RICHARD G. STONE,

Grievant,

v.

DOCKET NO. 97-ABCA-151

WEST VIRGINIA ALCOHOL BEVERAGE

CONTROL COMMISSION,

Respondent.

D E C I S I O N

Grievant, Richard G. Stone, filed this grievance on March 29, 1996, alleging:

> I have not received an explanation why I was not considered for a merit pay raise. Some warehouse employees received a 5% raise in September 1995 and the same employees again received 5% pay raises in February 1996. These employees have the same job title as myself-Equipment Operator.
>
> Relief Sought: I want the same 10% pay raise that my fellow warehouse employees received.

A level three hearing was held on September 24, 1996, and a decision was rendered by David M. Fryson, Hearing Examiner, which recommended granting the grievance on December 19, 1996. Richard A. Atkinson, III, Commissioner, West Virginia Alcohol Beverage Control Commission ("ABCC"), rejected the Hearing Examiner's recommendation, and denied the grievance as untimely on March 12, 1997. Grievant appealed that decision to level four on March 20, 1997, and the parties requested the matter be submitted on the record developed at level three. This grievance became mature for decision on June 6, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant is employed as an Equipment Operator at the ABCC Warehouse and is under the immediate supervision of Carl Linville. 2. In September 1995, four Warehouse employees were recommended by Mr. Linville for 5% merit raises: Johnny Hensley, Charles Roberts, Ronda Linville, and Robert Watkins.

3. Mr. Hensley possesses skills in mechanical repair work outside his duties of Equipment Operator. By using Mr. Hensley to repair equipment, instead of contracting the work to an outside contractor, the ABCC is able to save between $25,000 and $40,000 a year. LIII Tr., p. 26.

4. Mr. Hensley was told by his superiors in 1978 or 1979 that they would try to get him a raise in salary for performing these additional duties, but he never received a pay raise. LIII Tr., p. 27.

5. Mr. Roberts also performs duties outside his job as Equipment Operator, such as electrical and plumbing work, which also results in savings to the ABCC. LIII Tr., p. 28.

6. Mr. Linville wanted to acknowledge the benefit received to the ABCC from these individuals agreeing to perform duties outside their Equipment Operator duties, and in 1995, recommended them, as well as Ms. Linville and Mr. Watson, to his supervisor, Mr. Ron Moats, Deputy Commissioner, for merit increases. LIII Tr., p. 24.

7. Mr. Moats accepted Mr. Linville's recommendation in 1995 and granted 5% merit increases to those four individuals.

8. In 1996, Mr. Moats granted Mr. Hensley and Mr. Roberts a 5% merit increase, again, in recognition of their initiative and cooperation in performing duties outside their regular job duties, which resulted in considerable savings for the ABCC and the State. LIII Tr., p. 47. 9. Mr. Linville had no input into the 1996 merit increases.

10. Out of the total possible rating of “10" for their 1994 evaluations, Mr. Hensley received a 9.56; Mr. Roberts received a 9.78; Mr. Watkins received a 10.00; and Ms. Linville received a 9.78; G. Exs. 2, 3, 5, 6.

11. Out of the total possible rating of “10" for their 1995 evaluations, Mr. Hensley received a rating of 9.78, and Mr. Roberts received a rating of 9.78 on their 1995 performance evaluations. G. Exs. 2, 3.

12. Grievant received performance evaluations for years 1994 and 1995 in which he received a

ranking of “10", the highest score possible in the ABCC's rating system. G. Ex. 1.

13. Grievant did not receive a merit increase for the years 1995 or 1996.

14. Mr. Moats did not consider performance evaluations in 1994 or 1995 in awarding merit increases. LIII Tr., p. 46.

15. Sometime following the awarding of the September 1995 merit increase, Grievant inquired of the Commissioner why he was passed up for increase. The Commissioner told him he would look into it, but never got back with Grievant on the matter. LIII Tr., p. 6.

