MARY KARR,

Grievant,

v. **DOCKET NO. 98-BEP-145**

WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS/LEGAL SERVICES DIVISION,

Respondent.

DECISION

This grievance was filed by Grievant Mary Karr against her employer, Respondent West Virginia Bureau of Employment Programs, on or about July 3, 1997. (See footnote 1) The grievance states that employees in different classifications in two lower pay grades are making a higher salary than Grievant, as are employees with lower performance evaluations, and she has received only one merit raise in the past five years. As relief she requested that she be given a salary increase, with retroactive pay adjustment to 1996, and to be madewhole in every way.

The following findings of fact necessary to the Decision reached are made based upon the record developed at Level III.

FINDINGS OF FACT

1. Grievant has been employed as a paralegal in the Legal Services Division of the Bureau of Employment Programs ("BEP") for approximately ten years.

2. Grievant did not receive a merit increase during either of the fiscal years ending June 30, 1996, or June 30, 1997. Her last merit increase was in April 1995.

3. Grievant's last performance evaluation, completed October 21, 1996, rated her performance as "Exceptional" in all 11 categories, with a perfect score of 10 in 9 out of 11 categories. Her overall rating was 9.82 out of a possible 10.0, with no aspect of her work needing improvement. Her

performance evaluation for the rating period ending September 30, 1995, and completed October 20, 1995, rated Grievant's performance as “Exceptional” in all 11 categories, with a perfect score of 10 in 4 out of 11 categories. Her overall rating was 9.44 out of a possible 10.0, with no aspect of her performance needing improvement. John Kozak, Director of the Legal Services Division, signed both performance evaluations.

4. The Legal Services Division has been allotted a limited number of merit increases each year.

5. The criteria to be used in awarding merit increases within BEP is set forth in a memorandum. (See footnote 2) The memorandum states that an employee must have an overall ratingof 5.0 or above on his last performance evaluation to qualify for a merit increase, and that “considerable 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.” 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.

6. Not all employees in the Legal Services Division have been evaluated annually on a performance evaluation form. Employees who reported directly to Mr. Kozak were not evaluated using a performance evaluation form every year, and employees who reported to employees such as Grievant were not evaluated. Level III transcript at pages 56 and 63.

7. In deciding who should receive a merit increase, Mr. Kozak considered performance evaluations, his observations of the employee's ability to get along with others, attitude, and job enthusiasm, and the value to the agency of a particular work product. He also considered when the employee last received a merit increase, and whether there were other employees eligible for a merit increase who had not received one recently, as he believed BEP's Commissioner's attitude was that merit increases shouldbe spread around so that everyone eligible for a merit increase would eventually receive one, regardless of how high their performance evaluation was. Finally, although Mr. Kozak did not consider longevity with the agency or salary inequities, he did consider whether an employee worked overtime, but was not eligible for overtime compensation.

8. The Legal Services Division has 19 employees. During the fiscal years ending June 30, 1996, and June 30, 1997, the Legal Services Division was allowed to award 13 merit increases. (See

footnote 3) One secretary received a merit raise during the time period following Grievant's last merit increase, when she was working for Grievant and two attorneys. This employee was not performing her duties satisfactorily. Level III transcript, pages 47-48, 74. (See footnote 4) A performance evaluation had not been completed for this employeeprior to her receipt of a merit increase. Level III transcript at page 63.

DISCUSSION

In nondisciplinary matters, the grievant has the burden of proving her case by a preponderance of the evidence. Tucci v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995). A grievant seeking a merit increase must prove she is more entitled to the increase than another employee who received such an increase. Tallman v. W. Va. Div. of Highways, Docket No. 91-DOH-162 (Jan. 31, 1992). An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary or capricious, or contrary to law, or properly established policies or directives. Hudkins v. W. Va. Dep't of Transp., Docket No. 96-DOH-403 (Feb. 14, 1997); Terry v. W. Va. Dep't of Transp./Div. Of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991).

West Virginia Division of Personnel Administrative Rule 3.1.84 (1995) defines “salary advancement” as “[a] discretionary advancement in salary granted in recognition of the quality of job performance.” Rule 5.08 (1995), states 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.” Only “information that has been preserved in written form and can be referred to for later assessment” may be considered a “recorded measure of performance.” Hodges v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-190 (Apr. 13, 1998). See Woods v. Dep't of Health and Human Resources, Docket No. 97-HHR-248 (Sept. 22, 1997); Riffle v. W. Va. Dep't of Transp., Docket No. 92-DOH-138 (Aug. 21, 1992); Tallman v. W. Va. Div. of Highways, Docket No. 91-DOH-162 (Jan. 31, 1992).

Because of the limited funds available for merit increases, the policy for awarding merit increases in BEP has, for a number of years, been to look at factors other than who has the highest score on the performance evaluations, and to spread them around so that everyone who is eligible will receive one at some time or another. Thus, under this policy, even if Grievant consistently scored the highest

possible rating on her performance evaluation, she could be excluded from the pool of eligible employees, and other employees who scored lower than Grievant, but were still eligible for a merit increase, would receive merit increases in years when Grievant did not.

