STACKO HUDKINS, et al.,

Grievants,

v.

DOCKET NO. 96-DOH-403

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievants Steve Carson, Thomas Fordyce, Stacko Hudkins, William Lucas, David Swain, David Teters, Harold Toothman and Paul Woodyard, filed individual grievances on or about October 20, 1995, challenging the procedure in which merit raises were given in the Wood County District on or about October 16, 1995. Grievants seek as relief a 5% merit increase retroactive to October 16, 1995, and all costs associated with filing their grievances. The grievances were denied at levels one and two, and were consolidated for hearing at level three on June 4, 1996. Mr. Fred VanKirk, Secretary-Commissioner of Highways, adopted the level three decision denying Grievants' claims on September 4, 1996, and Grievants appealed to level four on September 23, 1996. A level four hearing was conducted on November 1, 1996, at which time this case became mature for decision.

Based upon a review of the record in this matter, and the evidence and testimony presented at level four, it is appropriate to make the following findings of fact.

Findings of Fact

1. Grievants are employed by Respondent Division of Highways at its Wood County Headquarters in Parkersburg, West Virginia. There are fifty-nine employees assigned to Wood County. LIII, G. Exs. 3, 4.

2. Merit raises were to be given out in October 1995, in accordance with the Department of Transportation ("DOT") Merit Pay Plan issued by Commissioner Fred VanKirk on August 28, 1995. LIII, A. Ex. 1.

3. The DOT Merit Pay Plan granted 5% increases to employees found to be meritorious in their job performance, as evidenced by an Employee Evaluation for calendar year 1994. LIII, A. Ex. 1.

4. The District Engineer, R.E. Epler, and Assistant District Engineer, Maintenance, George Shinsky, obtained the DOT Employee Evaluation forms for calendar year 1994 from the County Supervisor, Paul Reese.

5. Mr. Reese informed Mr. Epler and Mr. Shinsky that, while he had filled out the 1994 employee evaluations, he had not yet met with all of his employees, and not all of the employees had seen and signed their 1994 evaluations.

6. Mr. Epler decided to use the uncompleted employee evaluations anyway in order to determine which employees would receive the merit raises. 7. At Mr. Epler's direction, Mr. Shinsky established a scoring system for all of the employee evaluations. This scoring system was based on the number of areas in which employees received "exceeds expectations" on their evaluation forms.

8. A "tiebreaker" was necessary to establish final employee rankings for the merit raises, and Mr. Shinsky used seniority as the "tiebreaker".

. 9. Ten merit raises were granted in Wood County during October 1995. LIII, A. Ex. 2.

10. Grievants did not receive merit raises in October 1995.

Discussion

Grievants allege that Respondent incorrectly relied on incomplete employee evaluations in violation of West Virginia Division of Personnel Administrative Rules, as well as Department of Highways Administrative Operating Procedures, and engaged in favoritism in awarding the October 1995 merit raises. Respondent argues that it followed the Division of Personnel Administrative Rules which govern how merit raises are to be determined, and denies the allegations of favoritism.

In a non-disciplinary matter, it is incumbent upon Grievants to prove their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-1, et seq. The West Virginia Division of Personnel Administrative Rules, Section 3.1.84 (1995) defines "salary advancement" as "[a]

discretionary advancement in salary granted in recognition of the quality of job performance." Section 5.08 establishes the basis for which all salary advances are to be awarded, specifically, that "[a]ll salary advancements shall be basedon merit as evidenced by performance evaluations and other recorded measures of performance, e.g., quantity of work, quality of work, and attendance." LIV, G. Ex. 8.

The West Virginia Division of Highways Administrative Operating Procedures, Volume IX, Chapter 15, Section C (Rev. 8/15/81) state, in pertinent part:

MERIT INCREASE POLICY

1. Purpose:

> The purpose of this policy is to provide for granting merit increases to a limited number of employees (both hourly and salaried) based upon meritorious performance, while taking into consideration such factors as equitable pay relationships and length of service.

2 Performance Appraisal:

> There must be a completed current performance appraisal report on file in the Personnel Division for each salaried employee recommended for increase under this policy.

