CHARLOTTE JENKINS-MARTIN,

Grievant,

v. **Docket No. 98-BEP-285**

BUREAU OF EMPLOYMENT PROGRAMS/

CHARLESTON JOB SERVICES,

Respondents.

D E C I S I O N

Grievant, Charlotte Jenkins-Martin, grieves the failure of the Bureau of Employment Programs/Charleston Job Services ("BEP") to grant her a merit increase after she was recommended for one. At Level III, Grievant raised the issue of default, as the Respondent did not hold the Level III hearing in seven days as required by W. Va. Code § 29-6A-4(c) (effective July 1, 1998). Commissioner William Vieweg adopted the decision of the Level III Hearing Examiner denying the grievance in total, including the Motion for Default on July 31, 1998. Grievant appealed to Level IV, and after a continuance for good cause shown, the parties agreed to submit the case on the record developed below. This case became mature for decision on August 28, 1998, after receiving the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as an Office Assistant III ("OA") with the Charleston Job Services Section of BEP. Grievant has been employed by BEP since 1991 and with the

Charleston Job Service since 1995.

2. In January 1998, she was informed she would be one of three employees from her Section recommended for a merit increase, and that it should be effective in June 1998.

3. During this same period of time, Grievant had requested reallocation from an OA II to OA III because of an increase in duties during the time she had been employed with BEP.

4. On February 20, 1998, Grievant received notice she would be reallocated to an OA III effective April 1, 1998. This reallocation resulted in a 10 percent pay increase as Grievant was increased from a Pay Grade 4 to a Pay Grade 6.

5. Some time in March, Grievant was notified that she may not receive the merit increase because of her reallocation.

6. On March 20, 1998, Grievant's Supervisor, Lindy Vickers, sent an E-mail message to his supervisor stating:

> I talk[ed] to Bunny, she said they had pulled Charlotte J. Martin['s] merit because of the reclass and salary increase. I would like to summit (sic) Steve Janney in for that merit increase. I will send the paper work to "Q", Thanks.

7. At hearing, Mr. Vickers' testimony was that he had no idea why Grievant did not receive a merit increase, and that there was no hint that her denial was because of her reclassification. (See footnote 2)

8. On April 29, 1998, Steve Frantz, the Field Supervisor, informed Grievant she would not be receiving the recommended merit increase because of her reallocation. His information was based on the information he received from Mr. Vickers.

9. Three people from Grievant's section did receive merit increases in June 1998. Employee #1 is a Local Veterans Employment Representative, Employee #2 is an Employment Programs Interviewer, and Employee #3 is a Supervisor II.

NAME	EVAL. SCORE	LAST MERIT	SERVICE	TRAINING

Employee # 1	9.00	8/16/94	5 years	1 hour
Employee # 2	8.33	4/1/96	8 years	1 hour
Employee # 3	9.18	10/1/96	22 years	27 hours
Grievant	9.00	Never	17 years	36 hours (See footnote 3)

10. The West Virginia Division of Personnel requires that salary advancements be based on merit as indicated by performance evaluations and other recorded measuresof performance, such as quantity of work, quality of work, and attendance. W. Va. Div. of Personnel Admin. Rule, 143 C.S.R. 1 § 5.08(a) (1995). See King v. W. Va. Dept. of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995); W. Va. Div. of Personnel Admin. Rules, 143 C.S.R. 1 §§ 4.07, 5.01(f)(2)(b)(3), 5.05 (a), 5.08 (c).

11. The criteria to be used in awarding merit increases within BEP is set forth in an undated memorandum. The memorandum states an employee must have an overall rating of 5.0 or above on his last performance evaluation to qualify for a merit increase, and that "[c]onsiderable weight will be given to rating scores of 7.0 or better in the areas of quality and quantity of work, job knowledge and/or problem solving." (See footnote 4) The memorandum further states that factors such as involvement in special projects with more than satisfactory performance, skills improvement through training, and substantial changes in duties and responsibilities which increase accountability and expertise, should be considered in awarding merit increases.

12. Commissioner William Vieweg is the final authority on whether to grant or deny all recommended merit increases, and he denied Grievant's merit increase.

13. When merit increases are denied, the person is usually informed of the decision and the reason for the denial by the individual's direct supervisor.

14. Mr. Vickers was informed that Grievant would not be receiving a merit increase because she had received a 10 percent increase, a salary adjustment, as the result of her reallocation. 15. This grievance was initially filed on June 9, 1998. Grievant appealed her June 12, 1998 Level II decision on June 16, 1998. The Level III

hearing was not held until July 14, 1998.

16. W. Va. Code § 29-6A-4(c) specifies that a Level III hearing shall be held within seven days of receiving the appeal.

Issues

This grievance contains two issues. First, whether Grievant won by default due to BEP's failure to hold a hearing within the stated guidelines. Secondly, whether Commissioner Vieweg's decision to deny her the recommended merit increase was unfair, incorrect, or arbitrary and capricious. Respondent argues the default provision of W. Va. Code §§ 29-6A-1, et seq., do not apply to this grievance as it was filed prior to July 1, 1998, when the new provisions became effective. Additionally, BEP avers this decision was within Commissioner Vieweg's discretion, and that no rules, regulations, statutes, and policies were violated in the process of denying the merit increase.

