ERNIE SETLIFF, et al.,

Grievants,

v. **Docket No. 97-DOH-262**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievants (See footnote 1) , Ernie Setliff, Rickey Chapman, and Danny Hanna, are employed by the Division of Highways ("DOH") and state in their Statement of Grievance:

> Merit raises were given out in the month of August. We did not recieve (sic) an [i]ncrease and we believe we should have.

This grievance was amended at Level III to include the merit increases granted in December 1996 as well. The requested relief was to be given a merit increase with full back pay and benefits. This grievance was filed on September 23, 1996, and denied at all lower levels. This grievance was appealed to Level IV, and a Level IV hearing was held on June 1, 1998. (See footnote 2) At hearing, the undersigned Administrative Law Judge requested the parties to clarify the exact nature of the grievance and informed them that certain exhibitsdid not appear to be in the file. (See footnote 3) This case became mature for decision on July 1, 1998, the deadline for the parties' final proposed findings of fact and conclusions of law.

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. Grievants Hanna and Chapman are Equipment Operators II, and Grievant E. Setliff was

classified as a TC Main and is a Crew Leader. Grievants are employed by DOH at Cabell County within District Two.

2. On July 1, 1996, then Commissioner Fred VanKirk sent a memo to all Supervisors, to explain the process for the next series of employee merit raises. Grievants' supervisor, Mr. Thornburg, could grant 8.5 merit increases of 5 percent over the four quarters of the 1996 -1997 fiscal year. He had the option of changing these 8.5, 5 per cent merit increases to a greater number of 2.5 percent increases. Mr. Thornburg decided to decrease the merit increases to 2.5 per cent in order to enlarge the number of increases he could grant to the employees under his supervision to 17.

3. Mr. Thornburg was to give no more than one third of these increases in any given quarter. The first quarter recommendations were due on July 1, 1996, and they were to be effective on August 1, 1996. The second quarter recommendations were due on September 6, 1996, and they were to be effective on October 1, 1996. The third quarter recommendations were due on November 27, 1996, and they were to be effective onDecember 16, 1996. (See footnote 4) The fourth quarter recommendations were due on March 7, 1997, and they were to be effective on April 1, 1997.

4. Throughout the grievance, Grievants had the misconception that the third and fourth quarters of the fiscal year referred to in the above cited directions were the third and fourth quarters of calender year 1996. (See footnote 5)

5. Commissioner VanKirk directed that the fourth quarter merit increases recommendations be based on the 1996 evaluations.

6. Mr. Thornburg has three employees who are paid from his budget, but he does not supervise them in any way. They are supervised by Mr. Gene Cunningham, who directs and evaluates their work on the interstate. Mr. Cunningham evaluates these three employees, and tells Mr. Thornburg which ones he believes deserve merit increases. Any merit increases received by any of these three employees must be paid from the allotment given Mr. Thornburg by Commissioner VanKirk. Mr. Thornburg does not supervise Mr. Cunningham. 7. During the first and second quarter of fiscal year 1996 - 1997, Mr. Thornburg recommended approximately eight people for merit increases. Two of these eight employees were evaluated and recommended for merit increase by Mr. Cunningham. Mr. Thornburg did not re-evaluate or examine the performance evaluations of Mr. Cunningham's employees before he submitted their names for merit increases, as he was not their

supervisor. Mr. Thornburg has no control over these performance evaluations.

8. The 1995 evaluations used for these merit increases rate an employee in eight categories, and the employee is rated as "Exceeds Expectations", "Satisfactory", or "Needs Improvement." In some districts the supervisor has converted these categories into a numerical format and has interpreted "Exceeds Expectations" to equal three points, "Satisfactory" to equal two points, and "Needs Improvement" to equal one point. (See footnote 6) This conversion is not directed or suggested by either the performance evaluations or by DOH's Department of Personnel.

9. Mr. Thornburg does not utilize or even consider this point system when he reviews the performance evaluations to select employees for merit increases.

10. Mr. Thornburg was more generous in his assessments of his employees on the evaluation form than was Mr. Cunningham. 11. Using the point system discussed in Finding of Fact 8, of the employees Mr. Thornburg evaluated and recommended for increase, one employee received a total of 22 and the other three employees received a total of 19 points. (See footnote 7)

12. Using the point system discussed in Finding of Fact 8, of the employees Mr. Cunningham evaluated and recommended for increase, one employee received a total of 17 and the other employee received a total of 16 points.

13. Using the point system discussed in Finding of Fact 8, Grievants received the following evaluation totals: Mr. Setliff - 17 (See footnote 8) ; Mr. Chapman - 16; Mr. Hanna - 16.

