RANDALL PARSONS and

PHILLIP CLEMMER,

Grievants,

v. **Docket No. 97-DOH-289**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

This is a grievance by Randall Parsons and Phillip Clemmer (Grievants) submitted pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that their employer, the West Virginia Department of Transportation, Division of Highways (DOH), engaged in discrimination prohibited by W. Va. Code § 29-6A-2(d) when it failed to award them merit raises for Fiscal Year (FY) 1996-97. Grievants initiated separate grievances on January 10, 1997. Each grievance was denied at Levels I and II, and Grievants appealed to Level III where a joint hearing was conducted on March 18, 1997. On June 2, 1997, DOH Commissioner Fred VanKirk denied the grievances at Level III. Grievants jointly appealed to Level IV, and a hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on August 12, 1997. Both parties filed post-hearing arguments, and this matter became mature for decision on September 16, 1997, upon receipt of Respondent's submission. The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible evidence contained in the transcript and exhibits from Level III, as well as the testimony and exhibits presented at Level IV.

FINDINGS OF FACT

1. Grievants Randall Parsons and Phillip Clemmer are employed by Respondent West Virginia Division of Highways as Transportation Workers IV in the Repair Group of the Bridge Organization in

District One Headquarters.

2. Steve Campbell, Assistant District Engineer-Bridge, supervises approximately 35 employees in the Bridge Organization. That organization is divided into three groups: repair, inspection, and office staff.

3. David Adams, Construction Superintendent, supervises the Repair Group.

4. The Repair Group consists of three repair crews, each headed by a Crew Leader who reports to Mr. Adams. At present, the Crew Leaders in the Repair Group are Ronnie Drake, Jerry Noble, and Ronald Raynes.

5. On July 1, 1996, Division of Highways Commissioner Fred VanKirk issued the "DOT Merit Pay Plan" (Plan) for FY 96-97. J Ex 1 at L IV. The Plan limited merit pay raises to a certain number of employees in each organization, to be distributed quarterly during the fiscal year. The Plan further specified that "performance evaluations for calendar year 1995 are to be used as the primary basis for recommendations." J Ex 1 at L IV. 6. In accordance with the Plan, Mr. Campbell determined that five merit pay raises would be available for personnel assigned to the Repair Group for FY 96-97. There were approximately 16 employees then assigned to the Repair Group.

7. Mr. Campbell awarded a merit raise in the first quarter of FY 96-97 to Ronnie Drake, a Transportation Worker IV. Mr. Drake was rated "Exceeds Expectations" in 7 categories, "Satisfactory" in 2 categories and "Needs Improvement" in 0 categories on his most recent employee evaluation. See J Ex 1 at L III.

8. Grievants Parsons and Clemmer were likewise rated "Exceeds Expectations" in 7 categories, "Satisfactory" in 1 category, and "Needs Improvement" in 0 categories on their most recent employee evaluations. See J Ex 1 at L III. Grievants were not rated in one category applicable only to supervisors.

9. Mr. Campbell considered Grievants and Mr. Drake to have substantially equal evaluations. In deciding to award a merit raise to Mr. Drake, Mr. Campbell considered Mr. Drake's seniority, which is greater than either of Grievants. Grievant Clemmer has greater seniority than Grievant Parsons.

10. David Adams, previously a Crew Leader in the Repair Group, was promoted to Construction Superintendent over the Repair Group in August 1996. Mr. Campbell awarded Mr. Adams a 5% merit raise in the second quarter of FY 96-97. Mr. Adams was rated "Exceeds Expectations" in 5 categories, "Satisfactory" in 4 categories, and "Needs Improvement" in 0

categories on his most recent employee evaluation. See J Ex 1 at L III.

11. Charles Hill, a Transportation Worker IV in the Repair Group, was promoted to Crew Leader in late 1996. He subsequently declined the position, returning to his previous classification. He was awarded a 2.5% merit raise on January 1, 1997. LII HTat 10. Mr. Hill was rated "Exceeds Expectations" in 7 categories, "Satisfactory" in 1 category, and "Needs Improvement" in 0 categories on his most recent employee evaluation. See J Ex 1 at L III.

12. Mr. Campbell also awarded 5% merit raises to Crew Leaders Ronald Raynes and Jerry Noble, effective December 16, 1996.