LIV, G. Ex. 7.

The Grievance Board has been held that an employer's decision on 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. E.g., Tallman v. W. Va. Div. of Highways, Docket No. 91-DOH-162 (Jan. 31, 1992).

The material facts underlying this grievance are undisputed. DOH Commissioner VanKirk issued a Merit Pay Plan on August 28, 1995, informing all Division Directors and District Engineers that funds for merit increases had become available and that processing for these increases was to begin immediately. The Commissioner explicitly stated that theonly tool to be used in determining which employees would be awarded merit increases was their performance evaluations for calendar year 1994.

If Commissioner VanKirk had not explicitly limited the means of determining merit increases to employee evaluations for calendar year 1994, the undersigned would be inclined to agree with Respondent that it was not a violation of DOP's rules, or arbitrary and capricious, to use the incomplete performance evaluations in determining merit raises. As preliminary evaluative tools, these documents could properly be considered “other recorded measures of performance”, as contemplated by Rule 5.08. However, the Commissioner was clear in his directive that only employee performance evaluations for calendar year 1994 were to used in awarding merit increases. Because there were no completed employee performance evaluations in Grievants' district for calendar year 1994, Respondent could not have properly awarded merit increases to any employees in October 1995. Mr. Epler testified that, because of the limited time available under the Merit Pay Plan to identify employees for merit raises, he decided to use the incomplete performance evaluations, as the only alternative was to not give any merit raises, which he did consider to be fair to the employees. Mr. Epler acknowledged the documents were not completed performance evaluations and were not part of the employees' personnel files.

While it is clear Respondent did not strictly adhere to the Commissioner's directive regarding the awarding of the October 1995 merit raises, the relief available to Grievants is not so clear. Once a violation of a rule or regulation is found, it is necessary to determine an appropriate remedy. Grievants must show that they are more entitled to a merit raise than another employee who received a raise in order to prevail. Tallman v.W. Va. Div. of Highways, Docket No. 91-DOH-162 (Jan. 31, 1992). Unfortunately, what Grievants have successfully proven is that there were no completed performance evaluations upon which to base merit increases in October 1995; thus, Respondent could not properly have awarded merit increases to any employees, including Grievants.

Grievants rely on this Grievance Board's decision in Roberts v. W. Va. Dept. of Adm., Docket No. 94-DOP-182 (Dec. 1, 1994), rev'd, Cir. Ct. of Kanawha Co., Civil Action No. 95-AA-9 (Feb. 6, 1996), to support their argument that they should be awarded merit increases as relief for Respondent's error. In Roberts, the Administrative Law Judge found the evaluator used factors “not contemplated” by DOP § 5.08, such as “rater bias”, salary equity, seniority, and attendance, which were not part of the employees' performance evaluations, in determining merit raises. The ALJ found that use of these factors was arbitrary and capricious, and not supported by the language of Section 5.08, and thus the process of determining merit raises was flawed. However, the ALJ found the grievant would

not have been eligible for a merit increase based solely on her performance evaluation score, and thus denied her requested relief. (See footnote 1)

The Circuit Court of Kanawha County reversed the ALJ's decision and ordered grievant be awarded the merit raise at issue. While the undersigned finds Roberts instructional, it is unclear from the Circuit Court's Order what portion of that lengthy decision it disagrees with, or on what basis it determined the grievant was entitled to the merit raise. Without clearer analysis, the undersigned is reluctant to make a blanket determination that a flaw in the merit increase process necessarily results in merit raisesfor the Grievants. Therefore, while it is not necessary to evaluate Grievants' claims of discrimination and favoritism in light of the above holding, the undersigned will review them in an effort to determine whether in the interests of fairness, it would be appropriate to grant Grievants the relief they request.

