EDITH ANN HODGES,

Grievant,

v. DOCKET NO. 97-HHR-190

WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION

Grievant, Edith Ann Hodges, challenges her employer's decision not to grant her a merit increase in salary in approximately June of 1996. Grievant alleges that the process by which such merit raises were awarded was unfair and improper, and requests as relief that she be granted a salary increase each year for the next six years in addition to any yearly salary increases mandated by the state legislature. On July 3, 1996, a level one response was issued by Grievant's immediate supervisor, who could not grant relief. Grievant appealed to level two on July 12, 1996, and the grievance was denied by Jack Tanner, Community Service Manager, on July 25, 1996. A level three hearing was held on January 27, 1997, followed by a written decision denying the grievance dated April 9, 1997. Grievant appealed to level four on April 18, 1997, and the parties (See footnote 1) agreed to submit the matter for decision based upon the record developed below. Written arguments were submitted by both parties by August 1, 1997. This matter was reassigned for administrative reasons on March 18, 1998. The following findings of fact are made from a preponderance of the evidence of record, including the level three transcript and exhibits introduced at that hearing.

Findings of Fact

1. Grievant is employed in the Beckley office of the Department of Health and Human Resources ("DHHR") in its Operations Division as an Accounting Assistant III. She has been

employed by DHHR for approximately thirty-two years.

2. In late 1995, the various regional offices were informed that merit raises would be available to be awarded in early 1996. The Regional Director developed a calculation which was used to allocate raises equally to the offices.

3. Statewide staff committees were formed, and they promulgated criteria to be used for determining who would be awarded the merit raises. The criteria were unit- specific, and the Operations units utilized the following twenty measures for each employee's performance:

A. Demonstrates favorable job attitude.

B. Demonstrates ability to complete large volume of work.

C.

Demonstrates promptness in completing all job functions_uses time wisely.

D. Quality of work with regard to being error free.

E.

Past performance appraisals and progress in meeting goals.

F. Attendance record/punctuality.

G.

Effort to increase overall job related skills to improve job performance.

H. No formal disciplinary actions in last 12 months.

I.

Involvement in special projects with more than satisfactory performance.

J. Whether employee acts on own initiative.

K.

Employee volunteers to assume additional responsibilities/duties plus complexity of responsibilities.

L.

Helpfulness to others, (peers and customers) functions as a team player. Cooperation.

M.

Ability to maintain a positive attitude toward customers, even under adverse circumstances, keeping customer focused.

N.

Demonstrates professionalism. Respects confidentiality, accepts other's [sic] values and presents positive image.

O.

Any award, letter of commendation, etc. to be considered.

P. Flexibility: willingness to learn to do other assignments.

Q.

If necessary, demonstrates willingness to work beyond normal work day or work assignments limits, flexibility in taking annual leave, available and willing to accomplish time critical assignments.

R. Adherence to Agency policy and office procedures.

S.

Demonstrates loyalty. Contributes to mission of agency.

T.

Acceptance of supervision, keeping supervisor informed, acceptance of constructive criticism.

4. Evaluators were to give each employee a rating of zero through three for each criterion, with zero being "less than acceptable" and three being "exceptional, the best possible."

5. Tammy Trent, Operations Supervisor, and Grievant's immediate supervisor, decided to conduct the merit evaluations for her unit through a committee consisting ofherself and two unit employees (Sally Smith and Glenda Bradshaw), (See footnote 2) who were co-workers of Grievant's. This method for awarding the raises was approved at a meeting of all unit employees, but Grievant was unable to attend the meeting. (See footnote 3)

6. Grievant and four other employees were candidates for the two merit raises allocated to the Operations unit of the Beckley regional office.

7. Ms. Trent, Ms. Smith and Ms. Bradshaw, as a group, evaluated each merit raise candidate. They each gave an opinion as to the appropriate rating for each factor, discussed their differences, and arrived at a consensus, which was the final rating awarded.

8. Ms. Trent did not show the candidates' performance evaluations or personnel files to the other committee members. (See footnote 4) Each candidate's 1995 performance evaluation was used during the merit raise evaluation process.

9. For any factor in which Ms. Smith or Ms. Bradshaw did not have personal knowledge regarding the candidate, Ms. Trent's rating was reflected on the merit raise evaluation form.

10. On some factors, such as attitude, professionalism and communication, Ms. Smith and Ms. Bradshaw gave Grievant unfavorable ratings based upon their personal observations of Grievant while working with her in the Operations unit. 11. Of the five candidates, Grievant received the second highest rating on her 1995 performance evaluation.

12. Grievant received the lowest total score of the five candidates under the merit criteria, so she did not receive one of the merit raises. The raises were given to the two employees with the highest scores under the merit criteria.

Discussion

In a non-disciplinary matter, Grievant must prove her case by a preponderance of the evidence. See W. Va. Code § 29-6A-6; Tucci v. W. Va. Dept. of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995). Grievant's arguments are that her performance evaluation was not used as the basis for awarding a merit raise as required by regulation, that she had been recommended for a raise in 1993 and should still have been eligible, (See footnote 5) and that the "committee process" utilized by Ms. Trent for merit evaluation was biased and unfair.