13. Mr. Raynes' most recent employee evaluation contained an "Exceeds Expectations" rating in 1 category, a "Satisfactory" rating in 6 categories, and a "Needs Improvement" rating in 2 categories. See J Ex 1 at L III. Mr. Raynes' evaluation was the lowest of the 16 employees in the Repair Group. Mr. Noble's most recent employee evaluation contained an "Exceeds Expectations" rating in 6 categories, a "Satisfactory" rating in 3 categories, and a "Needs Improvement" rating in 0 categories. See J Ex 1 at L III.

14. Kenneth Workman was the immediate supervisor who evaluated Mr. Adams, Mr. Raynes and Mr. Noble. Mr. Campbell was the Reviewing Authority for each of the employee evaluations discussed in Findings of Fact Numbers 7, 8, 10, 11, and 13, above. See J Ex 1 at L III.

15. In awarding merit raises to Mr. Raynes and Mr. Noble, rather than Grievants, Mr. Campbell considered the pay differential between the Crew Leaders and their subordinates, in an effort to assure that Crew Leaders were paid more than their subordinates. This absence of a pay differential resulted, in part, from the merit raise awarded to Mr. Drake earlier in the same FY. Mr. Campbell further considered the impact of a perceived animosity between Mr. Raynes and his immediate supervisor, and hispersonal knowledge of Mr. Raynes' performance, rather than the performance rating documented on Mr. Raynes' annual evaluation.

16. Commissioner VanKirk's instructions for the subsequent Fiscal Year (97-98) specified that any employee who receives at least one "needs improvement" rating on their most recent annual evaluation is ineligible for a merit increase. See G Ex A at L IV. This restriction was not included in the FY 96-97 Plan. Cf. J Ex 1 at L IV and G Ex A at L IV.

17. Grievants each received 2.5% merit increases in FY 97-98, effective August 1, 1997.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their 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 (DOP), 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. Rule, 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). In accordance with the Plan, merit raises for FY 96-97 were to be based primarily on employee evaluations for 1995, the most recent calendar year. This guidance is consistent with DOP's regulations governing salary advancements. It is well established that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Bailey v. W. Va. Dept. of Transp., Div. of Highways, Docket No. 94-DOH-389 (Dec. 20, 1994).

Grievants established by a preponderance of the evidence that their most recent employee evaluations were superior to the most recent evaluation of Mr. Raynes. (See footnote 1) Due to financial constraints, only 5 merit raises were available to be distributed among the 16 employees in the Repair Group. The written guidance from DOH and DOP indicated that evaluations would be the primary consideration in awarding merit raises. Nonetheless, Mr. Campbell, in what was apparently a good faith effort to enhance the morale of his Crew Leaders, decided to disregard Mr. Raynes' lower evaluation as the product of "personal animosity" between him and his immediate supervisor, thereby separating Crew Leaders from the pool of employees competing for these limited raises. As a result of this decision, 100% of the Crew Leaders, including Mr. Raynes, received raises based upon considerations other than documented performance evaluations, or other recorded measures of performance, in direct violation of DOP and DOH policy. See King, supra. Grievants did not

establish that their evaluations were substantially superior to that of Mr. Noble. Mr. Noble exceeded expectations in 6 categories while maintaining satisfactory performance in all other categories. In the absence of evidence that DOH employs a strictly mathematical approach when comparing employee evaluations, the undersigned finds that Grievants and Mr. Noble had substantially equal evaluations. Thus, Grievants only established that one merit raise was issued in the Repair Group in violation of established policies.

Grievants also argued that Mr. Campbell's refusal to award them a merit raise constituted discrimination prohibited under W. Va. Code § 29-6A-2(d). Discrimination is defined therein 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(d). This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 2) of discrimination under § 29-6A-2(d), must demonstrate the following:

> (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) has/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.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992). Once a grievant establishes a prima facie case of discrimination, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH- 435 (Feb. 28, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dept. of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Applying this prima facie analysis to the facts presented here, Grievants have demonstrated that they were similarly situated to other employees in the Repair Group who were eligible for merit raises. However, another employee with a patently inferior performance evaluation received a 5% merit raise, and they did not. Thus, the undersigned administrative law judge finds that Grievants have shown they were treated differently from a similarly situated co-worker (See footnote 3) to their detriment, establishing a prima facie case of discrimination under W. Va. Code § 29-6A-2(d).