16. The 1996 merit increase was given in February 1996.

17. Grievant initiated this grievance on March 29, 1996.

ISSUES

Respondent has raised the affirmative defense of timeliness. Therefore, the first issue to be decided is whether the grievance was timely filed pursuant to the grievance procedure set forth in W. Va. Code §§ 29-6A-1, et seq. If it was, the second issue iswhether Grievant has proven by a preponderance of the evidence that he was entitled to a merit increase in 1994 and/or 1995 over Johnny Hensley and Charles Roberts. (See footnote 1)

DISCUSSION

Respondent must establish its timeliness defense by a preponderance of the evidence. Lynch v. W. Va. Dept. of Transp., Docket No. 97-DOH-060 (July 16, 1997); Ray v. Cabell County Bd. of Educ., Docket No. 96-06-343 (Feb. 21, 1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996). As an untimely filing will defeat a grievance, it is necessary to resolve the timeliness issue before addressing the merits of the grievance.

W. Va. Code § 29-6A-4(a) provides:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

It is clear from the evidence that the grievance is untimely with respect to the September 1995 merit raises. Grievant testified he inquired of the Commissioner some time after the increases were awarded why he did not receive one. The Commissioner told Grievant he would look into it, but did not get back with Grievant on that matter. Thus, it is clear Grievant was aware of the “event” in or about September 1995, but did not file until March 29, 1996. Grievant did not offer any excuse why he delayed filing a grievance over the 1995 merit increases, nor did he allege Respondent in any way attempted to discourage or prevent him from doing so. Therefore, Grievant's claim with respect to the 1995 merit increases must fail.

Respondent has failed to meet its burden of proof with respect to the February 1996 merit increases. There is simply no evidence establishing whether those increases were made known to all of the employees when they were given, or when Grievant eventually found out about them. Clearly, he did find out about Mr. Hensley and Mr. Roberts receivingmerit raises in 1996, prompting this grievance, but Respondent has failed to establish that Grievant knew of this event more than ten days prior to March 29, 1996. (See footnote 2)

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

In accordance with the rules of the West Virginia Division of Personnel, salary advancements must be based on merit as indicated by performance evaluations and other recorded measures of performance, such as quantity of work, quality of work, and attendance. W. Va. Div. of Personnel Admin. Rules, 143 C.S.R. 1 § 5.08(a) (1995). See King v. W. Va. Dept. of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). However, 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-185 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Services, Docket No. 89-RS-051 (May 16, 1989).

It is undisputed that in February 1996, Johnny Hensley and Charles Roberts, both Equipment Operators in ABCC's Warehouse, received 5% merit increases. Theirimmediate supervisor, Mr. Linville, was not involved in the granting of these merit increases. Mr. Ron Moats, Deputy Commissioner, recommended these two employees for the 5% merit increases, based upon their

initiative, cooperation, and willingness to perform duties outside of their classification, which resulted in considerable savings to the ABCC and the State. Mr. Moats admitted that he did not review performance evaluations when he recommended these two individuals for merit increases, but merely wished to acknowledge and reward them for their exemplary work.

No evidence was presented regarding the method by which merit increases are given at ABCC. No evidence was presented that there was any limitation on the number or amount of merit increases which could be given at any particular time. The evidence presented established that Mr. Hensley and Mr. Roberts, who both received scores of 9.78 on their 1995 performance evaluations, received merit increases in February 1996, and Grievant, who received a score of 10 on his 1995 evaluation, did not. The evidence also establishes that Mr. Hensley and Mr. Roberts willingly performed valuable work outside their job classification, without additional compensation, which benefited the ABCC and the State greatly. Grievant did not perform such additional work. Thus, while Grievant clearly was considered an excellent employee as evidenced by his rating of “10", the other individuals willingly performed valuable additional duties without compensation.

It is clear performance evaluations were not considered by Mr. Moats in awarding the merit increases. However, there were other recorded measures of performance by which Mr. Hensley and Mr. Roberts were evaluated for purposes of awarding them merit increases. There was evidence presented that those two gentlemen were assigned various tasks outside of their regular job duties in the Warehouse. There was alsotestimony that the savings benefit from their performance was calculated to establish just how much these two employees were saving the ABCC. This type of information could be viewed as “other recorded measures of performance, such as quantity of work, quality of work. . . “, etc.