The West Virginia Division of Personnel Administrative Rule ("Rule") provides that 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 (1995). 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). The Division of Personnel's Rule, set forth above, clearly requires that merit evaluations be based only on recorded measures of performance, meaning information that has been preserved in written form and can be referred to for later assessment. See Woods v. Dept. of Health and Human Resources/Bd. of Review, Docket No. 97-HHR-248 (Sept. 22, 1997) (an unrecorded disciplinary action cannot be used for merit evaluation); Tallman, supra (unsubstantiated impressions of employees' performance is not proper basis for distribution of merit increases); Riffle v. W. Va. Dept. of Transp., Docket No. 92- DOH-138 (Aug. 21, 1992) (employee's "uncooperativeness," not the subject of any written disciplinary action, cannot be considered).

Application of this principle to the facts of the instant case results in the unavoidable conclusion that DHHR has violated § 5.08. While many of the criteria used in the merit evaluation process were also included in the various categories listed on the 1995 employee performance evaluation forms, some of them were not. Also, Tammy Trent testified that she made sure that the other two committee members were not allowed to see the candidates' performance evaluations, so, obviously, many of the ratings assigned by those individuals were based upon general, unsubstantiated impressions. Moreover, Ms. Bradshaw in particular testified that she gave Grievant low ratings in some of the merit criteria, because she has

personally observed Grievant "making others' jobs more difficult," being "difficult" and "curt" with customers, and being generally unprofessional with coworkers. Obviously, these observations are not based upon any "recorded measures of performance," and contributed to Grievant's low merit rating. It does not matter that the ratings received by each candidate were a "consensus" score, influenced by Ms. Trent'ssupervisory knowledge, because there is no dispute that Ms. Smith's and Ms. Bradshaw's ratings were considered and used to calculate the final score.

The record reflects that the only "recorded measures of performance" which were considered in the merit evaluation process were the employee's performance evaluations and the information contained therein. Although worded slightly differently in some instances, much of the information considered under the various merit criteria was also included in the performance evaluation categories. For example, merit criterion "A _ Demonstrates favorable job attitude," is encompassed by the performance evaluation criterion of "Initiative," which includes "presents a favorable job attitude." However, the merit criterion of "S _ Demonstrates loyalty . . . contributes to mission of the Agency," is not clearly included in any of the performance evaluation categories, and appears to be quite subjective. Accordingly, only the information contained in the employee's performance evaluations was appropriate for consideration in the merit evaluation process. See Tallman, supra.

Based upon performance evaluations alone, Grievant has proven entitlement to one of the two merit raises awarded. Candidate A (See footnote 6) , who received the highest merit score and, thus, received one of the raises, had a lower performance evaluation score than Grievant. Candidate A received a 3.71 performance evaluation score, and Grievant received a 4.125. See Level II Exhibits. Accordingly, Grievant has met her burden of proving by a preponderance of the evidence that she was more entitled to the raise than an employeewho received one, as the result of Respondent's violation of an established regulation. See Hudkins, supra; Tallman, supra.

As to Grievant's request that the "committee" process not be used in the future, she is correct insofar as the process, as it has been utilized by DHHR in this instance, violates DOP's Administrative Rule. Therefore, DHHR is hereby instructed to, in the future, consider only "recorded measures of performance," including performance evaluations, when considering

employees for merit raises. If co-workers on such committees cannot be provided with performance evaluations and other recorded information regarding the candidates, then they should not be included in the merit evaluation process.

Finally, there is no basis for granting Grievant's request to be granted salary increases for the next six years. Only the merit increase process utilized in 1996 was at issue in this case, and granting Grievant future increases based upon one year's flawed process would be improper. Therefore, her request is denied.

In accordance with the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

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

2. 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). 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 C.S.R. 1, § 5.08 (1995).

4. Grievant proved by a preponderance of the evidence that DHHR violated § 5.08, because considerations which were not "recorded measures of performance" served as the basis for awarding the 1996 merit increases.

5. Grievant proved by a preponderance of the evidence that she was more entitled to a merit pay increase than another employee who was granted an increase. See Tallman, supra.

Accordingly, this grievance is GRANTED, and DHHR is hereby ORDERED to grant Grievant a merit pay increase, with applicable interest, retroactive to the effective date of the 1996 merit raises granted to other employees in her unit.

Any party may appeal this decision to the Circuit Court of Kanawha County or 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.

Date: April 13, 1998

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Grievant was unrepresented at level four, and Respondent was represented by counsel, B. Allen Campbell, Assistant Attorney General.

Footnote: 2

Ms. Smith and Ms. Bradshaw were disqualified from consideration for the merit raises at issue.

Footnote: 3

Grievant testified that, if she had been in attendance, she would have disapproved of this type of committee deciding who should receive merit raises.

Footnote: 4

Although not really explained in the record, Ms. Trent's testimony indicated that confidentiality policies prohibit showing an employee's personnel file to a co-worker.

Footnote: 5

The merit raises awarded in 1996 were based only upon the employees' performance in 1995, so Grievant's previous eligibility for a merit raise is irrelevant.

Footnote: 6

The employees were not identified by name, because of DHHR's confidentiality concerns.