RAY BYRL WOODS, JR.
Grievant,

v. **DOCKET NO. 97-HHR-248**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BOARD OF REVIEW,
Respondent.

DECISION

On August 7, 1996, Ray Byrl Woods, Jr. (Grievant) filed this grievance stating:

> As the Department of Health and Human Resources' only African American State Hearing Officer (Appeals Examiner), I recently discovered that I receive the lowest wages of any of my Caucasian counterparts. It has also come to my attention that a merit increase was awarded, within the last six (6) months, to a colleague despite the following facts:
>
> (1) I have accepted additional assignments, without question, to assist State Hearing Officers in other areas of the State:
>
> (2) I continue to receive excellent evaluations;
>
> (3) I have attended and participated, in at least, seventeen (17) Division of Personnel Workshops since my employment with the Office of Inspector General as a means to maintain a high degree of professionalism and finally;
>
> (4) I am the victim of disparate treatment.

As relief, Grievant seeks "[t]o be made whole in every way [specifically] at least, a ten (10%) merit increase and backpay to the date they were awarded within the Board of Review."

The grievance was denied at all lower levels. At Level IV, the parties agreed to submit the matter for decision based upon the record developed below. The case became mature for decision on August 6, 1997, the deadline for submission of Proposed Findings of Fact and Conclusions of Law.

ISSUES

1. Whether Respondent violated some law, regulation or policy by misinterpreting and/or misapplying merit increase procedures; and

2. Whether Respondent violated some law, regulation or policy in setting Grievant's salary?

FINDINGS OF FACT

1. Grievant has been employed by the State for over fourteen years, and has been a Hearing Examiner for Respondent Board of Review for over eight years, since December 1, 1988. (Tr. p. 3.)

2. Grievant is one of five Hearing Examiners, all of whom have the same duties. The Hearing Examiners (HEs) schedule and preside over hearings pertaining to approximately 24 programs, and render decisions regarding whether those programs were properly implemented. Grievant is the only African-American HE; the other four HEs are Caucasian. (Tr. pp. 3, 11.)

3. Grievant has the lowest salary of the five HEs. As of February 5, 1996, Grievant's salary was identical to that of one other HE, and $480, $3,684, $4,836, and $9,156 less than the other four HEs, respectively. As of August 6, 1996, Grievant's salary was $480, $1,188, $3,684, $6,264, and $9,156 less than the other HEs. When one HE was replaced on December 1, 1996, Grievant's salary was $3,672 less than the replacement employee's salary. (Gr. Ex. 4.)[1]

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[1] Respondent objected to some of the information on this Exhibit during the Level III hearing, on the ground that the salary figures had not been verified. As Respondent's objection has not been raised subsequently, nor has it submitted corrected

4. Grievant is the "least tenured" of the five HEs. (Tr. p. 21.)

5. Grievant was assigned 625 cases in which hearings were requested, according to a report dated July 31, 1995[2], more than any other HE. However, other HEs actually held more hearings than Grievant, and had fewer cases withdrawn or abandoned. (Gr. Ex. 2; Tr. pp. 4, 17.)

6. Grievant has taken on the work of other HEs, in addition to the work normally assigned to him, in order to help with backlogs. Grievant has never objected to taking on additional assignments, and works well with other HEs he is assisting. (Tr. p. 5.)

7. Grievant has received overall ratings of "Excellent" (the highest possible rating) in his three annual performance evaluations covering the period from January 1, 1993 to December 31, 1995. On each evaluation form, he received numerical ratings of 4 (or Very Good) in three of the seven assessed criteria, and ratings of 5 (or Excellent) in the remaining four criteria. The possible numerical ratings range from 1 to 5. (Gr. Ex. 5.)

8. Grievant has participated in approximately seventeen different workshops since he began employment with the Board of Review, and has not missed any mandatory training. (Tr. p. 9-10; Gr. Ex. 1.)

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information, it is assumed that the information is accurate.

[2] It is not clear what time period is covered, but it is assumed that the time period covered is consistent for all workloads for all HEs, and the Exhibit is therefore deemed relevant for comparison of HE workloads.

9. Dennis Rhodes is the Chairman of Respondent's Board of Review, and has held that position since 1988. He supervises the five HEs, including Grievant. Mr. Rhodes made the decisions regarding who would receive the two merit increases at issue here. (Tr. p. 13.)