Issues

Grievants argue they should have received merit increases because their evaluations were the same or higher than employees who did receive merit increases. (See footnote 9) Grievants did not argue discrimination. (See footnote 10) Toward the end of the Level IV hearing, Grievantsattempted to present evidence that Mr. Thornburg had shown favoritism to his two Office Assistants and the supervisors, as Grievants asked him to explain why they had received three straight merit increases. Respondent objected to this line of questioning believing it was outside the Statement of Grievance. The undersigned Administrative Law Judge asked Grievants to address this issue as there was no evidence to demonstrate that all these employees had received even two increases during the time in question, the first and second quarters, thus the issue appeared to be outside of the time defined in the grievance. Additionally, the undersigned Administrative Law Judge noted that favoritism had not

been addressed in the clarification of grievance requested at the start of the grievance. As this area was not previously added, Respondent objected, and Grievant did not have a response to the objection; this issue was not addressed further at hearing.

Respondent asserts the merit increases were properly based on the 1995 evaluations, the new evaluation form was not in use at the time in question, all employees were evaluated using a similar form, and differences in rater evaluation can not be completely controlled.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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).

In accordance with the rules of the West Virginia Division of Personnel, salary advancements must be based on merit as indicated by performance evaluations and other recorded measures of 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). DOH rules require merit increases to be based on "meritorious performance while taking into consideration such factors as equitable pay relationships and length of service." DOH Admin. Operating Procedures Vol. IX, Ch. 15. Typically these factors are used as tie- breakers. Morris v .W. Va. Dept. of Transp./Div. of Highways, Docket No. 97-DOH-176 (Aug. 22, 1997). However, 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-185 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Services, Docket No. 89-RS-051 (May 16, 1989). "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). 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.' Id." Trimboli v. W. Va. Dept. of Health and Human Servs./ Div. Of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

Mr. Thornburg's testimony is that he only considered the performance of his employees when he decided who should receive merit increases from the group he supervised. He also testified that he did not look at the performance evaluations completed by Mr. Cunningham or compare them with the evaluations of his employees because he has no control over Mr. Cunningham's evaluations. It is also clear he primarily considered the regulations of the Division of Personnel ("DOP") in awarding merit raises, as he referred to the 1995 performance evaluations when he made his recommendations. He also was adamant that he does not subscribe to the point theory utilized by some District Engineers. He reviewed his employees performance evaluations and selected who he thought had demonstrated the best performance. Mr. Thornburg clearly found a difference between satisfactorily rated employees. It is not arbitrary and capricious to find that even between two employees who received the exact same rating on their performance evaluations, that one is a better employee than the other. This is especially true when the rating categories are as broad as those used in the DOH performanceevaluations. It must also be noted that at the time the grievance was filed, Mr. Thornburg had only awarded one half of the merit increases assigned to his group for the fiscal year.

Selecting who will receive merit increases is at times difficult, especially when there are a limited number of raises to be awarded, numerous employees have demonstrated satisfactory performance, and employees are rated so similarly. Obviously, many employees in Cabell County had satisfactory evaluations and could be deserving of a merit increase. Unfortunately, there were a limited number of merit increases that could be awarded, and management decisions had to be made about who should receive them, utilizing the evaluations and the guidelines.

The specific problems in this grievance were caused by Mr. Thornburg being required to grant merit increases from his budget for employees over whom he has no control and has no right to evaluate. He also has no control over the supervisor who evaluates these employees. Although Mr. Thornburg is clearly irritated by this situation, and has complained about this state of affairs, at the time the merit increases were due he had two choices. One option was to accept Mr. Cunningham's

recommendation and grant merit increases to employees Mr. Cunningham thought were deserving of merit increases. This option meant granting merit increases to employees outside of Mr. Thornburg's control. Only Mr. Thornburg could give these employees a merit increase. The second option was to refuse to grant these employees the merit increases they deserved. Mr. Thornburg chose to accept another supervisor's recommendation and grant these merit increases. This decision cannot be seen as arbitrary and capricious. See generally Morris, supra. The merit increases awarded by Mr. Thornburg were based on performance evaluations and assessments by the employees' supervisors. This action is consistent with the directions from DOP. Grievants did not establish that their evaluations were substantially superior to those of the interstate employees, or that they were more deserving of a merit increase than the interstate workers. The fact that the two interstate workers' evaluations were equal to or lower than some other employees is not dispositive if the issue. Ratliff v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 96-DOH-004 (Jan. 31, 1997). They were rated by another evaluator, and the undersigned will take administrative notice that the evaluation of employees, even on the same form, will vary somewhat from rater to rater as the assessment of employees' performance is not an exact science. Id. Further, Grievants did not call Mr. Cunningham for any testimony to demonstrate that his evaluations and assessments were like Mr. Thornburg's.

