BRIAN HELLER,

Grievant,

v. Docket No. 96-T&R-318

WEST VIRGINIA DEPARTMENT OF TAX AND REVENUE,

Respondent.

DECISION

The grievant is employed by the West Virginia Department of Tax and Revenue (T&R) as an Auditor III. He alleges that his supervisor discriminated against him by giving other Auditor IIIs merit raises. The grievant's contention is that two other employees had duties that were not within their Auditor classification. They received raises although their supervisors did not have the knowledge or expertise to evaluate them properly. Through favoritism and discrimination they received merit raises and he did not. He also alleges that his own supervisor was prejudiced against him and did not evaluate him fairly. As relief, he requests a pay raise in the amount of $1272.00 to bring his salary "in line with favored employees". After adverse decisions at the lower levels, (See footnote 1) the grievant appealed to Level IV, and a hearing was conducted on December 16, 1996. The case became mature for decision on January 16, 1997, with the submission of proposed findings of factand conclusions of law.

DISCUSSION

On or about March 30, 1995, Lydia S. McKee, Deputy Secretary/Assistant Tax Commissioner, issued a memorandum to Dan Taylor, Director of the Auditing Division, stating that money had been allocated for merit pay raises within the Auditing Division. Attached to this memo was a draft of a document entitled, "Tax Division Raise Policy". (See Respondent's Ex. No. 1, Level IV hearing). It provided that recommendations for raises were to be made by the front-line supervisors in the form of a prioritized list. This list of recommendations then would be forwarded through the proper channels. The policy also established the criteria to be used in the making of recommendations. Factors to be considered were job performance, the employee's salary in relation to others, prior history of pay raises, and existence of disciplinary actions within the preceding year. Job performance would be

reviewed as to attendance, attitude, dependability, and educational/skill improvement. Although not effective until May 1, 1995, this policy was known of and appeared to be in use at the time the grievant's merit raise was under consideration.

The front line supervisor for the grievant, Ron Cole, provided his list of merit raise recommendations to his supervisor, Jim Rizzo on March 30, 1995. (See Respondent's Ex. Nos. 3 and 4, Level IV hearing). Of the seven Auditor IIIs under his supervision, Mr. Cole recommended two for promotion, not merit raises. The remaining five were thenranked by Mr. Cole for the merit raises. The grievant's name was at the bottom of the list, thus he ranked last. The rankings included comments regarding all seven Auditor IIIs. The comments were favorable except for those related to the grievant. He was described as follows:

> Brian is difficult to figure out, he seems to always be in a grey area of life. His work habits need improvement and also a change in attitude along with more communication would help.

The grievant's position is that Ron Cole was biased against him and did not evaluate him fairly. He believes that the low ranking and unfavorable comments were based upon friction and hard feelings between the two men. The grievant attempted to establish this through questions directed to George Hall, Assistant Division Director, and Jim Rizzo, Tax and Revenue Manager. Mr. Rizzo is Mr. Cole's supervisor. They were questioned about an offensive remark Mr. Cole is alleged to have made regarding the then Secretary of the Department of Tax and Revenue, James H. Paige III. The grievant heard the remark, an apparent racial slur, and reported it to George Hall. Mr. Hall was not sure at the Level IV hearing, but feels that he may have asked Mr. Rizzo to take care of the matter. Mr. Rizzo, through his testimony, indicated that he was told of the incident by the grievant, and that he spoke to Mr. Cole, advising him to discontinue such conduct. No disciplinary action was taken and the matter was closed.

The grievant contends that Mr. Cole was angry with him for being reported. He was therefore biased against him, and this adversely affected his merit raise recommendation. He further contends, this was discrimination.

The testimony of Mr. Hall and Mr. Rizzo disclosed no evidence establishing thatRon Cole had personal animosity toward the grievant or that his evaluation of the grievant was affected by any

personal bias. Mr. Hall testified at the Level IV hearing that he didn't tell Mr. Cole that the grievant had reported the racial slur incident. He didn't know if anyone else told him. Mr. Rizzo testified at the same hearing that the grievant reported the incident to him and that he discussed it with Mr. Cole. Mr. Rizzo was not asked whether he told Mr. Cole that the grievant reported him. The grievant did not have any further evidence on this issue. Mr. Cole did not testify.

The grievant alleged further discrimination. Two other Auditor IIIs, Randy Hunt and Andrew Glancy had volunteered to work with computers and did not perform accounting duties. They developed, maintained and supported the Auditing Division's computer programs.

