ROBERT BITTINGER, et al.,

Grievants,

v. **Docket No. 98-BEP-164**

BUREAU OF EMPLOYMENT PROGRAMS/
GREENBRIER VALLEY JOB SERVICE,

Respondent.

DECISION

Robert Bittinger, Steve Rutledge, Patricia Moody and Emily Rutherford (Grievants) allege that the Bureau of Employment Programs/Greenbrier Valley Job Services (BEP) engaged in discrimination when it failed to grant them merit pay increases. Grievants seek five percent raises retroactive to the dates raises for other employees in their office took place, additional five percent raises effective July 1, 1997, and otherwise to be made whole.

On October 10, 1997, this grievance was denied at Level I by Immediate Supervisor Betty Carola. On November 4, 1997, it was denied at Level II by Area Field Supervisor Jeff Smith. On May 6, 1998, it was denied at Level III by Grievance Evaluator Jack W. DeBolt.

This grievance was appealed to Level IV, where a hearing was held in the Grievance Board's Beckley office on September 21 and October 28, 1998. BEP was represented at this hearing by Assistant Attorney General Jeffrey G. Blaydes, Esq., and Grievants were represented by Grievant Rutledge and Lynn Belcher of AFSCME. The parties were given until November 20, 1998, to submit proposed findings of fact andconclusions of law. On November 17, 1998, Respondent moved for an extension of two working days, which was granted over Grievants' objection. This matter thus became mature for decision on November 24, 1998. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievants are employed at the Greenbrier Valley Job Services office of BEP.

2. On September 9, 1997, Grievants met with Office Supervisor Betty Carola, to complain that they had not received merit pay increases for some time. They received the impression that no one in the Greenbrier Valley office had recently received a merit pay increase.

3. On September 29, 1997, Grievants learned that three other employees in their office had received merit pay increases, one in a round of merit pay increases which occurred in October of 1996.

4. This grievance was filed on October 3, 1997.

5. The criteria to be used in awarding merit increases within BEP are set forth in an undated memorandum. The memorandum states that an employee must have an overall rating of 5.0 or above on his or her 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." 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, shouldbe considered in awarding merit increases.

6. Betty Carola has managed the Greenbrier Valley Job Service office for the past seven years. Sometime before October, 1996, she was informed by her supervisor, Area Field Supervisor Jeff Smith, that funds were available to grant merit pay increases to some, but not all, of her subordinates.

7. Carola based her merit pay increase decisions on employee evaluations, disciplinary actions, seniority (See footnote 1), attitude, the amount of time since an employee's last increase, and whether an employee had recently received a salary increase through promotion.

8. For the October, 1996 cycle of merit pay increases, the most recent evaluations had been completed during that month. The previous year's evaluations were apparently also considered.

9. Grievant Rutledge last received a merit pay increase on August 16, 1994. His 1995 and 1996 evaluations yielded final ratings of 8.22 and 8.22, respectively. He had three years and ten months seniority.

10. Grievant Moody last received a merit pay increase on April 16, 1995. Her 1995 and 1996

evaluations yielded final ratings of 8.44 and 8.55, respectively. She had 16 years seniority.

11. Grievant Rutherford has never received a merit pay increase. Her 1995 and 1996 evaluations yielded final ratings of 6.7 and 7.11, respectively. She had two years andtwo months seniority. Grievant Rutherford had recently been promoted and given a raise, was having trouble fulfilling the duties of her new position, and had been rude to customers.

12. Grievant Bittinger last received a merit pay increase on April 16, 1995. His 1995 and 1996 evaluations yielded final ratings of 8.22 and 8.11, respectively. He had 11 years, two months of seniority. Grievant Bittinger had a negative attitude, which he constantly expressed, causing disruption in the office.

13. The only employee to receive a merit pay increase during the October, 1996 round of increases was Employee Three. (See footnote 2) S/he received 1995 and 1996 evaluations yielding final ratings of 8.18 and 8.27, respectively. S/he had 13 years, two months seniority.