Consequently, while Grievant has proven that Respondent did not strictly adhere to the Division of Personnel Rules governing salary advancements because it did not consider performance evaluations, the relief available to Grievant is not so clear. Once a violation of a rule or regulation is found, it is necessary to determine an appropriate remedy. Grievant must show that he is more entitled to a merit raise than another employee who received a raise in order to prevail. Tallman v. W. Va. Div. of Highways, Docket No. 91-DOH-162 (Jan. 31, 1992). Unfortunately, Grievant has not met that burden. Grievant has failed to prove by a preponderance of the evidence that, even if 1995 performance evaluations had been considered by Mr. Moats, he would necessarily have received a

merit increase. While performance evaluations are a factor to be considered, the Division of Personnel Rules make it clear that they are not the only factor to be considered.

Grievant relies on this Grievance Board's decision in Roberts v. W. Va. Dept. of Admin., Docket No. 94-DOP-182 (Dec. 1, 1994), rev'd Cir. Ct. of Kanawha Co., Civil Action No. 95-AA-9 (Feb. 6, 1996), to support his argument that he should be awarded a merit increase as relief for Respondent's alleged error. In Roberts, the Administrative Law Judge found the evaluator used factors “not contemplated” by DOP § 5.08, such as “rater bias”, salary equity, seniority, and attendance, which were not part of the employees' performance evaluations, in determining their raises. The ALJ found that use of thesefactors was arbitrary and capricious, and not supported by the language of Section 5.08, and thus the process of determining merit raises was flawed. However, the ALJ found the grievant would not have been eligible for a merit increase based solely on her performance evaluation score, and thus denied her requested relief. (See footnote 3)

The Circuit Court of Kanawha County reversed the ALJ's decision and ordered grievant be awarded the merit raise at issue. While I find Roberts instructional, it is unclear from the Circuit Court's Order what portion of that lengthy decision it disagrees with, or on what basis it determined the grievant was entitled to the merit raise. Without clearer analysis, I am reluctant to make a blanket determination that a flaw in the merit increase process necessarily results in a merit raise for the Grievant. Hudkins, et al., v. W. .Va. Dept. of Transp., Docket No. 96-DOH-403 (Feb. 14, 1997).

While it is true that performance evaluations were not used to determine merit increases, this is not a case where the factors used to determine the raises were inherently arbitrary and capricious. (Cf., e.g., King, et al., v. W. Va. Dept. of Transp., Docket No. 94- DOH-340 (Mar. 1, 1995), where it was held that because the underlying factors used to establish merit increases were arbitrary and capricious, the grievants were entitled to receive merit raises as relief.) In this case, Grievant has failed to prove that, had performance evaluations been considered, he would have received a merit raise, especially in light of the fact that Mr. Moats' sole intention was to reward Mr. Hensley and Mr. Roberts for performance beyond the call of duty. Grievant simply has not shown thathe, also, performed duties outside of his classification, resulting in savings to the agency, which would warrant an increase in this instance.

CONCLUSIONS OF LAW

1. In a non-disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Tucci v. W. Va. Dept. of Transp., 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. "All salary advancements shall be based on merit as evidenced by performance evaluations and other recorded measures of performance, e.g., quantity of work, quality of work, and attendance." 143 CSR 1.5.08(a)(1995).

4. Grievant established that Respondent violated 143 CSR 1.5.08(a) in its issuance of merit raises in February 1996, by not considering performance evaluations.

5. Grievant has failed to establish that he would more likely than not have received a merit increase in February 1996 had the 1995 performance evaluations been considered by Mr. Moats.

Accordingly, this grievance is **DENIED**.

Any party 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 StateEmployees 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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MARY JO SWARTZ

Administrative Law Judge

Dated: August 21, 1997

Footnote: 1

Grievant did not allege he should have received a merit raise over Ms. Linville or Mr. Watkins.

Footnote: 2

The Commissioner, in his level three decision denying this grievance, refers to a March 12, 1996, newspaper article

published in the Charleston Gazette, in which the merit raises to Mr. Hensley and Mr. Roberts were discussed. Respondent's counsel also refers to this article in his Proposed Findings of Fact and Conclusions of Law, to support the argument that Grievant knew of the merit increases by at least March 12, 1996. However, no documentary evidence was introduced regarding this article, nor was there any testimony regarding the article in the level two transcript. Consequently, I cannot accept these unsworn and unsupported assertions as evidence in this case.

Footnote: 3

DOP amended Section 5.08 in response to the Roberts decision, to illustrate more clearly what types of other recorded measures of performance may be considered when awarding salary advancements.