Discussion

The first issue to resolve is whether Grievant has won her grievance by default. Grievant filed this grievance on June 9, 1998. The Code Section in question, W. Va. Code § 29-6A-3(a)(2), did not go into effect until July 1, 1998. This Code Section states in pertinent part:

> The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose ofshowing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

It is well-settled principle of statutory construction in this state that a statute is presumed to operate prospectively, unless retroactive applicability is clearly expressed or necessarily implied from the statute's language. Syl. Pt. 3, Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980); See Conley v. Workers' Compensation Div./Hercules, 199 W. Va. 196, 483 S.E.2d 542 (1997); W. Va. Code § 2-2- 10(bb) (1989). However, statutes which are merely procedural, rather than substantive, in nature may be retroactively applied. Shanholtz, supra. As recently held in Syllabus Point 2, in Public Citizen, Inc. v. First National Bank in Fairmont, 198 W. Va. 329, 480 S.E.2d 538 (1996), the Supreme Court of Appeals of West Virginia stated, "[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute . . . unless the statute provides explicitly for retroactive application." See generally, Conley, supra; State ex rel. Blankenship v. Richardson, 196 W. Va. 726, 474 S.E.2d 906 (1996). "Accordingly, an initial determination must be made as to whether the statute in question affects procedural or substantive rights." Dismissal Order, Sharifpour v. W. Va. Dept. of Transp./Div of Highways, Docket No. 98-DOH-265 (Sept. 9, 1998).

Black's Law Dictionary 997 (6th ed. 1991), defines "substantive law" as:

> That part of law which creates, defines, and regulates rights and duties of parties, as opposed to "adjective, procedural, or remedial law" which prescribes [the] method of enforcing the rights or obtaining redress for theirinvasion. The basic law of rights and duties . . . as opposed to procedural law . . . .

The recently issued Sharifpour Order, cited above, discusses the issue of default, and the Administrative Law Judge stated:

In the instant case, the default provision affects substantive rights and

> "augments substantive liabilities," in that the Grievant "prevails by default." In other words, the employee wins his grievance, and the employer is required to grant him the relief requested. Although the employer has the right to request a level four hearing to show that "the remedy received . . . is contrary to law or clearly wrong" the administrative law judge is to presume the "the employee prevailed on the merits of the grievance." Code §29-6A- 3(a)(2) (1998). This is not a procedural matter, because the default provision creates a "substantive liability" on the part of the defaulting employer, imposing upon it the "duty" of providing grievant what he has requested.

Sharifpour, supra.

Following the reasoning in Public Citizen, supra, the Sharifpour Order went on to find that it was clear that when a "default" statute effects "substantive" rights it is not applicable to pending cases. Because Grievant's case was filed on June 9, 1998, prior to the effective date of the Code Section, "the default provisions of Code §29-6A-3(a)(2) are not applicable, to [her] grievance, and [she] is not entitled to relief" on the grounds of default. Sharifpour, supra; See Public Citizen, supra.

The next issue to discuss is the merit of the grievance itself. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). This grievance is governed by the Division of Personnel's ("DOP") administrative rule on salary advancements which states, "[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." W. Va. Div. of Personnel Admin. Rule, 143 C.S.R. 1 § 5.08(a) (1995). See King, supra.

The additional criteria to be used in awarding merit increases within BEP states an employee must have an overall rating of 5.0 or above on his last performance evaluation to qualify for a merit increase, and that “[c]onsiderable weight will be given to rating scores of 7.0 or better in the areas of quality and quantity of work, job knowledge and/or problem solving.” Further, factors such as involvement in special projects with more than satisfactory performance, skills improvement through training, and substantial changes in duties and responsibilities which increase accountability and expertise, should be considered in awarding merit increases. Typically these additional factors, not discussed in DOP's rule, are used as tie-breakers. Morris v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 97-DOH-176 (Aug. 22, 1997).

Obviously, combining of these two sets of rules and guidelines is at times a difficult fit, especially when there are a limited number of raises to be awarded. The record also reveals the problems that are created when employees are rated so highly and so similarly. Clearly, there were several employees at BEP who had good to excellent evaluations and could be deserving of a merit increase. Unfortunately, there were only three increases to be given in Grievant's Section, and some management decisions had to be made about who should receive them, utilizing the evaluations and the guidelines. Grievant'ssupervisor had decided her performance was worthy of a merit increase; however, this merit increase was denied.

The general rule is that an employer's decision on merit increases will generally not be disturbed unless it is 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-185 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Services, Docket No. 89-RS-051 (May 16, 1989). The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the decision-maker. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982).