> This Grievance Board has had several cases in which the employer has limited the pool of applicants based on multiple factors. Roberts v. Dept. of Admin./Div. of Personnel, Docket No. 94-DOP-182 (Dec. 1, 1994) (employees with raises within one year were ineligible, supervisors were directed to pay close attention to equitable relationships among employees and use of leave time); Delauder v. Dept. of HHR/Child Advocate Office, Docket No. 92-HHR-483 (Aug. 31, 1993) (employee who had received any pay raise during past two years not considered); Clemens/Cordray v. Dept. of Highways, Docket Nos. 90-DOH-033, 041 (Sept. 28, 1990) (supervisor did not consider employees awarded a merit increase within the past two years); Osborne v. Div. of Rehab. Serv., Docket No. 89-RS-051 (May 16, 1989) (individuals with previous merit increases were not automatically entitled to merit increase even if performance stayed the same, supervisors directed to check for pay inequity). In Roberts, supra, this Board held that factors that had already been assessed in the evaluation, such as leave time, could not be utilized again to limit the pool of applicants. Other decisions, while noting merit increases had been limited to those who had not had an increase in the prior years, have not found this restriction to violate either DOP's or DOH's regulations.

Tucci v. Dep't of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995) (footnote omitted). BEP's policy for awarding merit increases is likewise not inconsistent with Personnel's Administrative Rules regarding how merit increases are to be awarded. However, Grievant proved that the Legal Services Division acted in violation of Personnel's Rule 5.08, by not completing performance evaluations on all employees prior to determining who should be awarded merit increases. As has been noted by this Grievance Board before, performance evaluations are an important part of the employee- employer relationship, and it is important that they be completed in a timely, thorough and objective manner. “Failure to complete performance evaluations denies the employee a chance to respond to the employer's comments and denies the employee the chance to grieve what he or she may perceive as a negative evaluation.” Hudkins, supra. It may also deny the employee the opportunity to improve, and obviously, affects the ability of all employees to compete fairly for available merit increases. Employers should take the requirement that performance evaluations be performed seriously, and make every effort to see that each employee is properly evaluated in a timely manner.

A grievant must demonstrate more than a flaw in the merit increase process. As previously stated, a grievant must also demonstrate that, had the process been properly conducted, she would have received a merit increase. Stone v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 97-ABCA-

151 (Aug. 21, 1997). In this case, Grievant proved at least one employee whose performance had not been evaluated received a merit increase, even though she was not able to capably complete the work assigned to her by Grievant and two attorneys. Grievant has met her burden of proving this employee's performance should not have been rewarded with a merit increase, and Respondent failed to present any evidence to the contrary. Grievant has proven she should have received a merit increase rather than another employee who received one, and Grievant should,therefore, be awarded relief. (See footnote 5) Tallman, supra. The amount of the merit increase was not identified, nor the exact date of the merit increase. Accordingly, Grievant will have to provide the name of that employee to BEP, and she should be awarded the same merit increase as was awarded to the secretary to whom Grievant referred in her testimony at Level III, retroactive to the date of that employee's last merit increase prior to the date of the filing of this grievance. Grievant also complains that she is receiving less pay than paralegals recently hired by the Attorney General's Office. While it may irritate Grievant that employees of other agencies are receiving more pay than she is, and she may point to this as a reason why her employer should consider her for a salary increase, each agency is responsible for setting salaries within the agency, so long as the salaries are within the pay range established for the pay grade. Grievant's employer obviously has no control over the fiscal policies of the Attorney General's Office, nor is it bound by that Office's internal policies on salaries. Even within the same agency, “employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification.” Cooper v. W. Va. Dep't of Public Safety, Docket No. 96-DPS-458 (Apr. 9, 1997), citing Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994), and W. Va. Code § 29-6-10. “In short, employees who are doing the same work must be placed within the same classification, but within that classification there may be pay differences if those differences are based on . . . specifically identifiable criteria that are reasonable and that advance the interests of the employer.” Largent at 246. There is no evidence that these other paralegals are being paid in excess of the salary range for the pay grade, or that Grievant's salary is not within the pay range for the paralegal pay grade. See Woods v. Dep't of Health and Human Resources, Docket No. 97-HHR-248 (Sept. 22, 1997); Randall, et al., v. W. Va. Public Serv. Comm'n, Docket No. 94-PSC-001 (Feb. 28, 1996); Saidi v. W. Va. Dep't of Transp., Docket No. 95- DOH-106 (June 13, 1995).

CONCLUSIONS OF LAW

1. In nondisciplinary matters, the grievant bears the burden of proving theelements of her grievance by a preponderance of the evidence. Tucci v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995). A grievant seeking a merit increase must prove she is more entitled to the increase than another employer who received a merit increase. Tallman v. W. Va. Div. of Highways, Docket No. 91-DOH- 161 (Jan. 31, 1992).