As has been frequently stated by this Grievance Board, "[a]n 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, supra. Here, Grievants have failed to meet their burden of proof and demonstrate that DOH's actions violated any policy or were arbitrary or capricious. No one disputes Grievants received satisfactory evaluations, but unfortunately for Grievants, there were limited funds available.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Grievants have the burden of proving their case by a preponderance of the evidence in a nondisciplinary matter. Tucci v. W. Va. Dept. of Transp./W. Va. Div. of Highways, 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. In accordance with the rules of the West Virginia Division of Personnel, salary advancements must be based on merit, as indicated by performance evaluations and other recorded measures of 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).

4. Grievants did not demonstrate that DOH violated any statute, policy, rule, regulation, or applicable written agreement, or acted in an arbitrary and capricious manner when it awarded merit raises in August and December of 1996.

5. Grievants have failed to meet their burden of proof and demonstrate that they were more deserving of a merit increase than the employees selected to receive these merit increases. Ratliff v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 96-DOH- 004 (Jan. 31, 1997). See Roberts v. Dept. of Admin./Div. of Personnel, Docket No. 94- DOP-182 at 18 (Dec. 1, 1994). 6. Grievants have failed to meet their burden of proof and demonstrate Respondent failed to follow its Merit Increase Policy when awarding the merit raises in August and December of 1996.

Accordingly, this grievance is **DENIED**.

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.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 27, 1998

Footnote: 1

Originally there were two additional Grievants. One received the relief he sought at Level III, and the other Grievant did not elect to pursue his grievance to Level IV.

Footnote: 2

DOH was represented by Timbera Wilcox, Esquire, and Grievants were represented by Barry Holder from the West Virginia State Employees Union.

Footnote: 3

Copies of some of the exhibits were added to the record at Level IV, and Grievants clarified they were grieving the merit increases for both August and December 1996.

Footnote: 4

The original dates for the third quarter merit increases were submission on December 6, 1996, with the effective date of January 1, 1997.

Footnote: 5

This fact became clear when the undersigned Administrative Law Judge had the opportunity, after the hearing, to review in detail all the exhibits presented during the course of the hearing. This misunderstanding caused Grievants to argue that the December merit increases were incorrectly granted as the 1996 evaluations were not utilized. Pursuant to Commissioner VanKirk's memo, the 1996 evaluations were not to be applied until the April 1997 merit increases were submitted. Additionally, Mr. Thornburg testified at the April 1997, Level III hearing that he had timely completed the 1996 evaluations, but had been unable to find the time to share them with his employees as they had been involved in emergency work requiring extra hours. If Mr. Thornburg had not used the 1995 evaluations to recommend the fourth quarter merit increases in April, he could not have made any recommendations. As previously stated these fourth quarter increases were not at issue.

Footnote: 6

It is unclear why an employee who is rated as needing improvement could earn a point, but this issue was not germane to this grievance.

Footnote: 7

It is unknown what the evaluation totals for the other two employees were, as Grievants intentionally chose not to submit these evaluations or to contest them in any way.

Footnote: 8

It must be noted that at Level IV of this grievance, Grievant Setliff believed he had received a score of 18. This belief is incorrect as he received one "Exceeds Expectations" and seven "Satisfactorys" (7 x 2 = 14 + 3 = 17) for a total of 17. In actuality Grievant Setliff's total score is 19 because he, as a supervisor, is assessed in one additional category. This area was not addressed in the grievance, and thus Grievant Setliff's score was totaled as 17 for the purpose of this

grievance, so that his score could be compared with all other employees involved in the grievance. To do otherwise would be to grant Mr. Setliff an advantage over the other employees.

Footnote: 9

Grievant Setliff's score was higher than the lowest of Mr. Cunningham's employee; Grievant Hanna's and Grievant Chapman's score was the same as this employee. No Grievant was the same or higher than any of Mr. Thornburg's employees.

Footnote: 10

At the time the grievance was filed, Grievants did not know what other employees had received on their evaluations, or how they compared with the employees who received merit increases. The filing was based on the feeling that they were overdue for a meritincrease, and that they probably received a higher score than at least one person who had received a merit increase.

Grievants testified at length about their evaluations, and whether Mr. Thornburg had sufficient information on which to base his assessments. It must be noted that Grievants did not grieve their evaluations, and all Grievants received satisfactory evaluations, thus this issue was not considered. Further, Grievants did not compare themselves to other employees and argue they should have received a better evaluation than a similarly situated employee or assert they should have received a higher score in a certain category. Mr. Cunningham was not called to testify about his process in evaluating employees and how he recommended them for merit increases.