CHRISTINE HAROLD,

Grievant,

v.

DOCKET NO. 02-DEP-142

WEST VIRGINIA DEPARTMENT OF

ENVIRONMENTAL PROTECTION/

INFORMATION TECHNOLOGY OFFICE,

Respondent.

D E C I S I O N

Grievant, Christine Harold, filed the following grievance against her employer, the West Virginia Department of Environmental Protection/Information Technology Office ("DEP"), on August 20, 2001:

> In March of 2000, I took over the Oil and Gas system as Project Leader. At the time, I was already project leader for the RIMS system, and continue to lead this project today. Subsequently around June of 2000, I took over as project leader for the Administrative System, of which I continue to lead also. At the time of taking over the Oil and Gas project, I qualified as a Programmer/Analyst IV and have been working as one since March of 2000.
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> In March of 2001, I requested to put in my paperwork for a Programmer/Analyst IV. I was told at that time that instead, I was being put in for a merit raise and that I could put in my paperwork for a Programmer/Analyst IV "later". After waiting to see if the merit raise came up in my July 16th paycheck, I went to my supervisor to ask why it wasn't there yet. On July 16, my supervisor said he would check on it for me.
>
> On August 7, I came to work and opened up an email from my supervisor in which he chewed me out for something I felt was not my fault. I responded "in-kind" and reminded him about my raise. He responded back telling me that he had revoked it as of that day, which was August 7. I have had nofurther communications from him, either verbal or written, that he has changed his mind concerning the revocation of my raise.

> Upon researching this matter, I found out that a new hire, Debbie McGinnis, was hired in as a Programmer/Analyst III at a salary of $48,223, which is at least $3000 higher than what I am being paid now as Programmer/Analyst III. In addition, I have found that the average paid for an applications developer in ITO is $51,083.
>
> I believe that departmental rules and regulations concerning hiring, merit raises, and promotions have been violated here. All applicable state and federal rules and regulations concerning hiring, merit raise, and promotions also apply.
>
> Relief Sought:
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> I want the merit raise that I was promised back in March of 2001 and my salary to be brought up to the level matching the new hire, Debbie McGinnis. In addition, I want what I had originally asked for which was to be promoted to a Programmer/Analyst IV with a 10% increase, retroactive to March of 2000. I feel that I am justified in asking for this relief, because I have been performing the duties of a Programmer Analyst IV, and have received commendations from my customers attesting to the good work I have been doing for them.

The grievance was denied at level one on August 24, 2001, by Grievant's immediate supervisor, Doug Kelley, at level two on September 10, 2001, by Keith Borgel, and at level three on May 8, 2002, by Secretary Michael O. Callaghan's adoption of the decision issued by Jack C. McClung. Grievant appealed to level four on May 17, 2002, and a level four hearing was held in the Grievance Board's Charleston, West Virginia, office on October 1, 2002. This matter became mature for decision on November 12, 2002, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Fred Tucker, UMWA-WVSEU Representative, and DEP was represented by Steven E. Dragisich, Assistant Attorney General.

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

None.

Level Three DEP Exhibits

Ex. 1 -

Series of emails between Christine Harold and Doug Kelley between July 25, 2001 and August 7, 2001.

Level Four Grievant's Exhibits

Ex. 1 -

September 13, 2000 memorandum from Keith Borgel to Randy Huffman.

Ex. 2 -

January 2000 Employee Performance Appraisal of Christine Harold.

Ex. 3 -

June 2000 Employee Performance Appraisal of Christine Harold.

Level Four DEP Exhibits

Ex. 1 -

Series of emails between Christine Harold and Doug Kelley between July 25, 2001 and August 7, 2001. (Same as LIII DEP Ex. 1).

Testimony

Grievant testified in her own behalf. DEP presented the testimony of Doug Kelley, Keith Borgel, and Lowell D. Basford.

Based on a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant has been employed with DEP in its Information Technology Office ("ITO") for approximately ten years, and has been a Programmer Analyst III since 1997.

2. Prior to March 2000, Grievant was the Project Leader for the Reclamation Information Management System ("RIMS"). In March 2000, Grievant became the Project Leader for the Oil and Gas System, and in June 2000, she became the Project Leader for the Administrative System. Thus, as of June 2000, Grievant had Project Leaderresponsibilities for three DEP computer systems. In May 2001, Grievant voluntarily surrendered her Project Leader position for the Oil and Gas System.

3. Grievant believed her multiple project management duties put her squarely within the Programmer/Analyst IV classification. ITO staff had been told there was no money for merit raises or promotions, but in or about September/October 2000, Grievant asked her Senior Manager in ITO, Keith Borgel, "to see if he could scrounge up some money for it," but nothing came of that effort. LIII Tr., p. 11.

4. Despite Grievant's belief that she should be classified as a Programmer/Analyst IV, she did not submit a Position Description Form ("PDF") to initiate a classification review, because filling out PDFs is a lot of work, and she did not want to do it if there was no money anyway. LIV Test., Harold.