10. Mr. Rhodes was instructed to submit two employees' names for merit increases. The employees were selected based upon criteria decided upon by the Office of Inspector General Team (OIG Team or Team), and memorialized in the Merit Increase Worksheet submitted as Grievant's Exhibit 3. The Team consisted of Mr. Rhodes, the Inspector General, the Director of Quality Control, the Director of Medicaid Fraud, the Director of Fraud Management Investigations, and the Budget Analyst and Attorney for the OIG. (Tr. p. 14; Agency Ex. 1.)

11. The Merit Increase Worksheet, and the criteria assessed thereby, constitute a policy or procedure of the OIG.

12. Mr. Rhodes rated all five HEs, using the form and criteria mandated by the OIG Team. The criteria measured for purposes of the merit increase were different, and somewhat differently measured, than those criteria measured for purposes of annual evaluations. Although both the Merit Increase Worksheet and the Performance Evaluation form applied a 1 through 5 point system, with 5 being "Excellent," only whole numbers could be used on evaluations, while half-points could be assigned for merit increases. Also, "a higher standard [was used for] determining a point assessment value" for the criteria on the merit increase

worksheet than for those on the evaluation form. (Tr. pp. 15-17, 20-22; Gr. Ex. 2; and Admin. Ex. 1.)

13. In the first merit increase criterion, "Exceeds expectations in both quality and quantity of work," Grievant and three other HEs were given 4 points, while the other HE was given 4.5 points. The additional half-point was given to a HE who processed more hearings and/or wrote more decisions than other HEs. Numbers of hearings requested was not considered in this criteria. (Admin. Ex. 1; Tr. p. 17.)

14. All HEs were given the same points in the second criterion, pertaining to being a "team player." (Admin. Ex. 1; Tr. p. 17.)

15. In the third criterion, "Volunteers for and/or willingly accepts additional and/or special assignments," Grievant and two other HEs were given three points, one HE was given 4.5 points, and one HE was given 5 points. While Grievant did volunteer to help other HEs who got behind on their work, he returned some of the incomplete cases later. Other HEs did not return incomplete cases. (Admin. Ex. 1; Tr. pp. 18, 26.)

16. In the fourth criterion, "Dependable regarding attendance, meeting deadlines without reminders and performing work with little supervision," Grievant was given 3.5 points, two HEs were given 4 points, and two HEs were given 5 points. Grievant asks for guidance "a little more" than some of the other HEs, and Mr. Rhodes determined that, therefore, other HEs worked with less supervision than Grievant. (Admin. Ex. 1; Tr. p. 18.)

17. In the fifth criterion, "Shows initiative (Self-starter, self-improvement, training)," Grievant was given 3.5 points while all other HEs were given 4 points. Mr. Rhodes considered Grievant's attendance at workshops in assessing this criterion. Other HEs attended the National Association of Hearing Officers (NAHO) conference, which Mr. Rhodes considered to be more important than Grievant's workshops, because it was job specific. Grievant was offered the opportunity to attend the NAHO conference, but declined. Other HEs also served on committees and teams, while Grievant did not. (Tr. pp. 12, 19-20, 23; Admin. Ex. 1.)

18. In the sixth criterion, "Has good attitude and no disciplinary actions in previous two years," Grievant was given 3 points, two HEs were given 4 points, one HE was given 4.5 points, and one HE was given 5 points. Grievant was given fewer points due to a verbal reprimand Mr. Rhodes had given him. The verbal reprimand was given about the same time as the merit increase comparisons were being made. The reprimand was intentionally not recorded or referenced in Grievant's personnel file, as the result of a deliberate decision on Mr. Rhodes' part. (Admin. Ex. 1, Tr. pp. 18-19, 31.)

19. Although other information is included on the merit increase worksheet, it was not used for selecting the two employees to be recommended for merit increases.

20. Mr. Rhodes' ratings of the HEs was based upon his personal knowledge and information in their personnel files. (Tr. pp. 22-23.)

21. As a result of Mr. Rhodes' ratings on the Merit Increase Worksheet, the five HEs received total points in the six criteria of 27.5; 25.5; 25; 23.5; and 21.5, respectively. Grievant received the lowest total points. (Admin. Ex. 1.)

22. The two HEs recommended for merit increases were those with the highest total number of points. Those two HEs received the recommended 5% merit increases. (Tr. pp. 27, 29.)

23. Annual performance evaluations and merit increase assessments are different. Performance evaluations compare the employee's performance with that required by the position, while merit raise evaluations compare the employee's performance with that of his colleagues. (Tr. pp. 28, 29.)