Both Mr. Hunt and Mr. Glancy received merit raises despite the fact that they were supervised by persons, George Hall and Stephen Crouse, who were not knowledgeable about computers. The grievant contends that Mr. Hall and Mr. Crouse can not properly evaluate persons whose work they do not understand. Mr. Crouse testified that he understood results, that the computers programs worked, and that was sufficient information for him to perform an evaluation.

The grievant contends that this is further evidence of discrimination and that it shows a disparity in the way he is treated compared to other Auditor IIIs.

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.

W.Va. Code § 29-6A-2(h) defines favoritism as:

> unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

The grievant's allegations, favoritism and discrimination, are intertwined. Both involve treating an employee or employees, in a different manner from a similarly situated employee. However, more must be shown. The grievant must demonstrate by a preponderance of the evidence that the different treatment is not based upon some valid employment related reason.

The case of Wallace v. Div. of Highways, Docket No. 96-DOH-121 (Nov. 19, 1996), involves a

grievance similar to that of Mr. Heller's. Wallace also alleged favoritism after failing to obtain a merit increase. The facts in Wallace were that he had been disciplined for taking an unauthorized leave. He had also previously received written reprimands for other matters. His performance evaluation was rated as “Needs Improvement”. The employee who had received the merit raise had not been disciplined and had a satisfactory evaluation. Therefore, the grievant was not similarly situated. The decision to not grant a merit raise to Mr. Wallace was based upon a valid job related rational.

The grievant's argument that the supervisors of Glancy and Hunt did not have sufficient knowledge to perform proper evaluations must also fail. Stephen Crouse, Glancy's supervisor testified that although he was not knowledgeable about computers, that Glancy was achieving results in that the computers were successfully performing their work. He was satisfied. Their was no evidence submitted to show that this was not an adequate evaluation of Mr. Glancy's job performance or that there was anything wrong with Glancy's work which was not being observed.

It is incumbent upon the grievant to prove bias by his supervisor. The alleged animosity of Ron Cole toward Mr. Heller has not been proven by a preponderance of the evidence. Indeed there was some evidence that there may be a reason for animosity, but no evidence that it actually existed or had any effect upon Mr. Cole's recommendation. Ron Cole apparently has retired and was not available to testify. His testimony was essential. It is important for the trier of facts to have present before him all witnesses whose credibility could be at issue. If Mr. Cole had testified, then his credibility could have been judged and possibly impeached. Instead there is speculation and suspicion. There is not a preponderence of the evidence.

After a full consideration of the discussion above, I believe the following Findings of Fact and Conclusions of Law to be appropriate.

FINDINGS OF FACT

1. The grievant, Brian Heller, is employed as a Tax and Revenue Auditor III, assigned to the Wheeling region.

2. On March 30, 1995 a memorandum was issued by Lydia S. McKee, Deputy Secretary/Assistant Tax Commissioner to Dan Taylor, Director of the Auditing Division advising of the allocation of money for merit raises. Also, with the memo was a “Proposed Raise Policy for the Tax

Division". (See respondent's exhibit #1, Level IV hearing).

3. The proposed raise policy gave criteria for the ranking of employees in the order in which salary increases would be recommended.

4. Ranking was necessary because the funds available for merit raises werelimited.

5. Each supervisor was directed to provide a list of employees ranked in the order of recommendation for the merit raises.

6. The grievant's supervisor, Ron Cole, prepared and submitted such a list dated March 30, 1995, wherein the grievant was ranked last. Upon the list, favorable comments were written regarding each employee, except grievant's which were unfavorable, criticizing his work habits, attitude, and failure to communicate.
(See Respondents' Ex. Nos. 3 and 4, Level IV hearing).

7. A second list prepared by Mr. Cole also dated March 30, 1995, recommends two additional persons for promotion, but not the grievant. (See Respondents' Ex. Nos. 3 and 4, Level IV hearing).

8. The lists were submitted to Dan Taylor, Director of the Auditing Division, who followed the rankings and comments of Ron Cole and the other field supervisors in deciding upon merit raises.

9. All Auditors IIIs except the grievant received a merit raise.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the grievant has the burden of proving his case by a preponderance of the evidence. Napier v. Logan County Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995).

2. 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.

3. W. Va. Code § 29-6A-2(h) defines "favoritism" as:

> unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

4. The grievant has failed to prove by a preponderance of the evidence that the respondent

has engaged in acts of discrimination or favoritism in not awarding the grievant a merit raise.

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 §18-29-7. 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

JAMES D. TERRY

Administrative Law Judge

DATE: May 8, 1997

Footnote: 1

A Level III hearing was conducted on July 2, 1996. Any references to that transcript and/or exhibits will be referred to as "L3, at __."