JOHNNY GREEN,

Grievant,

v.

DOCKET NO. 98-DOH-202

WV DEPARTMENT OF TRANSPORTATION/ DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Johnny Green, challenges the rescission of a merit increase he received in 1995. This grievance was denied by Grievant's immediate supervisor on April 23, 1997. Grievant appealed to level two, where the grievance was denied by William Hartman, District Engineer, on April 29, 1997. Upon appeal to level three, the parties agreed that, in lieu of a hearing, a deposition would be taken from Jeff Black, Director of Human Resources, on November 7, 1997. The grievance was denied in a written level three decision dated June 1, 1998. (See footnote 1) **Grievant appealed to level four on June 11, 1998. This matter was held in abeyance for several months, due to a strike in which Grievant's representative was involved. A level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on October 13, 1998. Grievant was represented by Marilyn Kendall of the State Employees' Union, and the Division of Highways was represented by Timbera Carrico, Esquire. This matter became mature on November 16, 1998, upon receipt of Grievants' written post-hearing submission. Respondent elected not to file anysubmission.**

The following findings of fact are made from a preponderance of the evidence of record, including all documents and exhibits submitted at level three.

Findings of Fact

1. Grievant is employed by the Division of Highways (DOH) in Berkeley County, District Five.

2. Effective October 16, 1995, Grievant and five of his co-workers in District Five received merit salary increases.

3. Numerous employees in District Five filed a consolidated grievance ("Allen grievance"), alleging that the raises granted to Grievant and his co-workers were not based upon merit.

4. In the level three grievance decision in Allen, dated May 23, 1997, DOH Commissioner Fred VanKirk found that the raises were, indeed, not based upon appropriate measures of performance. He ordered that the raises of Grievant and another employee, Jamie James, be rescinded, because District Five had been allocated a limited number of raises (Level III, Gr. Ex. 3).

5. In accordance with the level three decision referred to above, Commissioner VanKirk rescinded Grievant's 1995 merit increase, effective April 30, 1997. (See footnote 2)

6. The Allen grievance was appealed to level four. Allen, et al., v. W. Va. Dept. of Transp., Docket No. 97-DOH-199 (Oct. 31, 1997). The Grievance Board ruled that twoadditional employees were more entitled to raises than two of the original employees (aside from Grievant and Mr. James) who had received the 1995 merit increases. The administrative law judge awarded raises to the two employees, but did not order rescission of the initial raises. DOH did not rescind any raises in response to this level four decision.

7. Grievant does not contend that he was entitled to the merit increase he received in October of 1995.

8. In a level two decision dated February 3, 1997, DOH found that the grievant, Mike Timbrook, was more entitled to a merit increase than another employee who had received one. Mr. Timbrook was granted a raise, but the other employee's raise was not rescinded. (Level III, Gr. Ex. 14.)

9. A level two grievance decision dated April 22, 1997, granted a merit raise to Mary Hayden, finding that she was more entitled to an increase than an employee who had received one. The decision granted a raise for Ms. Hayden, but it did not mention rescission of the other employee's raise. (Level III, Gr. Ex. 13.) DOH rescinded the original raise in response to this decision.

10. DOH has no formal policy regarding the rescission of merit raises when co- workers are successful in a grievance.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his allegations 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); 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). See W. Va. Code § 18-29-6. Grievant contends that DOH's practice with regard to the rescission of merit raises in response to successful grievances is inconsistent and, in this case, discriminatory. He argues that DOH rescinds raises in some cases and lets them stand in others, even without being ordered to do so by the grievance evaluator.

"Discrimination" is defined by W. Va. Code § 29-6A-2(d) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees". A prima facie case of discrimination requires the grievant to prove the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employees;

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

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

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992). Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995). Grievant has established a prima facie case of discrimination. He is similarly situated to other employees whose raises have been determined to have been improperly awarded. However, many of those employees were allowed to retain their raises after a co-worker's successful grievance, while Grievant's was rescinded. There has been no allegation by DOH that the reasons for its actions were related to any of the employees' job duties.

DOH admits that, in the past, it has not rescinded merit raises under circumstances similar to Grievant's. However, Jeff Black testified that, around the time that the level three decision in Allen was rendered, DOH decided to adopt a "policy" of rescinding improper merit raises. This "policy" has never been placed in writing. Moreover, in late 1997, after the adoption of this so-called policy, DOH did not rescind any merit raises when the Grievance Board found two more of the original six merit raises to have been awarded to the wrong employees. Mr. Black's only explanation for DOH's failure to rescind those raises was that, because of the number of employees involved in the Allen grievance, DOH felt that it had "gotten off easy" with only having to grant two more raises. If all of the raises had been found to be improper, DOH could have been faced with giving as many as sixteen merit raises to District Five. However, an additional two raises did not cause nearly the hardship that sixteen would have. Therefore, no raises were rescinded in response to that level four determination.

DOH has failed to provide legitimate, non-discriminatory reasons for its disparate treatment of Grievant. While his raise was rescinded after having been determined to be improper, others have been allowed to stand after the same determination. Therefore, DOH's practice is discriminatory, and Grievant has proven his case by a preponderanceof the

evidence. While it would not be improper for DOH to adopt a policy of rescinding merit raises in response to such grievance decisions, such a policy must be applied consistently to all employees.

The following conclusions of law are appropriate in this grievance.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his allegations 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); 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). See W. Va. Code § 18-29-6.

2. In order to establish a prima facie case of discrimination under W. Va. Code §29-6A-2(d), the grievant must prove the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employees;

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

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

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

3. Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94- DOH-376 & 377 (Feb. 23, 1995).

4. Grievant has proven by a preponderance of the evidence that DOH engaged in

discrimination by rescinding his merit raise in this case.

5. DOH has failed to provide legitimate, non-discriminatory reasons for its actions.

Accordingly, this grievance is GRANTED, and Respondent is ORDERED to reinstate Grievant's 1995 merit raise, with back pay and interest to April 30, 1997.

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, and 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.

Date: December 30, 1998 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The record does not explain the significant delay between the deposition and the level three decision.

Footnote: 2

Although his raise was also rescinded, Mr. James has been off work for an extensive period of time, and he has not actually been paid since the decision to rescind the raises.