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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equallysupports both sides, a party has not met its burden of proof. Id.

BEP has raised a timeliness defense to this grievance. W. Va. Code § 29-6A-4(a) provides as follows:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant.

"Days" is defined as "working days exclusive of Saturday, Sunday or official holidays." W. Va. Code § 29-6A-2(c). A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Pryor et al. v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-341 (Oct. 29, 1997); West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 17, 1997); Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

This grievance was filed on October 3, 1997. BEP argues that Grievants' ten day filing period began to run on September 9, 1997, when they met with Office Supervisor Betty Carola, to complain that they had not received merit pay increases for some time. At this meeting, they received the impression that no one in the Greenbrier Valley office had received a merit pay increase during the October, 1996, round of increases.

However, the event upon which this grievance is based, Grievants' discovery that merit pay increases had been granted to other employees in their office, but not to them, became fully and unequivocally known to Grievants only on September 29, 1997, when they contacted the state Auditor's office. See Spahr v. Preston County Bd. of Educ., 182W. Va. 726, 391 S.E.2d 739 (1990). They filed this Grievance four working days later. BEP has failed to establish that this Grievance was not timely with respect to the October, 1996, round of merit pay increases.

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 § 5.8(a) (1998). See King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). Additional criteria to be used in awarding merit increases within BEP require that an employee must have an overall rating of 5.0 or above on his or her 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).

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 Serv., Docket No. 89-RS-051 (May 16, 1989). An employer is free to limit the pool of employees consideredfor merit pay increases to those who have not recently had one. Tucci v. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995), and the numerous cases cited therein. Grievants seeking merit increases must prove they were more entitled to the increase than another employee who received one. Tallman v. W. Va. Div. of Highways, Docket No. 91-DOH 162 (Jan. 31, 1992).

However, 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. Setliff v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-262 (July 27, 1998); Morris, supra; Ratliff v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-004 (Jan. 31, 1997); Parsons/Clemmer v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-289 (Oct. 30, 1997).

___In applying the arbitrary and capricious standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra at 286; Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96- 20-362 (Jan. 30, 1997).

Grievants contend that BEP's failure to grant them merit pay increases during the October, 1996, round of merit increases constitutes discrimination prohibited under W. Va. Code § 29-6A-2(d). Discrimination is defined therein as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of theemployees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d). This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under § 29-6A-2(d), must demonstrate the following: (a) that s/he is similarly situated, in a pertinent way, to one or more other employee(s); (b)

that s/he has, to his or her detriment, been treated by his or her 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. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992). Once a grievant establishes this prima facie case of discrimination, the employer can then offer a legitimate reason 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).

Grievants demonstrated that they were in the pool of employees considered for merit raises in 1996, and another employee in the pool with similar evaluations received a merit raise, while Grievants did not. Thus, the undersigned Administrative Law Judge finds that Grievants have shown that they were treated differently from a similarly situated co-worker to their detriment, establishing a prima facie case of discrimination under W. Va. Code § 29-6A-2(d).

In response to this prima facie case, BEP provided testimony from Grievants'supervisor that established job-related, non-discriminatory reasons for the decision not to award merit raises to Grievants. Supervisor Betty Carola testified that because she was not authorized to give merit increases to all employees, she has tried over the years to “spread them around” to qualified employees. Ms. Carola based her merit pay increase decisions on employee evaluations, disciplinary actions, seniority, attitude, the amount of time since an employee's last increase, and whether an employee had recently received a salary increase through promotion.

Ms. Carola testified that she gave a raise to Employee Three because that employee had good evaluations, seniority of 13 years and two months, had not received a merit increase since December 15, 1994, had provided supervision when Ms. Carola was away, and done work in addition to her regular duties during a time of change.

Grievant Rutledge had substantially similar evaluations to Employee Three, and had been without a merit increase for a similar period of time. However, he had some ten years less seniority.

Grievant Moody had better evaluations than Employee Three and greater seniority, but had gone without a merit increase for some four fewer months.

