CHARLES SMITH,

Grievant,

v. **Docket No. 01-DOH-523**

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Charles Smith, filed this grievance against his employer, the Division of Highways ("DOH") on February 28, 2001. The Statement of Grievance reads:

> **A younger employee has passed me in pay scale. We both have the same job titles, in the same county, and we do the same work. I have always had satisfactory or exceeds expectations on all of my evaluations. We have always before gotten merit raises at the same time.**
>
> **RELIEF SOUGHT: I would like to be brought up with the younger employee's [pay] and not be passed again without reason.**

At the Level IV hearing, Grievant stated he had recently received a merit increase, and the relief he now sought was to have the date he received this merit increase moved back to when the younger employee received his raise, so he would be eligible for the next merit increase at the same time as the younger employee. (See footnote 1)

This grievance was denied at all lower levels. Grievant appealed to Level IV on October 1, 2001, and a Level IV hearing was held in the Grievance Board's Elkins office on November 15, 2001. This case became mature for decision on that date, as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

The thrust of Grievant's argument is that Tim Cogar, an employee within the same classification and performing the same work, but with less seniority, was given a merit increase before he received a merit increase, and this action was in violation of the merit increase guidelines. Grievant also alleges his lower evaluations for 1998 and 1999 were the result of retaliation by his supervisor because he requested a transfer. Because Grievant filed this grievance after the last round of 2000 merit increases, the evaluations at issue are the 1999 evaluations upon which the 2000 merit increases are based. (See footnote 3)

Respondent asserts there was no violation of the guidelines, and Mr. Cogar received a merit increase before Grievant because his evaluation was higher. Respondent also maintains there was no retaliation over Grievant's transfer. Grievant requested the transfer, and even though his supervisor believed this change would result in fewer advancement opportunities, he granted this request as soon as possible. (See footnote 4)

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. Grievant was hired by DOH on March 20, 1995, and he is employed as an Equipment Operator II.

2. Grievant received merit increases on December 16, 1996, and September 1, 1998.

3. Tim Cogar was hired approximately four and one half months after Grievant, on August 1, 1995, and he is employed as an Equipment Operator II.

4. Mr. Cogar received merit increases on September 1, 1998, and January 1, 2001. The last merit increase he received gave him a higher salary than Grievant.

5. In 1995, 1996, and 1997, Grievant was evaluated by his supervisor, Jimmy Collins, and received three exceeds expectations on his evaluations.

6. Sometime in 1998, Grievant requested a transfer to the Cowan substation because he believed there would be trouble after he spoke his mind over problems at the Webster Springs substation. (See footnote 5) **Mr. Collins expressed his concern over this transfer, as he was aware there were fewer opportunities for advancement for grader operators at this substation. Grievant wanted the transfer anyway, and as soon as possible, Mr. Collins granted**

this request.

7. In 1998 and 1999, Grievant was evaluated by Mr. Collins and received one exceeds expectations on his evaluations. Grievant's overall rating for 1999 was 2.04. Grievant signed these evaluations as agreeing with them as he believed at the time that they were fair.

8. In 2000, Grievant's evaluation was completed by Doug Williams, his crew leader, and Grievant received three exceeds expectations on his evaluation.

9. Mr. Williams rated every employee under his supervision exactly the same way, even though he noted there were differences in their performances. He rated all the employees the same way in an attempt to prevent grievances.

10. Mr. Cogar received four "exceeds expectations" on his 1998 evaluation and three "exceeds expectations" on his 1999 evaluation. His overall numerical rating for 1999 was 2.13. **(See footnote 6)**

11. Mr. Collins attempts to give all employees a merit increase at least every two and one half years, and tries never to "double up," meaning giving an employee a merit increase two years in a row.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't 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). I. Merit increase

Merit increases are governed by Division of Personnel Rule ("DOP"), 143 C.S.R. 5.8(a), "Salary Advancements" which states, "All salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance." See King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). Although not submitted into evidence by the parties, DOH's 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. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-176 (Aug. 22, 1997). See Ratliff v .W. Va. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-004 (Jan. 31, 1997). Pursuant to the guidelines on merit increases, the performance evaluations are the main factor to consider, and equitable pay relationships and length of service are only to be considered after it is demonstrated an employee's work performance deserves a merit increase. The combining of these two sets of guidelines is at times a difficult fit, especially when there is a limited number of raises to be awarded. Ratliff, supra.

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). "Generally, an action is considered arbitrary and capricious if the agency 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 was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). " While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [an agency]. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

The testimony revealed the problems created when employees are rated so similarly, and pay raises are expected within a certain time frame regardless of the performance evaluations. Merit increases are just that; a reward for a job well done. 143 C.S.R. 5.8(a).