24. Grievant is not the only HE who did not receive a merit increase. (Tr. p. 20.)

25. Mr. Rhodes' decision on who to recommend for merit increases was not based on any racial bias. (Tr. p. 27.)

DISCUSSION

In a non-disciplinary matter, Grievant must prove his case by a preponderance of the evidence. W. Va. Code §§29-6A-1, et seq.; Tucci v. W. Va. Dept. of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995). The West Virginia Division of Personnel Administrative Rules (Rules) define "salary advancement" as "[a] discretionary advancement in salary granted in recognition of the quality of job performance." 143 C.S.R. 1, §3.1.84 (1995). The Rules establish that "[a]ll 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." Id., §5.08. The granting of 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. Hudkins v. W. Va. Dept. of Transp., Docket No. 96-DOH-403 (Feb. 14, 1997); Tallman v. W. Va. Div. of Highways, Docket No. 91-DOH-162 (Jan. 31, 1992).

Here, Respondent chose to measure performance among employees to establish their relative merit by using a merit increase worksheet to assign points for each of six criteria. There was no allegation that this choice was arbitrary, capricious, or otherwise improper. This approach does not violate any legal requirements, and it provides a reasonable framework for choosing among employees. See Tucci, supra (limiting pool of employees eligible for merit increases to those who had not received salary increases in the past year is acceptable procedure), and cases cited therein. Therefore, it is accepted as a valid method by which to assess relative merit among eligible employees.

However, Grievant argued that his ratings, and perhaps those of the other HEs, were assigned in an improper fashion. In support of his position, Grievant introduced testimony and other evidence of his exemplary performance. There is no question that Grievant's performance has been commendable and meritorious. However, the issue is one of choosing among several excellent performers. Grievant's excellent performance was simply less excellent than that of several colleagues. The basis for Mr. Rhodes' determinations on this point was explained satisfactorily, using the six criteria mandated by the OIG Team.

Notably, Grievant did not dispute the facts used to assess his performance, or that of his colleagues. He did not submit evidence that other HEs had poorer performance than his. Even Grievant's Exhibit 2 shows that, while Grievant had the most requests for hearing, other HEs actually held more hearings. This evidence is insufficient to show that Grievant's performance was better than the HEs who received merit increases.

The only questionable consideration, under these facts, is whether a verbal reprimand, not made part of an employee's written record, can be viewed as a "recorded measure of performance." Clearly, a written warning is considered a recorded measure of performance. Hall v. W. Va. Dept. of Transp., Docket No. 96-DOH-035 (Jan. 31, 1997) at 4. However, common usage of the word "recorded" in this context mandates that the information be somehow preserved for posterity, and for later assessment. See Riffle v. W. Va. Dept. of Transp., Docket No. 92-DOH-138 (Aug. 21, 1992) (uncooperativeness cannot be considered, unless it was the subject of some recorded measure of performance). Where a verbal reprimand, deliberately and intentionally not preserved for later observation, is recollected and considered, it does not constitute a "recorded measure of performance" upon which merit increase decisions may be based.[3]

Assessment of an employee's performance is obviously not an exact science. Hall, at 5. However, it is clear that Respondent must follow any procedures it establishes to conduct its management

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[3] However, no determination is made that verbal disciplinary actions can never be considered. They simply must be "recorded."

affairs. Ellis v. W. Va. Div. of Energy, Docket No. 91-ENGY-181 (Jan. 13, 1993). See also Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). Here, consideration of an unrecorded disciplinary action is not allowed by 143 C.S.R. 1, §5.08. Respondent failed to strictly adhere to established requirements regarding merit increases.

However, the relief available to Grievant must still be determined. Grievant must show that he is more entitled to a merit increase than another employee who received an increase, in order to receive a merit increase as a result of a grievance. Ratliff v. W. Va. Dept of Transp., Docket No. 96-DOH-004 (Jan. 31, 1997); Tucci; Hudkins; Tallman. It is not sufficient to show merely that there was some flaw in the merit increase process, as all flaws do not necessarily result in merit increases for grievants. Hudkins, at 6-7.

Here, even if one were to give Grievant the maximum of five points in the sixth criterion (where the assessment error occurred), Grievant had a lower total score than three other HEs. (Grievant then ties with one HE, with 23.5 total points.) Only two merit increases were awarded. While Grievant's performance was laudatory and excellent, the performance of several colleagues was even better. Thus, Grievant has not shown that, more likely than not, he would have received a merit increase but for the flaw in the merit increase process.