Grievant Rutherford had significantly lower evaluations than Employee Three, and, as an employee with just two years and two months of seniority, had never been given a merit increase. However, Grievant Rutherford had recently received a substantial pay increase upon being promoted. Supervisor Carola also cited Rutherford's rudeness to customers, which caused complaints, and her problems fulfilling the duties of her new position, as factors in her not receiving a merit increase.

Grievant Bittinger had nearly identical evaluations to Employee Three, and had beenwithout a merit increase for about eight months longer. However, he had two years less seniority than Employee Three. Moreover, Bittinger had been evaluated by Carola as having an attitude problem, in that he had a very negative attitude toward change, which he constantly expressed, causing disruption in the office. He resisted Carola's attempt to get him to dress more professionally. At one point, he wrote on his evaluation that he had no regard for management, and his testimony at Level IV tended to confirm Carola's perception that he can be belligerent.

In each of these situations, BEP established job-related, non-discriminatory reasons for the decision not to award merit raises to Grievants. The decision not to award Grievant Moody an increase, although she had higher evaluations than Employee Three, was not arbitrary or capricious, because the fact that she had gone without an increase for less time than Employee Three demonstrated that “all other factors” were not equal. Setliff, supra.
BEP was free to limit the pool of employees considered for merit pay increases to those who have not recently had one. Tucci, supra. Grievants failed to prove they were more entitled to the increase than another employee who received one. Tallman, supra.

Because Grievants failed to establish that the reasons BEP articulated for its merit pay increase decisions were merely pretexts for discrimination, the presumption created by Grievants' establishment of a prima facie case is rebutted. Therefore, Grievants have not established, by a preponderance of the evidence, that they were subjected to impermissible discrimination. See Tex. Dep't of Community Affairs v. Burdine, supra; Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 309 S.E.2d 342, 352 (W. Va. 1983); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). BEP's method for granting merit pay

increases was also not demonstrated to be arbitrary and capricious or an abuse of discretion, in that it was reasonable, relevant factors were considered, and no clear error of judgment was established. Bowman, supra.

Allocating merit pay increases is a difficult task, especially when there are a limited number of raises to be awarded, numerous employees have demonstrated satisfactory performance, and employees are rated so similarly. Supervisor Carola had to balance many factors in her decisions, and her judgments were, of necessity, often subjective ones. Obviously, many employees in BEP's Greenbrier Valley office 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. Ms. Carola did so, and the undersigned declines to disturb her decisions.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. 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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is,evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

2. A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Pryor et al. v. W. Va. Dep't of Transp., Div. of Highways, Docket No. 97-DOH-341 (Oct. 29, 1997); West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 17, 1997); Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. Respondent failed to meet its burden of establishing that this grievance was not timely

filed.

___4. 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 § 5.8(a) (1998). See King v. W. Va. Dept. of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). Additional criteria to be used in awarding merit increases within BEP require that an employee must have an overall rating of 5.0 or above on his or her 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 meritincreases.

___5. W. Va. Code § 29-6A-2(d) defines discrimination 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.

6. To establish a prima facie case of discrimination, a grievant must show:(a) that s/he is similarly situated, in a pertinent way, to one or more other employee(s); (b) that s/he has, to his or her detriment, been treated by his or her 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. Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

7. Grievants established, by a preponderance of the evidence, a prima facie case of discrimination.

8. Respondent rebutted Grievants' prima facie case.

9. Grievants failed to establish that the reasons BEP articulated for its merit pay increase decisions were merely pretexts for discrimination.

Accordingly, the 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 toappeal and provide the civil action number so that the record can be prepared and
transmitted to the appropriate court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated December 7, 1998

Footnote: 1 *BEP's Administrative Directive 6300.60, which implements W. Va. Code § 29-6-10, mandates that seniority be considered when determining who shall receive, or have withdrawn, a benefit such as a pay increase.*

Footnote: 2 *The non-grieving employees at the Greenbrier Valley Job Service office were referred to by numbers throughout this grievance.*