CHARLES S. HALL,

Grievant,

v. DOCKET NO. 96-DOH-035

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Charles Hall, grieves his failure to receive a merit increase in November 1994, and alleges this failure "violated W V DOH administrative Rules Vol 9 Chapter 15." This Section is the "Merit Increase Policy" of the Division of Highways("DOH") Administrative Operating Procedures and requires merit increases to be based on "meritorious performance while taking into consideration such factors as equitable pay relationships and length of service." He requests as relief that he receive "an increase in wages effective November 15, 1994." This grievance was denied at Levels I, II, and III. At the Level IV hearing on September 19, 1996, Grievant asked only to make a briefstatement on the record. (See footnote 1) This grievance became mature for decision on October 15, 1996, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 2)

The following Findings of Fact are derived from the record.

Findings of Fact

1. Grievant is employed by DOH as a Transportation Worker II at the Coon Knob interstate maintenance facility in Braxton County.

2. Grievant received a merit increase in February 1994.

3. In November 1994, DOH supervisors were directed to recommend deserving employees for a merit increase. A set number of increases, for each of the four areas in Grievant's district, was decided in advance, based on the number of employees in each area and the amount of money to be awarded. Approximately one-third of the employees in each

group would receive increases. 4. The November 1994 increases were based on the 1993 evaluations, as they were the most recent on record, and other guidelines and written measures of performance established by DOH and the Division of Personnel("DOP").

5. Grievant's 1993 evaluation rated him as "meets or exceeds expectations." This document also noted in the "Plan for Improvement" area that Grievant needed to "Work on better house keeping habits and tool storage." Grievant has 19.7 years of service.

6. In August 1994, prior to the decision on November merit increases, Grievant received a Written Warning indicating that on August 2, 1994, he was "uncooperative with the leadman concerning the operation of mowers." This same Warning indicated that on August 3, 1994, Grievant was asked to assist in the unloading of a supply truck and "used profanity in reply to the orders." This Written Warning was considered when deciding November 1994 merit increases.

7. Two employees at Coon Knob received merit increases.

8. One of the merit increases referred to in Finding of Fact 7 went to Fred Allen, a supervisor at Coon Knob. His performance evaluation was completed by a different individual than Grievant's, and was slightly lower. Mr. Allen had not received a merit increase in February 1994, and has 21.2 years of service.

9. The other merit increase referred to in Finding of Fact 7 went to Mike Adams, a Transportation Worker II, who had a slightly higher performance evaluation than Grievant, and whose performance rating was conducted by the same rater as Grievant's. Mr. Allen had received a pay increase in February 1994 and has 21.9 years of service. 10. Neither Mr. Allen nor Mr. Adams had received any type of disciplinary action during the previous twelve months.

Discussion

Both DOH and DOP have written guidelines on the factors to be considered when awarding merit increases. DOH is required by DOP's Administrative Rules to base all merit increases on "performance evaluations and other recorded measures of performance." 183 CSR 1.5.08(a)(1993). (See footnote 3) Clearly, a written warning is considered a recorded measure of performance. DOH requires merit increases to be based on "meritorious performance while

taking into consideration such factors as equitable pay relationships and length of service." W. Va. Admin. Operating Procedures Vol. IX, Ch. 15. A review of the record demonstrates DOH took its own regulations, as well as those of DOP, into consideration in awarding the two merit raises. It must be noted Grievant did not argue DOP's regulations were not followed, he only argued DOH did not follow its own rules on merit increases.

Both employees who received the Coon Knob merit increases had more years of employment than Grievant. Neither had received any type of disciplinary action during the previous twelve months. Further, the performance evaluation of Mr. Adams was performed by the same rater as Grievant's and was higher than Grievant's. The performance evaluation of Mr. Allen was only slightly lower than Grievant's and was performed by another rater. The undersigned will take administrative notice that the evaluation ofemployees, even on the same form, will vary somewhat from rater to rater, as the assessment of an employee's performance is not an exact science. It is also noted that Mr. Allen had not received a merit increase in February 1994, and whlie both Grievant and Mr. Adams had.

"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). Here, Grievant has failed to meet his burden of proof and demonstrate that DOH's action violated any policy or was arbitrary or capricious.

The above discussion will be 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. Tucci v. W. Va. Dept. of Transp./ W. Va. Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995).

2. "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).

3. It is appropriate for an employer to consider written disciplinary action taken against

an employee during the previous twelve months when awarding merit increases, as this is a recorded measure of performance. 4. Grievant has failed to meet his burden of proof and demonstrate Respondent failed to follow its Merit Increase Policy when awarding the November 1994 merit increases.

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: January 31, 1997

Footnote: 1

Grievant's statement dealt with his feelings that since he filed this grievance, he and fellow union members had been discriminated against in the issuing of subsequent merit increases. Neither Grievant nor his representative asked to amend his grievance. If Grievant does indeed feel he has been discriminated against, this action can be filed as a separate grievance, but this issue is not the subject of this grievance and is not before this Grievance Board at this time.

Footnote: 2

Although this grievance was filed in December 1994, it was not received by the Grievance Board until January 25, 1996. The parties did not specify why the delay occurred below, and did not raise this delay as an issue with this Board. The Level IV Hearing, scheduled on April 29, 1996, was continued at the request of Grievant's representative, stating the parties wanted to discuss the possibility of submitting the case of the record. At the time this requested continuance was granted, the parties were asked to submit either the mutually agreed upon

briefing schedule or four mutually agreed upon dates for a hearing. No response was received, and the undersigned eventually scheduled the case for hearing in September.

Footnote: 3

It is noted that this Rule has been amended to clarify what the term "other measures of performance" means; however, the above-stated rule is what was in effect at the time these merit raises were awarded.