5. In March 2001, Grievant raised the issue again with her immediate supervisor, Doug Kelley, who said he would check on a merit raise for her. In July of 2001, Mr. Kelley told Grievant that the Office of Abandoned Mine Lands ("AML") had agreed to fund a merit raise for her. At that time, AML had entered into a contract to fund her Programmer Analyst III position for computer services provided to them by the ITO and specifically by Grievant.

6. Grievant's July 16, 2001, paycheck did not reflect a merit raise. Mr. Kelley told her it probably had not gone through yet, and that he would check on it.

7. On August 7, 2001, Grievant received an email from Mr. Kelley telling her he was not happy with her performance at a RIMS demonstration. Grievant felt that she was "chewed out" for something that was not her fault, so she responded to him "in-kind," and reminded him about the merit raise. This prompted another email from Mr. Kelley in whichhe rescinded her merit raise because of her insubordination and her performance at the RIMS demonstration. LIV DEP. Ex. 1.

8. Grievant discovered that a new hire, Debbie McGinnis, was hired as a Programmer Analyst III at a salary approximately $3,000 higher than Grievant's salary. Grievant's salary is within the Programmer Analyst III range.

DISCUSSION

In a non-disciplinary grievance, Grievant bears the burden of proving the allegations in her grievance by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. 88-ENGY-015 (Nov. 2, 1988); Procedural Rules of the W. Va. Education and State Employees Grievance Board, 156 C.S.R. 1 § 4.21. Grievant alleges she is doing the work of a Programmer Analyst IV and should be reclassified, that she was improperly denied a merit raise that was promised to her, and that another employee within the same classification is being paid a higher salary than she.

The West Virginia Division of Personnel Administrative Rule 4.5 provides that either an employee or the agency can request that a position be evaluated any time significant changes occur in the duties and responsibilities of the position. In order to initiate the evaluation, a PDF must be filled out by the employee, listing the duties and responsibilities of the position, approved by the agency, and submitted to the Division of Personnel ("DOP"). Grievant wanted to be promoted to a Programmer Analyst IV. However, at the time she approached her supervisor about a promotion, the employees in ITO were told there was no money for merit raises or promotions. Grievant admits she did not complete a Position Description Form to be submitted to DOP in an attempt to have her position reallocated or reclassified, because it was too time consuming, and there is no evidencethat her supervisors prevented her from pursuing that avenue of advancement. While Grievant believes she is working as a Programmer Analyst IV, she has done nothing to initiate a position review by DOP, and is therefore not entitled to relief in the form of a reclassification, reallocation, or promotion.

Grievant also maintains she was promised a merit raise by her supervisor, Mr. Kelley. It is undisputed that Mr. Kelley told Grievant he would check into a merit raise for her, and discovered there was money in the Office of Abandoned Mine Lands available to grant her the raise. (See footnote 1) Mr. Kelley did recommend a merit raise for Grievant to AML, but he testified that such raises must be approved by his superiors, and that had not yet occurred. (See footnote 2)

The merit raise application was in the works on August 7, 2002, when Mr. Kelley informed Grievant by email that he was not satisfied with her performance at a recent RIMS meeting. Mr. Kelley testified that Grievant was not prepared for this meeting, despite the fact she had known about the meeting, and its subject matter, for over two months. He told her in the email that he "was embarassed. . . .We should have been prepared and wewere not." Mr. Kelley then set out a plan to further the RIMS implementation. Grievant then responded to Mr. Kelley "in-kind," as follows:

> You should be embarrassed. You went ahead and scheduled that date, without consulting me first. I told you that I was not ready. I have been trying to get my laptop setup properly, so that I would be comfortable doing demos. But because I didn't want to hold up the process any further, I agreed to it. I didn't even want to do another demo, because it was just another opportunity for the AML staff to take pot shots at me, which they did. Proper management of this issue would have been for Randy, Keith and you to get with Charlie and say "Either you want a system or you don't. If you do, then if Chris isn't doing her job, we'll get somebody else." Period.
>
> . . .
>
> I appreciate your suggestions, however I know how to do JAD/RAD since I have done it before in the past. You act like I don't know what I am doing. I was doing this before you came on board, by the way. The problem has always been lack of cooperation on the part of the AML staff.
>
> I have been bogged down with project scheduling, reporting and general ITO overhead, that has kept me from doing "real" work.
>
> I don't appreciate your attitude with me. You will get more cooperation from me if you don't try to bully me and treat me with some modicum of respect. Also, I do not intend on adding entries in the Microsoft project for a "maintenance project".
>
> You've blown it with me. This is the last straw. Oh by the way, thanks for checking on that raise for me. I still haven't seen it.

LIV DEP Ex. 1.

Based on this email, Mr. Kelley decided to rescind his recommendation for a merit raise, due to her insubordinate behavior, and informed her that he did "not intend to reward this type of behavior." LIV DEP Ex. 1.

Merit raises are entirely discretionary, and an employer's decision on merit raises 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. Dept. ofTransp., Docket No. 91-DOH-186 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehab. Serv., