

JAKE WALLACE,

Grievant,

v.

DOCKET NO. 96-DOH-121

**WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION/DIVISION OF HIGHWAYS,**

Respondent.

D E C I S I O N

Grievant, Jake Wallace, filed this grievance on December 8, 1994, alleging:

I feel that I was passed over for a merit raise many consecutive times. I feel that this act was discriminatory and I should be given merit raise consideration same as my fellow co-workers.

Relief Sought: I feel that I should be given the same consideration as others, and should be given a merit raise made retroactive. Raise should be offered in a systematic manner free of favoritism.

Following adverse decisions at the lower levels, Grievant appealed to level four on May 10, 1995.

[\(See footnote 1\)](#) Following several continuances for good cause, a level four hearing was held on September 30, 1996, at which time this case became mature for decision. [\(See footnote 2\)](#)

The material facts are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievant has been employed by Respondent in District One at Elkview as a Transportation Worker II for approximately 2-1/2 years.
2. Grievant did not receive a merit raise for calendar year 1994. Merit raises were available and made effective February 1, 1994 and again on November 15, 1994.

3. Grievant was disciplined in September 1994, for unauthorized leave and received a two-day suspension without pay, and penalized eight hours for the day in question. Adm. Ex. 1. This was not Grievant's first infraction and he had received written reprimands in the past regarding this conduct.

4. Grievant's performance evaluation for calendar year 1994 was rated overall as "Needs Improvement." G. Ex. 1.

5. Another employee who had been employed by Respondent for approximately 1-1/2 to 2 years received a merit raise in 1994.

Discussion

Grievant alleges Respondent has engaged in acts of discrimination and favoritism in not awarding him a merit increase in 1994, while giving an increase to another employee who had been employed approximately the same length of time as Grievant. Respondent denies any wrongdoing and justifies its decision not to consider Grievant for a merit increase based upon the fact that he had been disciplined in 1994.

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 employees or agreed to in writing by the employees.

W. Va. Code § 29-6A-2(h) defines "favoritism" as:

. . . unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

When alleging discrimination or favoritism, Grievant is required to establish by a preponderance of the evidence:

(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) have not, in a significant particular; and

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

Once Grievant establishes a prima facie case of discrimination or favoritism, the employer can then offer a legitimate reason to substantiate its actions; thereafter, Grievant must show that the offered reasons are pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant has failed to established a prima facie case of discrimination and favoritism. In order for Grievant to show that he has been discriminated against, it is necessary to prove that he is similarly situated in a pertinent way to another employee. Grievant has failed to prove that the identified employee who had received a merit increase in 1994 had been disciplined in any way during that calendar year, as had Grievant. Thus, it cannot be found that those two employees were similarly situated ina pertinent way. Further, Respondent's actions in not considering Grievant for a merit raise cannot be found to be arbitrary and capricious.

Section 5.08 of the West Virginia Administrative Rules, Series I (1993) Amended, states for salary advancements:

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

Grievant received an overall rating of "Needs Improvement" on his 1994 performance evaluation. In addition, Grievant received a written notice of disciplinary action from Respondent suspending him for two days for taking unauthorized leave, an infraction for which Grievant had been previously reprimanded. 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 decisions. Osborne v. Div. of Rehab. Services, Docket No. 89-RS-051 (May 10, 1989). Respondent's decision in this instance not to consider Grievant for a merit increase will not be disturbed.

Conclusions of Law

1. In a non-disciplinary grievance, it is incumbent upon the Grievant to prove his case by a preponderance of the evidence.
2. 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 employees or agreed to in writing by the employees.

3. W. Va. Code § 29-6A-2(h) defines "favoritism" as:

. . . unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

4. Grievant has failed to prove Respondent engaged in acts of discrimination or favoritism in not considering him for a merit raise in 1994.

5. 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 decisions. Osborne v. Div. of Rehab. Services, Docket No. 89-RS- 051 (May 10, 1989).

6. Grievant has failed to prove by a preponderance of the evidence that Respondent's decision not to award him a merit raise was arbitrary, capricious, or contrary to law.

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.

MARY JO SWARTZ
Administrative Law Judge

Dated: November 19, 1996

[Footnote: 1](#)

The level four appeal of this grievance had inadvertently been placed in another grievance file and was never acknowledged by the Grievance Board until May 10, 1995. Respondent made no objections based on timeliness.

[Footnote: 2](#)

Grievant's representative did not appear at the level four hearing; Grievant elected to proceed with the hearing without representation.