In response to this prima facie case, DOH provided an explanation from Grievants' second-level supervisor concerning why he considered other factors, such as the relative pay differential between the Crew Leaders in the Repair Group and their subordinates, and perceived animosity against Mr. Raynes by his immediate supervisor, in deciding not toaward merit raises to the employees with the best evaluations. This explanation was simply not persuasive. Any anomalies regarding the employees' respective ratings should have been corrected before the evaluations were approved by Mr. Campbell. See Morris v. W. Va. Dept. of Transp., Docket No. 97-DOH-167 (Aug. 22, 1997). However, Mr. Campbell made no effort to insure that Mr. Raynes' performance was more accurately documented. Further, although the factors Mr. Campbell considered in reaching his decision on merit raises are arguably job-related, those particular considerations were impermissible under current DOP and DOH policies governing merit raises. See King, supra. In these circum stances, DOH failed to establish a job-related, non-discriminatory reason for the decision to award a merit raise to another employee rather than Grievants. Therefore, Grievants established that they were subjected to impermissible discrimination by a preponderance of the evidence. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342, 352 (W. Va. 1983); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91- PEDTA-225 (Dec. 23, 1991).

The evidence is uncontradicted that there were a limited number of merit raises available to be awarded to the employees in the Repair Group. Further, when all factors were considered equal, as between Grievants and Mr. Drake, Mr. Campbell considered the relative seniority of the employees in determining which employee received a merit raise. Neither party contended that such consideration was improper as a tie-breaking mechanism. Therefore, a preponderance of the evidence indicates that the merit raise awarded to Mr. Raynes should have been awarded to the most senior of Grievants, Grievant Clemmer. Accordingly, Grievant Clemmer is entitled to a 5% pay raise,retroactive

to the date Mr. Raynes began receiving his merit raise in FY 96-97. Thus, Grievant Clemmer shall be awarded back pay, with interest, to be offset to the extent Grievant Clemmer received a 2.5% merit raise on August 1, 1997. (See footnote 4)

In addition to the foregoing, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievants have the burden of proving each element of their 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.

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- 185 (Dec. 30, 1991).

3. 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. Rule, 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). 4. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Bailey v. W. Va. Dept. of Transp., Div. of Highways, Docket No. 94-DOH-389 (Dec. 20, 1994).

5. In order to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), a grievant must demonstrate the following:

(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) has/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.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

6. Grievants established a prima facie case of discrimination under W. Va. Code § 29-6A-2(d) in regard to the award of merit raises to employees within the Repair Group for FY 96-97. Respondent failed to establish legitimate non-discriminatory, job-related reasons for its actions. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Ball v. Mason County Bd. of Educ., Docket No. 96-26-135 (Aug. 30, 1996); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). 7. Grievants demonstrated by a preponderance of the evidence that DOH violated written guidance in the "DOT Merit Pay Plan" issued by DOH Commissioner Fred VanKirk on July 1, 1996, and DOP's Administrative Rule, 143 C.S.R. 1 § 5.08(a) (1995), in regard to its issuance of merit raises within the Repair Group for FY 96-97. See King, supra.

Accordingly, this grievance is **GRANTED, IN PART**. Respondent West Virginia Division of Highways is hereby **ORDERED** to increase Grievant Clemmer's salary by 5%, retroactive to the date when a 5% merit raise was implemented for Ronald Raynes in FY 96-97. Consistent with this Decision, Grievant Clemmer shall receive back pay, with interest, to be offset by the increased salary from a 2.5% merit raise which Grievant Clemmer began receiving on August 1, 1997. All other relief 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 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: October 30, 1997

Footnote: 1

Mr. VanKirk's merit raise policy for FY 97-98 explicitly states that employees with a "Needs Improvement" rating in any category on their most recent employee evaluation are ineligible for merit raises. Obviously, this policy was not in effect at the time Grievants were passed over for merit raises. Nonetheless, the rating system employed by DOH is straightforward, and an evaluation with two categories rated "Needs Improvement" is patently inferior to Grievants' evaluations with no categories rated less than "Satisfactory."

Footnote: 2

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).

Footnote: 3

Although Crew Leaders and Transportation Workers are in different classifications, a preponderance of the evidence indicates that all 16 employees in the Repair Group were "pooled" for purposes of competing for the 5 merit raises available in FY 96-97.

Footnote: 4

Under DOH policy, Grievant Clemmer would not have been eligible for a 2.5% merit raise in FY 97-98, had he received the 5% merit raise to which he was entitled in FY 96-97.