activity as evidenced by the subsequent investigation which resulted in the tire being returned and the supervisor disciplined. Since that time the supervisor has failed to recommend Grievant for a merit raise for five consecutive years and has warned co-workers not to associate with Grievant. This activity, already determined in part to be discriminatory, has been ongoing since the incident in 1989 and appears to have no basis other than retaliation.

Having determined that Grievant established a prima facie case of discrimination, the review of this matter shifts to whether Respondent has shown a legitimate, non-retaliatory reason for its actions. If Respondent successfully rebuts the claim of discrimination, Grievant may nonetheless prevail by establishing that the offered reasons are merely pretextual. In the present matter, it is accepted that Respondent has provided a legitimate, non-retaliatory reason for Mr. Riggleman's failure to recommend that Grievant receive a merit raise, i.e., that Grievant had received one merit raise consistent with other employees. Nevertheless, Grievant must still prevail because he has shown that reason to be pretextual.

The several occurrences of tardiness cannot be used against Grievant when the same infraction did not exempt the employee with whom he rode to work from receiving a merit raise. The examples of bad attitude are also unpersuasive. Certainly, falling asleep as the

result of required medication a year or more ago, does not qualify as a bad attitude. The incidents in which Grievant entered an office and loudly expressed his concern regarding money which he believed he was due, did not incite his co-workers to unrest or compromise the quality of his work. Further, while the incidents were documented, Mr. Riggleman did not consider them serious enough to warrant any discipline. Therefore, while an inappropriate manner for Grievant to express his opinion, this activity does not warrant the label of bad attitude. (See footnote 6)

In addition to the foregoing narration it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. An allegation of unlawful retaliation under W.Va. Code §§6C-1-1 et seq., is properly within the jurisdiction of the West Virginia Education and State Employees Grievance Board. Coddington v. W.Va. Dept. of Health and Human Resources/Weston State Hospital, Docket Nos. 93-HHR-265, 266,267 (May 19, 1994).

2. A grievant alleging discrimination in violation of W.Va. Code §§6C-1-1 et seq. must make a prima facie showing of retaliatory motive by proving:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

An employer may rebut the prima facie case by offering a legitimate, non-retaliatory reason for the action; however, a grievant may still prevail if he proves by a preponderance of the evidence that the reason offered is pretext. See Frank's Shoe Store v. W.Va. Human Rights Comm'n, 365 S.E.2d 251 (W.Va. 1986).

3. Grievant has established a prima facie case of retaliation by proving that he has not received a recommendation that he be awarded a merit raise from his supervisor for a period of five years following Grievant's reporting the misappropriation of one or more grader tires.

4. Respondent presented a legitimate, non-discriminatoryreason for the action. However, Grievant has proven by a preponderance of the evidence that the reason offered is pretextual. This conclusion is supported in part by the level three decision in which the evaluators determined that the supervisor had exhibited behavior which resulted in Grievant being treated in a discriminatory manner.

Accordingly, the grievance is GRANTED and the Division of Highways is hereby Ordered to process a merit increase for Grievant in an amount comparable to that received by other Transportation Worker II's, effective February 1, 1994, and to take whatever steps necessary to insure the retaliatory actions taken by Mr. Riggleman cease and desist.

DATED 2/28/95 Sue Keller

Senior Admn. Law Judge

Footnote: 1

Grievant's initial statement of grievance also included a reference to the reclassification pay process. Grievant stated that his pay should be higher in consideration of "hazardous road conditions also years on the job and care of equipment." Grievant did not allege that he was misclassified or that his compensation falls outside the paygrade for Transportation Worker II. At the level III hearing Respondent attempted to clarify this issue; however, Grievant offered evidence only to the issue of discrimination. At level four Grievant again addressed only the issue of a merit raise. Therefore, any claims regarding classification are deemed abandoned.

Footnote: 2*The grievance was denied at levels one and two. The hearing evaluators at level three determined that Grievant had been the victim of some discriminatory action by the supervisor, but denied the requested relief on other grounds.*

Footnote: 3*This salary range includes increases granted effective February 1, 1994. Although these increases occurred approximately a month after the grievance was filed, they will be considered in this matter because they provide a more complete picture of an ongoing situation. Further, Grievant's concerns regarding reclassification and merit increases are not clearly articulated. Since the reclassification did not generally result in salary increases, and no merit raises were awarded in 1993, the 1994 salary levels will be used as the basis for any relief awarded.*

Footnote: 4 ***Respondent's "Merit Increase Policy" requires that there "be a completed current performance appraisal report on file in the Personnel Division for each salaried employee recommended for increase under this policy. By Respondent's own admission, the 1993 performance appraisals had not been completed when recommendations were made for the 1994 merit raises. The only written measures of performance which were available were "Records of Significant Occurrence" and DOH-12 forms (Daily Work Report).***

Footnote: 5 ***In fact, employee records establish that six of the eleven Operator II's received merit raises in 1994.***

Footnote: 6 ***The record provides insufficient evidence to support any determinations regarding Mr. Riggleman's alleged interference with Grievant's ability to gain promotion by controlling the endorsements on his CDL license and prohibiting him from attending training sessions.***