JOHNNY L. RATLIFF,

Grievant,

v. DOCKET NO. 96-DOH-004

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Johnny Ratliff, 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 to receive "an increase in wages effective November 15, 1994." This grievance was denied at Levels I, II, and III. At the Level IV hearing, the parties supplemented the record developed below. 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 1) **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 Heaters maintenance facility in Braxton County.

2. 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 area would receive increases. Three raises were to be awarded in Grievant's area.

3. The November 1994 increases were based on the 1993 evaluations and other

guidelines established by DOH and the Division of Personnel("DOP").

4. Grievant's supervisor recommended four employees for the November 1994 increase. They were Gary Gillispie, Steve Hughes, Junior Self, and Grievant.

5. The three employees who received the increases were Gary Gillispie, Steve Hughes, and Terry "Mike" Chapman, Grievant's supervisor. The final decisions on these merit raises were made by Frank Belknap, the County Supervisor.

6. Grievant's hire date is October 2, 1979, and he makes $8.69 an hour. Grievant's 1993 evaluation rated him overall as "meets or exceeds expectations." Heexceeded expectations in seven areas and was rated as satisfactory in the eighth. Grievant received a merit increase in February 1994. **(See footnote 2)**

7. Mr. Hughes is an Equipment Operator II, and his hire date is October 27, 1989. He received $8.35 an hour prior to the raise, and $8.56 after the raise. His evaluation rated him as exceeds expectations in six categories and satisfactory in the remaining two. Mr. Hughes had improved significantly in the last two years and management wished to reward this improvement. He also received a merit increase in February 1994.

8. Mr. Gillispie is an Equipment Operator II, and his hire date is June 2, 1978. He received $8.79 per hour before the merit increase and $9.01 after the raise. He was rated as exceeds expectations in six categories and satisfactory in the remaining two. He had not received a merit increase since 1985.

9. Mr. Chapman is the Crew Leader at Heaters, and as such he was evaluated by Mr. Belknap, his direct supervisor. He received one exceeds expectations and eight satisfactories on his evaluation. He was paid $9.89 an hour prior to the November 1994 increase and $10.01 after the increase. He had not received a merit increase since 1991.

10. Mr. Belknap, stated that Mr. Chapman rated his employees "too high", and this fact had been discussed with him. The closeness in the ratings of all Mr. Chapman's employees made it difficult to differentiate between employees and to select individuals for merit raises. 11. Other individuals who had the same evaluation as Grievant did not receive raises. At least one individual, who did not receive a merit increase, had a higher evaluation than Grievant.

12. If there had been an opportunity to award another merit increase at Heaters, Mr.

Belknap would have awarded it to Gale Stalnaker. Mr. Stalnaker has been employed by DOH since October 16, 1979, and his rate of pay was $8.89. (See footnote 3) He frequently functions as the Crew Leader in Mr. Chapman's absence, and his evaluation was the same as Grievant's. Level III Trans. at 41-47.

Discussion

Both DOH and DOP have written guidelines to be considered when awarding merit increases. DOH is required by DOP's Administrative Rules to base all such salary advances on "performance evaluations and other recorded measures of performance." 183 CSR 1.5.08(a)(1993). (See footnote 4) DOH rules require merit increases to be based on "meritorious performance while taking into consideration such factors as equitable pay relationships and length of service." DOH Admin. Operating Procedures Vol. IX, Ch. 15. It is clear that DOH took into consideration both its own regulations and those of DOP in awarding the three merit raises. The combining of these two sets of rules and guidelines is at times a difficult fit, especially when there is a limited number of raises to be awarded. It must be notedGrievant did not argue DOP's regulations were not followed, he only argued DOH did not follow its own rules on merit raises.

The testimony also reveals the problems that are created when employees are rated so highly and so similarly. Obviously, many employees at Heaters had good to excellent evaluation and could be deserving of a merit increase. Unfortunately, there were only three increases to be given, and some management decisions had to be made about who should receive them utilizing the evaluations and the guidelines.

Although Grievant could have received a merit increase, he has not met his burden of proof and demonstrated that he was more deserving than some of the other individuals who also did not receive increases. Even if the performance evaluations were the only thing taken into consideration, Grievant still has not proven he would have been chosen for the increase. The testimony was clear that several employees who had evaluations the same as Grievant's and one employee, who had a better evaluation, did not receive a merit increase. Also, Mr. Belknap testified he would have awarded the raise to Mr. Stalnaker, and Mr. Stalnaker had the same evaluation as Grievant. Roberts v. Dept. of Admin./Div. of Personnel, Docket No. 94-

DOP-182 at 18 (Dec. 1, 1994). (See footnote 5) **Additionally, the reasons given for the individuals selected to receive increases fell within the established guidelines. The fact that Mr. Chapman's evaluations were lower than some other employees is not dispositive if the issue. He was rated by another evaluator, who testified that the ratings given to the other employees were too high. The undersigned will take administrative notice that the evaluation of employees, even on the same form, will vary somewhat from rater to rater as the assessment of employees' performance is not an exact science. Further, Mr. Chapman had not received a merit increase since 1991.**

Mr. Gillispie's evaluation was very similar to Grievant's, he had greater seniority than Grievant, and he had not received a merit increase since 1985. As with Mr. Gillispie, Mr. Hughes' evaluation was almost the same, and he made less money than Grievant, even after he received this merit increase. Mr. Hughes' supervisors also indicated they had seen a great improvement in his performance, and they wanted to reward this behavior.

As has been frequently stated by this Grievance Board, "[a]n 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 actions violated any policy or was arbitrary or capricious. No one disputes Grievant is a good employee, but unfortunately for Grievant, there were limited funds available.

The above-discussion will be supplemented by the following Conclusion 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. Grievant has failed to meet his burden of proof and demonstrate that he was more deserving of a November 1994 merit increase than others who did not receive one. Roberts v. Dept. of Admin./Div. of Personnel, Docket No. 94-DOP-182 at 18 (Dec. 1, 1994).

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.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: January 31, 1997

Footnote: 1

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 caseof 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: 2

Grievant testified he also received a merit increase in 1995, but this testimony was not considered relevant to this grievance.

Footnote: 3

No testimony was elicited to indicate when Mr. Stalnaker last received a raise.

Footnote: 4

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.

Footnote: 5

In January 1997, this Grievance Board received notice that Roberts had been reversed. This Order only states the Administrative Law Judge was clearly wrong and does not state any findings of fact, conclusions of law, or any other grounds for reversal. Thus, it is unclear which portion of Roberts is in error. Given this status of affairs, the Undersigned has assumed (an always dangerous proposition) that the error the court found in Roberts did not relate to the facts that numerically, Ms. Roberts could not have received a merit increase because of the number of raises that could be awarded and her score on her performance evaluation, but the reason for the reversal of this Decision was based of her supervisor's flawed reviewing process, as spoken to in detail in Roberts.