DISCRIMINATION:

W. Va. Code §29-6A-2(d) defines "discrimination" 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." To establish a prima facie case of discrimination, Grievant must show:

> (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.

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if she can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Here, Grievant failed to make a prima facie case under the above standard. Grievant's pay may have been lower than that of his colleagues since August of 1996. However, his salary was not significantly lower than that of other HEs. Indeed, in February 1996, his salary was identical to one other HE. Even in August 1996, his annual salary was only $480 less than another HE's. This evidence is insufficient to show that Grievant has been treated differently "in a significant particular."

Even if Grievant were deemed to have presented a prima facie case of discrimination, Respondent gave job-related reasons for the small pay differential (as well as for the merit increase decisions), including length of service, which Grievant did not

even allege were mere pretext. Grievant's racial discrimination argument consists of simply asserting that because he is African-American and the other HEs are Caucasian, the differential must be racially motivated. However, such information standing alone generally does not make a prima facie showing of discrimination. Ftnt. 1, Phillips v. W. Va. Dept. of Tax and Revenue, Docket No. 91-T-289 (Jan. 15, 1992). Such information standing alone, as here, cannot show an employer's job-related explanation, when offered, is a mere pretext. Under any analysis of the evidence presented, Grievant's discrimination claim must fail.

EQUAL PAY FOR EQUAL WORK:

The "equal pay for equal work" doctrine applicable to this grievance is embodied in W. Va. Code §29-6-10, which states, in pertinent part:

> [The Division of Personnel is authorized to promulgate rules which provide for]... a position classification plan for all positions in the classified service... based upon similarity of duties performed and responsibilities assumed, so that... the same schedule of pay may be equitably applied to all positions in the same class... Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which he is employed. The principle of equal pay for equal work in the several agencies of the state government shall be followed in the pay plan as established hereby.

This provision has been interpreted by the West Virginia Supreme Court of Appeals to not mandate identical pay for identical work. The Court determined that it does not violate the "equal pay" doctrine for employees within a classification to be paid differing amounts, so long as those amounts are within the confines of the classification's pay scale. Largent v. W. Va. Div. of Health, 192 W. Va. 239 at 244-246, 452 S.E.2d 42 (1994). "In

short, employees who are doing the same work must be placed within the same classification, but within that classification there may be pay differences if those differences are based on ... specifically identifiable criteria that are reasonable and that advance the interests of the employer." Id. at 246.

Here, Grievant's only evidence of a violation of the "equal pay for equal work" doctrine is that his salary is lower than that of his four colleagues. He has not alleged that his salary and theirs are not within the applicable pay range for the classification. Nor has he presented any evidence that the pay differentials are based upon improper considerations. Here, Grievant's assertion of racial discrimination is rejected, as he presented no objective evidence to support any finding of racial discrimination or bias. There is no proof, only speculation and suspicion on Grievant's part. It is incumbent upon Grievant to prove bias by his supervisor. Heller v. Dept. of Tax and Revenue, Docket No. 96-T&R-318 (May 9, 1997) at 6. Under the circumstances presented here, Grievant's argument must fail. Id. See Taylor v. Monongalia County Health Dept., Docket No. 96-MCHD-383 (May 28, 1997); Nafe v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997).

CONCLUSIONS OF LAW

1. In a non-disciplinary matter, Grievant must prove his case by a preponderance of the evidence. W. Va. Code §§29-6A-1, et seq.; Tucci v. W. Va. Dept. of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995).

2. "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 C.S.R. 1, §5.08.

3. The granting of 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. Hudkins v. W. Va. Dept. of Transp., Docket No. 96-DOH-403 (Feb. 14, 1997); Tallman v. W. Va. Div. of Highways, Docket No. 91-DOH-162 (Jan. 31, 1992).

4. Employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994).

5. Respondent did not fully comply with 143 C.S.R. 1, §5.08 in issuing merit raises for HEs, as an unrecorded disciplinary action was considered in giving Grievant a lower rating in one of the six criteria by which relative merit was established.

6. Grievant failed to establish that he would more likely than not have received a merit increase but for the flaw in the process noted in Conclusion of Law No. 5.

7. Grievant failed to establish that Respondent's granting of merit increases to other HEs was unreasonable, or arbitrary or capricious.

8. Grievant failed to establish a prima facie case of discrimination, or that Respondent violated the "equal pay for equal work" doctrine.

Accordingly, this grievance is **DENIED.**

Any party or the 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.

Dated: September 22, 1997

JENNIFER J.MEEKS
Administrative Law Judge