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 employee or agreed to in writing.” Subsection (h) defines favoritism as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” In order to make a prima facie showing of discrimination or favoritism, Grievants must establish:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) have not, in a significant particular;

and,

> (c) that such differences were unrelated [to the] actual job responsibilities of the grievant and/or the other employee, and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievants identify one individual, Ronald Galland, who allegedly received favorable treatment, in

that even though he did not complete the operating engineer's school in Medina, West Virginia, he was promoted to Equipment Operator III, and ultimately to Crew Leader. At least one of the Grievants, William Lucas, completed the operating engineer's school, but was not promoted to Equipment Operator III. While it certainly is questionablewhy Mr. Galland was promoted to Equipment Operator III without completing the operating engineer's school, the issue here is one of merit raises, and Mr. Galland did not receive a merit raise in October 1995. Thus, even if Mr. Galland's promotion was the result of favoritism, that action has not been shown to have any bearing on the issuance of merit raises in this case.

Grievants also allege that Respondent violated its own nepotism policy which also has resulted in favoritism. Specifically, Respondent's nepotism policy states, in pertinent part:

> It shall be the policy of the Department of Highways to prohibit the employment or transfer of immediate family members into the same organizational units (i.e., sections within the District/Divisions or Counties) where they would be under the direct or indirect supervision of an individual whose relationship to them would fall within the immediate family members definition.

W. Va. DOH Administrative Operating Procedures (11/01/85).

Assistant County Supervisor Dale Deuley, and his brother, Bobby Deuley, apparently work in the same District. Dale Deuley is responsible for making up the work schedules, and apparently assists the County Supervisor, Paul Reese, in the evaluation process. Thus, Dale Deuley apparently, at least indirectly, supervises the work of his brother, Bobby, which would be a violation of the nepotism policy. Both Dale and Bobby Deuley received merit raises in October 1995, although Grievants presented no concrete evidence that Dale Deuley participated in the evaluation process with respect to his brother. Nevertheless, a review of the incomplete performance evaluations indicates that Bobby Deuley received five (5) “exceeds expectations” ratings out of a total of six (6). While the Grievants received overall “meets expectations” ratings, none of them received more than two (2) “exceeds expectations” ratings, and therefore it is more likely than not that Bobby Deuley would have received a merit increase before any of the Grievants. A review of the incomplete performance evaluations for Grievants and the 10 successful employees indicates that it is more likely than not that Grievants would not have received merit increases before any of those individuals. LIII, A. Exs. 2, 3.

While it is true that the performance evaluations used to determine merit increases were not complete and thus not valid for this purpose, this is not a case where the factors used to determine the raises were inherently arbitrary and capricious. (Cf., e.g., King, et al. v. W. Va. Dept. of Trans., Docket No. 94-DOH-340 (Mar. 1, 1995), where it was held that because the underlying factors used to establish merit increases were arbitrary and capricious, the grievants were entitled to receive merit raises as relief.) In this case, there was insufficient evidence presented to establish that the ratings reflected by those documents were based upon discrimination, favoritism, or were arbitrary and capricious. However, just because Grievants have failed to establish their case by a preponderance of the evidence, the employer should not interpret this decision as a condonation of its actions. It is an important, and in this case critical, part of the employee-employer relationship that performance evaluations be conducted in as timely, thorough and objective manner as possible. This is the not the first time this particular employer has found itself in this situation due to its laxity in conducting employee performance evaluations. Failure to complete performance evaluations denies the employee a chance to respond to the employer's comments and denies the employee the chance to grievewhat he or she may perceive as a negative evaluation. This employer is cautioned that failure to keep up with its employee evaluations in the future could lead to a different, and potentially expensive, result than this one, as evidenced by the Circuit Court's decision in Roberts, supra.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Tucci v. W. Va. Dept. of Trans., 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. “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 CSR 1.5.08(a)(1995).

4. Grievants have established that Respondent violated 143 CSR 1.5.08(a) in its issuance of merit raises for the 1994 performance rating period to the employees in Grievants' district, because

there were no valid performance evaluations on which to base the merit raises. Grievants have established that Respondent violated its own merit raise policy because there were no current completed performance evaluations upon which to base merit raises. 5. Grievants have failed to establish that they did not receive merit increases in October 1995 as a result of discrimination or favoritism.

6. Grievants have failed to establish that they would more likely than not have received merit increases but for the flaw in the process noted in Conclusion of Law No. 4.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: February 14, 1997

Footnote: 1 *DOP has since amended Section 5.08, as referenced previously.*