"An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it; or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion." See Bedford County Memorial Hosp. v. Health and Human Servs., 769 F.2d 1071 (4th Cir. 1985); Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-255 (Mar. 19, 1998). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed 1985). Arbitrary is further defined as being "synonymous with bad faith or failure to exercise honest judgment." See Trimboli v. W. Va. Dept. of Health and Human Servs./ Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

The question presented by this grievance is whether Commissioner Vieweg's decision to deny Grievant's merit increase was arbitrary and capricious. This grievance deals with both a lower rated employee and an equally rated employee receiving a merit increase, while Grievant did not. This Grievance Board has found that an agency's decision to grant a lower ranked employee a merit increase when a higher ranked employee does not receive one to be incorrect, if all other factors are equal. (See footnote 5) Setliff v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 97-DOH-262 (July 27, 1998); Morris, supra; Ratliff. v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 96-DOH-004 (Jan. 31, 1997).

Here, Grievant's performance evaluation was equal to one of the three employees who received a merit increase, and was higher than another. Thus, applying DOP's regulation, Grievant should receive a merit increase, especially as there was no indication whatsoever that Grievant was other than a quality employee. If the supplementary guidelines identified by BEP are utilized, it still appears that Grievant deserves a merit increase as she had the required performance evaluation score, more hours of skills improvement training than the other employees who received merit

increases, and clearly had a substantial change and increase in her duties she as was reallocated to a OA III. (See footnote 6) Given the evidence and the required standard of review, the undersigned Administrative Law Judge finds the need to examine why the Commissioner denied the merit increase. Although Mr. Vickers stated under oath that he had no idea why the merit increase was denied, and that there was no indication that it was related to Grievant's salary adjustment, the undersigned Administrative Law Judge finds this statement to be untrue. On March 20, 1998, Mr. Vickers sent an E-mail message to his supervisor indicating Grievant's merit increase had been denied because of her reallocation. BEP's guidelines do not contain any language that would permit it to deny a merit pay increase solely because an employee recently received a salary adjustment due to a reallocation. In other words BEP's policy does not authorize the Commissioner's actions.

It would be arbitrary and capricious to deny a merit increase because an employee who has been misclassified and incorrectly paid a lower salary, finally is properly classified and paid the correct salary for the work she has been performing for some time. A merit increase is to be based on "performance evaluations and other recorded measures of performance." Grievant's performance evaluation indicates she earned a merit increase over lower or equally ranked employees because of her performance evaluation score, as well as her ratings using BEP's guidelines.

Respondent put forth no reason why the increase was denied, and instead relied on the argument that the Commissioner has total discretion. Although the Commissioner has substantial discretion, his action must still conform to the arbitrary and capricious standard. Accordingly, the undersigned Administrative Law Judge finds the decision to deny Grievant a merit increase because she had received an increase when she was finally, properly classified is arbitrary and capricious.

Conclusions of Law

1. Because the default provision in W. Va. Code § 29-6A-3(a)(2), is substantive in nature, it cannot be applied retroactively, and does not affect grievances filed prior to July 1,1998.

2. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS- 72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

3 Grievant has demonstrated by a preponderance of the evidence that the denial of her merit increase was arbitrary and capricious, as she was more highly ranked than one similarly situated employee, and equal to another, who received merit increases.

Accordingly, this grievance is **GRANTED**, and Respondent is directed to give Grievant the merit increase she was to receive in June 1998, with appropriate back pay.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 24, 1998

Footnote: 1

Grievant was pro se, and Respondent was represented by Kelli Talbott, Senior Assistant Attorney General.

Footnote: 2

Throughout these proceedings the parties used the terms reclassification and reallocation interchangeably.

Footnote: 3

The number of hours listed for Grievant's training was incorrectly calculated in the Level III hearing in that the Hearing Examiner found Grievant had one hour of training. According to the lower level record, one of Grievant's exhibits submitted at Level III indicated she had many more hours. This exhibit was not found in the lower level record submitted to the undersigned Administrative Law Judge, but Grievant attached a copy to her written submissions, and Respondent raised no objections. This exhibit showed eight hours of training, and Grievant testified to an additional three and one half days of training attended in Ripley, Beckley, and Charleston. Since Grievant's testimony was unrebutted, the undersigned Administrative Law Judge finds Grievant had 36 hours of training.

Footnote: 4

Grievant had received a nine out of a possible ten in each of these categories.

Footnote: 5

If, for example, the highly ranked employee had received a written reprimand or some other type of disciplinary action, the failure to grant a merit increase could be understandable. Also, it is at times acceptable to eliminate some employees from the pool of potential candidates. Tucci v. Dept. of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995).

Footnote: 6

There was no testimony about any of the employees involvement in special programs. Grievant, pro se, attempted to obtain this data, prior to her Level III hearing, through an Freedom of Information Act ("FOIA") request. BEP denied this request as not falling within the FOIA guidelines, but did not inform Grievant that such data could be obtained through a discovery motion. Accordingly, this area was not considered in this grievance.