ROBERT BITTINGER,

Grievant,

v. Docket No. 98-BEP-164R

BUREAU OF EMPLOYMENT PROGRAMS/
GREENBRIER VALLEY JOB SERVICE,

Respondent.

DECISION

Robert Bittinger, Steve Rutledge, Patricia Moody and Emily Rutherford (Grievants) alleged that the Bureau of Employment Programs/Greenbrier Valley Job Services (BEP) engaged in discrimination when it failed to grant them merit pay increases. Grievants sought 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 and conclusions of law. On November 17, 1998, Respondent moved for an extension of two working days, which was granted over Grievants' objection. This matter thus first became mature for decision on November 24, 1998. This grievance was denied in Bittinger et al. v. Bureau of Employment Programs/Greenbrier Valley Job Service, Docket No. 98-BEP- 164 (Dec. 7, 1998), which is incorporated herein by reference, and Grievants appealed to Kanawha County Circuit Court.

On November 21, 2000, Kanawha County Circuit Court Judge Charles E. King, Jr. issued an

Opinion and Final Order dismissing that appeal as to Grievants Rutledge, Moody, and Rutherford, and remanding Grievant Bittinger's grievance “for a determination as to whether he is entitled to a merit pay increase, when proper consideration is given to his attitude as contained in his employee performance evaluations.” A Level IV hearing on this issue was scheduled for March 22, 2001. However, by letter of March 15, 2001, the parties agreed that this grievance could be decided on the existing record and without further briefing, and it became mature for decision on that date.

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. Grievant is employed at the Greenbrier Valley Job Services office of BEP.

2. 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, should be considered in awarding merit increases.

3. Betty Carola manages the Greenbrier Valley Job Service office. 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.

4. 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 lastincrease, and whether an employee had recently received a salary increase through promotion.

5. 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.

6. 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.

7. Carola testified, at the Level IV hearing on the merits of this grievance, that Grievant Bittinger had a negative attitude, which he constantly expressed, causing disruption in the office.

8. The only employee to receive a merit pay increase during the October, 1996, round of merit increases was Employee Three. (See footnote 2) He received 1995 and 1996 evaluations yielding final ratings of 8.18 and 8.27, respectively. He had 13 years, two months seniority. 9. The evaluation form used by Carola to evaluate employees eligible for merit pay increases at the Greenbrier Valley Job Services office for the October, 1996, cycle of merit pay increases rated employees on a scale of one to ten in 11 categories, one of which was attitude. A rating of zero to one was unsatisfactory. A rating of one to three was marginal. A rating of three to five was satisfactory. A rating of five to seven was good. A rating of seven to nine was very good. A rating of nine to ten was exceptional. 10. Carola evaluated Grievant's attitude, on his 1995 and 1996 evaluations, as a Seven, or “very good.”

11. Carola evaluated Employee Three's attitude on his 1995 and 1996 evaluations as 8, or “very good,” and 9, or “exceptional,” respectively.

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 § 4.19 (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 equally supports both sides, a party has not met its burden of proof. Id.

In accordance with the rules of the West Virginia Division of Personnel, “salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance.” W. Va. Div. of Personnel Admin. Rule, Series I, 5.08(a) (1993). 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 torating 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. See Morris v. W. Va. Dep't 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). A grievant seeking a merit increase must prove he was 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 inreaching 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).

As noted above, Kanawha County Circuit Court Judge Charles E. King, Jr. remanded Grievant Bittinger's grievance “for a determination as to whether he is entitled to a merit pay increase, when proper consideration is given to his attitude as contained in his employee performance evaluations.”

In doing so, Judge King noted that “[t]he evidence demonstrates that the factor given the greatest weight by Ms. Carola was Grievant Bittinger's attitude. A reading of the evidence and the ALJ's decision demonstrates that Grievant Bittinger's perceived negative attitude outweighed any other factor that would have otherwise justified awarding him a merit raise.”

“The factor that Ms. Carola improperly considered was Grievant Bittinger's attitude. It was not improper for her to consider his attitude separate and apart from the other factors that make up the employee evaluation, or to place primary emphasis on that factor. The problem is that her testimony regarding Grievant Bittinger's attitude is directly contrary to his employee evaluations, as prepared by her, which Division of Personnel rules require be given primary consideration.” Judge King then cited W. Va. Div. of Personnel Admin. Rule, set forth above, which states that salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance.

Judge King concluded by noting that Grievant's rating for attitude for 1995 and 1996 was seven, or “very good,” and that “[i]t is hardly appropriate to deny an employee a merit raise on the grounds that he has a very good attitude.”

As noted by Judge King, Carola's testimony regarding Grievant's attitude appeared to contradict the employee evaluations she gave him. Accordingly, Grievant's ratings on the attitude portion of his evaluations must be compared to those of Employee Three, the only employee to receive a merit increase during the October, 1996, round of merit increases. Tallman, supra.

As noted in Findings of Fact ten and eleven, Carola evaluated Grievant's attitude, on his 1995 and 1996 evaluations, at seven, or “very good.” However, Carola evaluated Employee Three's attitude on his 1995 and 1996 evaluations at eight, or “very good,” and nine, or “exceptional,” respectively. Employee Three had a recorded attitude one step higher than Grievant's in 1995, and two steps higher in 1996, with his attitude improving to “exceptional” during the period. There is no doubt that Carola held a negative view of Grievant's attitude, as she wrote in the “supervisor's remarks” section of his 1995 evaluation “I feel needs improvement in attitude,” and in that section of his 1996 evaluation: “I feel his attitude still needs some working on.”

Accordingly, Grievant has failed to establish, by a preponderance of the evidence, that he was more entitled to the merit pay increase at issue in this remanded grievancethan Employee Three. Id. The merit pay increase at issue in this remanded grievance 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 judgement was established. Bowman, supra. When proper consideration is given to Grievant's attitude, as contained in his employee performance evaluations, it is determined that he was not entitled to a merit pay increase.

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

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. In accordance with the rules of the West Virginia Division of Personnel, “salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance.” W. Va. Div. of Personnel Admin. Rule, SeriesI, 5.08(a) (1993). See King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995).

3. Grievant failed to establish, by a preponderance of the evidence, that he was more entitled to the merit pay increase at issue in this remanded grievance than Employee Three. Tallman v. W. Va. Div. of Highways, Docket No. 91-DOH 162 (Jan. 31, 1992).

4. The merit pay increase at issue in this remanded grievance 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 judgement was established. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974). 5. When proper consideration is given to Grievant's attitude, as contained in his employee performance evaluations, it is determined that he was not entitled to a merit pay increase.

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. 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.

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ANDREW MAIER

Administrative Law Judge

Dated: April 6, 2001

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. In contrast, the BEP undated memorandum referred to in Finding of Fact two states "[w]hile length of government service is not a merit factor in considering employees for salary increases, only those full-time employees who have been with the Bureau for one (1) year or longer should be recommended."

Footnote: 2

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