NANCY BOARD,

Grievant,

v. **DOCKET NO. 00-RS-216**

DIVISION OF REHABILITATION SERVICES,

Respondent .

D E C I S I O N

This grievance was filed by Grievant, Nancy Board against Respondent, Division of Rehabilitation Services ("DRS"), on or about March 29, 2000, alleging discrimination, favoritism, and misapplication of the policy for awarding merit increases. She sought as relief a 7 1/2% merit increase, retroactive to October 16, 1999. (See footnote 1)

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievant is employed by DRS as a Senior Specialist in Staff Development in Charleston. She has been employed by DRS for over 30 years. Her supervisor is Angela Farha. At the time merit increases were awarded in 1999, only one other DRS employee was in the same classification as Grievant.

2. James S. Jeffers, Director of DRS, issued a Memorandum to managers and supervisors on August 31, 1999, providing general instructions for recommending merit increases. The memorandum states that the merit increase plan consists of three parts, a performance increase of 4%, an incentive increase of 1%, and an outstanding incentive increase of 3.5%. The memorandum states that no more than 30% of existing permanent staff in a unit could be recommended for merit increases, with fractions being rounded down; performance increases could not be awarded to employees whose performance evaluations did not reflect a rating of at least 4.0 in quantity of cases processed, 4.0 in quality of work, and 4.0 overall; incentive increases may be awarded only to employees who have

completed 90% of MAPS (Management and Performance System); outstanding incentive increases may be awarded only to employees who have completed 100% of MAPS, or if they do not complete MAPS, they must have completed all of their job duties and exceeded in more than one job duty; and that employees must have the supervisor's recommendation for any of the increases.

3. Merit increases for the 1998-99 fiscal year appeared in DRS employee paychecks issued October 31, 1999.

4. Grievant's overall rating on her performance evaluation was 4.5 out of a possible 5.0. Her ratings in quantity and quality of work were 4.0, and she completed her MAPS. Grievant was eligible for a merit increase, but did not receive one. Her supervisor did not recommend her because she was allowed to recommend only 30% of her staff, one person, for a merit increase. There are two other employees in Grievant's unit, and both of them had better evaluations than Grievant. One employee in Grievant's unit received a merit increase.

5. This grievance was filed on or about March 29, 2000, after Grievant was present at a meeting on March 16, 2000, where she learned that the criteria which wereto be used in awarding merit increases were not followed.

6. Larry Bell, the District Manager in Clarksburg, has 43 employees in his unit. He recommended seven employees for merit increases, and they were the only employees in his unit who met the minimum criteria of a 4.0 in quality, 4.0 in quantity, and 4.0 overall. One of the employees he recommended did not receive a merit increase until he filed a grievance. Six employees in his unit who did not meet the minimum criteria, and were not recommended by him for a merit increase, were awarded merit increases. Using the formula established for calculating 30% of a unit, his unit was allowed 12 merit increases. Twelve merit increases were initially awarded to the employees in his unit. After one employee grieved, the total number of employees receiving merit increases in his unit was 13, exceeding the 30% limit. None of Mr. Bell's employees are in the same classification as Grievant.

7. Mr. Bell met the established criteria for receiving a merit increase; he was recommended by his supervisor for a merit increase; and he did not receive a merit increase.

8. Dwight McMillian, District Manager in Huntington, was allowed to recommend 11 of the 39 employees in his unit for merit increases, based upon the 30% maximum per unit. He recommended 11 employees in his unit for merit increases. All met the published criteria for awarding merit

increases, and all received merit increases. More than 12 other employees in his unit met the published criteria, but did not receive merit increases. One employee in his unit who did not meet the minimum standards, and was not recommended for a merit increase, received a 7 1/2% merit increase. (See footnote 2) Twelve employees in his unitreceived merit increases, which was more than 30% of the employees in the unit. Mr. McMillian believes that awarding merit increases to employees who did not meet the minimum criteria has had a bad effect on morale.

