RONALD ALLEN, et al.

v. Docket No. 97-DOH-199

W. VA. DEPT. OF TRANSPORTATION/DIVISION OF HIGHWAYS

D E C I S I O N

Grievants, Ronald Allen, Michael Todd Bragg, Stephen Rouss, Clarence Cole, Brice Sparkman, Edwin Faircloth, Paul Miller, Virgil Evans, Darrell Parsons, and William Smallwood, employed by the Division of Highways (Respondent) in Berkeley County, filed individual grievances at level one in November 1995, complaining that they were equally deserving of merit raises given to coworkers. The grievances were denied at levels one and two. The complaints were consolidated at level three, and, following an evidentiary hearing, Mr. Parsons and Mr. Evans prevailed. The remaining Grievants advanced their complaint to level four on April 23, 1997. Following a hearing held on August 5, 1997, the grievance became mature for decision with the simultaneous submission of proposed findings of fact and conclusions of law by the parties on September 8, 1997.

The following findings of fact are made based upon the record in its entirety.

1. Grievants are employed by the Department of Transportation, Division of Highways (Respondent), in Berkeley County.

2. Six merit pay increases were awarded by the Division of Highways in Berkeley County, effective October 16, 1995.

3. Respondent's policy requires that merit raises be awarded primarily on the basis of meritorious performance while taking into consideration such factors as equitable pay relationships and length of service.

4. Division of Personnel Regulation, Section 5.08 (1995), provides that “all salaryadvancements shall be based on merit as evidenced by performance evaluations and other recorded measures of performance . . . .”

5. The employee's most recent evaluation were the basis for determining meritorious performance.

6. Grievant Bragg's most recent evaluation was equal to Employee F, and Mr. Bragg has several years more seniority than Employee F. (See footnote 1)

7. The most recent evaluations of Grievants Rouss, Cole, and Sparkman were superior to Employee F, and they each have more seniority than Employee F.

8. Grievants Allen, Faircloth, and Miller received performance evaluations superior to that of Employees C and F, and equal to Employees A and E. They also have accrued more seniority.

9. Grievant Smallwood's most recent evaluation rated him higher than Employees C and F, and equal to those of Employees A and E. He has more seniority than Employees A, E, and F.

10. Grievants' rate of pay, effective October 16, 1995, was as follows: Smallwood - Unknown; Allen, Miller, and Cole - $8.69; Faircloth - $8.52; Rouss - $8.43; Sparkman - $8.72; and Bragg - $8.24.

11. Those employees cited by Grievants who received merit raises effective October 16, 1995, were receiving the following compensation: Employee A - $8.61; Employee C - $8.34; Employee E - $8.92; and Employee F - $7.77. (See footnote 2) 12. As a result of the level three decision, the merit raises awarded to Employees C and F were determined not to have been awarded in compliance with directives, were rescinded, and reassigned to Grievants Evans and Parsons.

Discussion

___Grievants do not allege discrimination or favoritism, but argue that Respondent violated its own policy when awarding the October 1995, raises which were not based on performance evaluations, and when seniority was not uniformly applied to all individuals as a tiebreaker. Grievants assert that they each were more deserving than at least one individual who received a merit increase. Respondent argues that Grievants have failed to prove that the merit raises were awarded in a manner which was unreasonable, arbitrary or capricious, or contrary to law or properlyestablished policies and directives.

While Grievants' arguments regarding their individual circumstances are valid, they support a ruling only in favor of Grievants Allen and Faircloth. Grievants Rouss, Cole and Sparkman compare

themselves only to Employee F. Since the merit raise awarded to Employee F was rescinded as a result of the level three decision, these Grievants no longer present a claim upon which relief may be granted. Grievant Smallwood was absent from work virtually the entire year of 1994, and Grievant Bragg was also absent for a period of nearly a year, including most of 1994. Although Respondent asserted that the Grievants were not penalized for lack of a 1994 evaluation, it does not seem unreasonable that employees who had been absent for such prolonged periods of time during the rating period would not receive merit raises. (See footnote 3)

Grievants Allen, Faircloth, and Miller claim similar or better evaluations and greater seniority than Employees A, C, E, and F. Because Employees C and F are no longer under consideration, it is only necessary to note that Grievants Allen and Miller had identical evaluations, and more seniority, than Employees A and E. Keeping Respondent's consideration of pay equity in mind, Employee E earns more than all four of these Grievants, and Employee A earns more than Grievant Faircloth. Using Respondent's criteria, Grievant Allen, the most senior of these four employees, and Grievant Faircloth, who earns the lowest wages, would appear to have been the proper employees to have received the merit raises awarded to Employees A and E. (See footnote 4)

In addition to the foregoing findings of fact and discussion it is appropriate to make thefollowing conclusions of law.

Conclusions of Law

1. In nondisciplinary matters Grievants have the burden of proving their case by a preponderance of the evidence. Tucci v. W. Va. DOT/DOH, Docket No. 94-DOH-592 (Feb. 28, 1995), and Grievants seeking merit increases must prove they are more entitled to the increase than another employee who received such an increase. Tallman v. W. Va. Division of Highways, Docket No. 91-DOH-162 (Jan. 31, 1992).

2. An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary or capricious, contrary to law, or properly established policies or directives. Terry v. W. Va. DOT/DOH, Docket No. 91-DOH-186 (Dec. 30, 1991).

3. W. Va. Division of Personnel Rule 5.08 (1995), provides that salary advances shall be based on merit as evidenced by performance evaluations and other recorded measures of performance, such as quality and quantity of work and attendance. Roberts v. W. Va. Dept. of Admin./Div. of

Personnel, Docket No. 94-DOP-182 (Dec. 2, 1994).

4. W. Va. Division of Highways awards merit raises on the basis of performance evaluations, with consideration given to length of service and equitable pay relationships.

5. Grievants Allen and Faircloth have proven that when consideration is given to performance evaluations, length of service and equitable pay relationships, they were more entitled to merit raises than Employees A and E.

Accordingly, the grievance is GRANTED regarding Grievants Allen and Faircloth, and DENIED regarding all other Grievants. Any party may appeal this decision to the circuit court of the county in which the grievance occurred, 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.

DATE: October 31, 1997 _____

SUE KELLER

Senior Administrative Law Judge

Footnote: 1

Employees who received merit raises were referred to only by letter designations in the record.

Footnote: 2

The following chart sets out the foregoing employee information in what may be a more easily digestable format:

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Footnote: 3

It is further noted that Grievant Smallwood was subject to formal disciplinary action in November 1993.

Footnote: 4

Respondent asserts that it would be improper to grant more than the six merit raises allocated to Berkeley County, and Grievants do not offer any argument to the contrary.