In this specific case, Grievant complains that Mr. Cogar received a merit increase before he did. As directed by DOP's and DOH's guidelines, the first thing to examine isthe performance evaluations. As Mr. Cogar's evaluation was higher than Grievant's, there was no violation of the regulations or guidelines. Additionally, Grievant argues he is more senior than Mr. Cogar. There is a difference of only four and one half months, and this difference is not significant. Differences which would be significant would be measured in years. Grievant has failed to meet his burden of proof and demonstrate DOH's actions violated any policy or were arbitrary or capricious. No one disputes Grievant is a good employee, but unfortunately for Grievant, there were limited funds available. Ratliff, supra.

Additionally, it is not arbitrary and capricious to find that even between two employees who received very similar ratings on their performance evaluations, that one is more deserving of a merit increase than the other. This is especially true when the rating categories are as broad as those used in the performance evaluations. Setliff v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-262 (July 24, 1998).

It is clear selecting who will receive merit increases is at times difficult, especially when numerous employees have demonstrated satisfactory performance, and employees are rated so similarly. Obviously, many employees have good evaluations and would be deserving of a merit increase. Unfortunately, there will always be a limited number of merit increases to award, and management decisions have to be made about who should receive them, utilizing the evaluations and the guidelines. Collins v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 98-DOH-103 (July 27, 1999). See Bittinger v. Bureau of Employment Programs, Docket No. 98-BEP-164 (Dec. 7, 1998).

II. Retaliation The next issue to address is Grievant's allegation of retaliation. W. Va. Code § 29- 6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> **1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;**

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Salmons v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 99-DOH-385 (Apr. 25, 2000); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen, supra. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, theemployee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant has not established a prima facie case of reprisal. No evidence was submitted to show Grievant had ever filed or participated in a grievance before this time. **(See footnote 7)** **Grievant did not receive a merit increase at the same time as Mr. Cogar because his performance evaluation rating was lower. This action is in accordance with DOP's and DOH's guidelines. See Salmons, supra.**

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't 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).

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); Osborne v. W. Va. Div. of Rehabilitation Serv., Docket No. 89-RS- 051 (May 16, 1989).

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. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995).

4. 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. Dep't of Transp./Div. of Highways, Docket No. 97- DOH-176 (Aug. 22, 1997). See Ratliff v .W. Va. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-004 (Jan. 31, 1997).

5. Grievant has failed to meet his burden of proof and demonstrate that he was more deserving of a merit increase than Mr. Cogar at the time Mr. Cogar was selected to receive his merit increases. Ratliff, supra. 6. Merit increases are to be given on the basis of job performance as reflected in the performance evaluations.

7. Reprisal is defined as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it." W. Va. Code § 29-6A-2(p). A grievant claiming retaliation may establish a prima facie case of reprisal by proving the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer

or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Salmons v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 99-DOH-385 (Apr. 25, 2000); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

8. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for theadverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

9. Grievant did not establish a prima facie case of reprisal, as he had not participated in the grievance process before.

10. Grievant failed to establish that DOH violated any law, rule, policy, regulation, or written agreement in regard to his failure to receive a merit increase at the same time as Mr. Cogar.

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. 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: December 12, 2001

Footnote: 1

Also at the Level IV hearing, Grievant sought to amend his grievance to include the assertion that the wrong person had been performing his evaluations for several years. Respondent objected to this amendment, as it was not part of the original grievance, and it was not prepared to defend against this allegation at the Level IV hearing. Grievant's request to amend was denied based on Respondent's objection, and Grievant was directed he could file a grievance on this issue.

Footnote: 2

Grievant represented himself, and Respondent DOH was represented by Attorney Jennifer Francis.

Footnote: 3

Grievant indicated he first discussed this issue with his supervisors in December 2000.

Footnote: 4

The issue of timeliness was first raised at Level III, and disallowed by the Level III Hearing Examiner. This issue was not raised at Level IV.

Footnote: 5

Grievant did not indicate what this trouble was and did not indicate it involved his supervisor in any way.

Footnote: 6

No evaluations for Mr. Cogar were submitted for 1995, 1996, 1997, and 2000.

Footnote: 7

Even if this claim of reprisal was seen in a broader sense, the contention would still fail. This grievance, although filed because Grievant did not receive a merit increase, is in actuality a complaint about performance evaluations. Grievant's evaluations did decrease after he moved to the Cowan substation, but his own testimony was he believed the evaluations were fair at the time he received them, and he signed a statement which read, "I

have discussed with my supervisor this evaluation of my past performance and AGREE with ALL of the conclusions reached." Grievant certainly had to be aware that his ratings had decreased, but he still felt they were fair.

Additionally, Mr. Collins testified credibly that he did not have any negative feelings about Grievant for wanting a transfer, but only worried that it was not the best career move for him. These comments do not sound like those made by a supervisor upset with an employee.