9. Respondent raised a timeliness defense at Levels I and II.

Discussion

DRS asserted this grievance should be dismissed as untimely filed. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

The first issue which needs to be addressed is whether this defense was timely raised by DRS. Effective July 1, 1998, W. Va. Code § 29-6A-3 requires the respondent to raise the issue of timeliness at or before Level II. DRS did so.

As to when a grievance must be filed, W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

A grievance must be filed within 10 days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a) provides, in pertinent part:

> 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. . . ..

Only working days are counted in determining when the 10 day time period runs for filinga grievance. Holidays are not counted. W. Va. Code § 29-6A-2(c).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally

notified of the decision being challenged. Harvey, supra; Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). With regard to a merit increase, the grievable event is ordinarily the failure to receive a merit increase, not learning that others have received merit increases. Jones v. Div. of Rehabilitation Serv., Docket No. 00-RS-046 (June 22, 2000). Grievant knew October 31, 1999, that she had not received a merit increase.

Grievant argued that she did not know the merit increase criteria had not been used in awarding merit increases to some DRS employees until she heard supervisors questioning how merit increases were awarded at a meeting on March 16, 2000; and the grievable event occurred when she became aware the criteria were not applied.

Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." The same discovery rule found in the education grievance procedure is also found in the grievance procedure for state employees at Code § 29-6A-4. In this case Grievant had no reason to believe that established criteria had not been followed in awarding all employees merit increases, until March 16, 2000, and the event triggering the time period for filing a grievance was her discovery of the fact that other employees were not required to meet the minimum criteria. Hammond v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-222 (Nov. 30, 1998); Little v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-092 (July 27, 1998). Until Grievant knew of this fact, she had no reason to raise a claim ofdiscrimination, or to otherwise challenge the process followed in awarding merit increases. See Short v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-038 (Mar. 25, 1999); Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998). She filed her grievance as soon as she found out that employees who did not meet the minimum standards had received merit increases. Although reasonable minds could differ on this issue, “the interest of equity would not be served by a rigid interpretation of the standard. See Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).” Hammond, supra. The grievance was timely filed.

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).

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 Administrative Rule, 143 C.S.R. 1 § 5.08(a) (1998). See Morris v. W. Va. Dep't of Transp., Docket No. 97-DOH-167 (Aug. 22, 1997); King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). 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. Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR- 092 (July 27, 1998); Morris, supra; Salmons v. W. Va. Dep't of Transp., Docket No. 94- DOH-555 (Mar. 20, 1995); Terry v. W. Va. Div. of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Serv., 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. Dep't of Health and Human Servs./ Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

In this case, DRS set out the criteria which were to be used in awarding merit increases, requiring that certain minimum standards be met, but then did not follow these criteria. DRS offered no explanation for its deviation from the published criteria. DRS did not rely upon the criteria intended to be considered, and its action, absent any explanation, is arbitrary and capricious.

However, as DRS pointed out, “[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)." Karr v. W. Va. Bureau of Employment Programs, Docket No. 98-BEP-145 (Aug. 28, 1998). While Grievant pointed to other employees throughout the state who received merit increases, and whose performance evaluations were not as good as Grievant's, that does not mean she would have received a merit increase had the merit increase criteria been followed. It is also true that at least one unit in the state was allowed to exceed its 30% allocation by one person; however, that still does not mean Grievant should have received a merit increase. Of the three employees in Grievant's unit, one received a merit increase, and the other employee had a better evaluation thanGrievant. In one unit in the state, one or more employees recommended by their supervisor for merit increases, who met the minimum criteria, and would not have caused the unit to exceed the 30% allocation, did not receive merit increases, while other employees in the unit who did not meet the minimum criteria, and were not recommended by their supervisor, received merit increases. These employees are the ones who should have received merit increases.