2. An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary or capricious, or contrary to law or properly established policies or directives. Terry v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991).

3. West Virginia Division of Personnel Rule 5.08 (1995), provides that salary advances shall be based upon merit, as evidenced by performance evaluations and other recorded measures of performance, such as quality and quantity of work and attendance. Roberts v. W. Va. Dep't of Admin./Div. Of Personnel, Docket No. 94-DOP-182 (Dec. 2, 1994).

4. Grievant proved that her employer awarded a merit increase to another employee in violation of Personnel's Rule 5.08, and that she should have been awarded a merit increase instead of that employee.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to adjust Grievant's salary to reflect the merit increase she should have received, and pay Grievant back pay to the date she should have received a merit increase, consistent with the preceding discussion in this Decision, plus interest, from the date Grievant should have received the merit increase.

Any party or the West Virginia Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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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BRENDA L. GOULD

Administrative Law Judge

Date:

August 28, 1998

Footnote: 1

The record does not reflect what occurred at Level I. The grievance was denied at Level II on July 23, 1997. Grievant appealed to Level III, where a hearing was held on November 13, 1997. Grievant represented herself, and Respondent was represented by L. Eugene Dickinson, Esquire. The grievance was denied at Level III on April 13, 1998, and Grievant appealed to Level IV on April 24, 1998. Both parties agreed to have the case decided based on the record developed at the lower levels of the grievance procedure. This case became mature for decision on June 30, 1998, the due date for written argument. Neither party submitted written argument at Level IV.

Footnote: 2

Grievant was not aware of this memorandum prior to the hearing in this matter, or that the additional criteria set forth in this memorandum existed. Thomas K. Rardin, Personnel Administrator for BEP, stated, "that is a document that istransmitted to the directors as a management tool by the Commissioner. I don't believe that as a management tool that the Commissioner is required to share it with every single employee within the Bureau." Mr. Rardin did not indicate why BEP employees should not be made aware of the factors which would be considered in determining which of them would receive a merit increase. This would seem to be something which all employees should be made aware of.

Footnote: 3

Mr. Kozak could not recall whether any individual received more than one merit increase during this time period. Although Respondent's counsel indicated Respondent would provide information after the hearing to answer Grievant's question of Mr. Kozak regarding whether the 13 merit raises went to 13 different individuals, this was never made a part of the record.

Footnote: 4

This testimony was given by Grievant during the course of her cross-examination of Mr. Kozak. Although Respondent's counsel objected to her statement of "facts not in evidence," no ruling was made on the objection, Grievant was under oath at the time she made the statement, and she was not informed that she was not allowed to present her testimony in this fashion. Respondent's counsel could have asked to cross-examine Grievant on this matter. She was a pro se Grievant, who was not a lawyer, and should have been given some latitude, or at least direction, in this regard. Further, Grievant later specifically asked Mr. Kozak, "[n]ow it was this individual weighing criteria, not the performance evaluation, that you used as your criteria in giving my secretary a merit raise to put her at a higher salary than I made, even though the two attorneys that she worked for would not use her?" No objection was made to this question. Mr. Kozak responded

to this lengthy question by simply stating, "I don't agree with that statement, no." He offered no explanation regarding how this secretary came to receive a merit increase, even though he offered lengthy explanations in response to many other questions. Accordingly, Grievant's statements in the midst of cross-examination of Mr. Kozak regarding her formersecretary's abilities, or lack thereof, will be considered evidence.

Footnote: 5

Prior to the Level III hearing, Grievant requested copies of performance evaluations for all employees in the Legal Services Division, in an effort to demonstrate her superior entitlement to a merit increase. Respondent refused to provide this requested information, asserting that performance evaluations are personal matters under the Freedom of Information Act ("FOIA"). Of course, Grievant's request was not made under FOIA, but was in the nature of a discovery request. Respondent's counsel also questioned whether "the fact that someone receives a merit increase whether or not they have a higher or lower evaluation," states a cause of action. The performance evaluations of other employees were one part of the information essential to proving Grievant's argument that she was entitled to a merit increase over other employees. Had she been provided this information, she would have also been made aware that performance evaluations were not being completed on all employees. It is readily apparent from many other Grievance Board decisions that the performance evaluations of other employees are clearly relevant, important evidence when a grievant is challenging the propriety of merit increases, and that these documents have been made available to other grievants on many occasions. This information should have been provided to Grievant as she requested, with those portions of the document which contained confidential information redacted. Another option would have been for Respondent to talk to Grievant about what she wanted, and seek a way to provide the information to her, while accommodating its own confidentiality concerns. Grievant is not a lawyer, and should not be expected to know that she could have insisted that this information be provided to her. It is very disturbing, to say the least, that a state employer would act in this manner in a grievance proceeding involving an employee, particularly when the employee is appearing pro se, while Respondent is represented by counsel. Unfortunately, this practice of simply refusing to provide the information requested and making no attempt to accommodate the employee's request in a manner which will also maintain confidentiality, is all too common in grievance proceedings.