Grievant argued that awarding employees whose evaluations were not as good as hers merit increases was discriminatory and evidenced favoritism. 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." W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 29-6A-2(d) and (h), a grievant must demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph

County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show that the offered reasonsare pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). 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); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievant is not similarly situated to employees in other units who are not performing the same duties she is performing, and who have been evaluated by other supervisors. “[T]he 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.” Setliff v. Dep't of Transp., Docket No. 97-DOH-262 (July 27, 1998), citing Ratliff v. W. Va. Dep't of Transp., Docket No. 96-DOH-004 (Jan. 31, 1997). Further, DRS allotted merit increases by pools of employees, which it was allowed by law to do. DRS did not compare the evaluations of all employees in the state, and then award merit increases to those with the best evaluations. Rather, DRS divided the merit increases by units, allowing each unit to award merit increases to only a certain number of employees. Under this system, even if DRS had followed the written criteria to the letter, there would probably have been other employees in the state with lower evaluations than Grievant who received merit increases because those employees were compared to others in their unit, not to Grievant. Grievant is similarly situated to other employees in her unit. She is not similarly situated to all employees throughout the state.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the party asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

2. A grievance must be filed within 10 working days following the occurrence of the event upon

which the grievance is based. W. Va. Code § 29-6A-4(a). 3. "[T]he time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), Syllabus Point 1. Grievant had no reason to believe that established criteria had not been followed in awarding all employees merit increases, until March 16, 2000, and the event triggering the time period for filing a grievance was her discovery of the fact that other employees were not required to meet the minimum criteria. Hammond v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-222 (Nov. 30, 1998); Little v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-092 (July 27, 1998). See Short v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-038 (Mar. 25, 1999); Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998).

4. This grievance was filed as soon as Grievant discovered that employees who did not meet the minimum standards had received merit increases. The grievance was timely filed.

5. 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 Administrative Rule, 143 C.S.R. 1 § 5.08(a) (1998). See Morris v. W. Va. Dep't of Transp., Docket No. 97-DOH-167 (Aug. 22, 1997); King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). 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. Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR- 092 (July 27, 1998); Morris, supra; Salmons v. W. Va. Dep't of Transp., Docket No. 94- DOH-555 (Mar. 20, 1995); Terry v. W. Va. Div. of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Serv., Docket No. 89-RS-051(May 16, 1989).

6. "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. Dep't of Health and Human Servs./ Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

7. DRS acted in an arbitrary and capricious manner in awarding merit increases by not following the published criteria.

8. "A grievant must demonstrate more than a flaw in the merit increase process. . . . 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)." Karr v. W. Va. Bureau of Employment Programs, Docket No. 98-BEP-145 (Aug. 28, 1998).

9. Grievant did not demonstrate she would have received a merit increase had the criteria been followed.

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

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v.Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

11. Grievant is not similarly situated to all DRS employees in other units throughout the state.

Accordingly, this grievance is **DENIED**.

Any party or the 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

_____

BRENDA L. GOULD

Administrative Law Judge

Date: September 22, 2000

Footnote: 1

Grievant's supervisor denied the grievance as untimely on March 31, 2000, also noting that she had applied the merit increase criteria. Grievant appealed to Level II on April 5, 2000. Her second level supervisor responded on April 19, 2000, that the grievance was untimely, and also that Grievant's supervisor properly applied the merit increase criteria. Grievant appealed to Level III, where a hearing was held on June 14, 2000. The grievance was denied at Level III on June 19, 2000. Grievant appealed to Level IV on June 26, 2000. A Level IV hearing was held on August 28, 2000. Grievant was represented by Judy Neal, and DRS was represented by Warren N. Morford, Jr., Esquire. The parties declined to submit written argument, and this matter became mature for decision at the conclusion of the Level IV hearing.

Footnote: 2

This employee was a counselor. Mr. McMillian testified that he was told the Senior Management Group had decided to give some deserving counselors, who did not meet the minimum criteria, merit increases. However, DRS presented no witnesses to testify that this is what occurred. Perhaps bad employee morale over what is perceived to be an unfair application of the merit increase plan would improve if DRS would explain its failure to follow the plan.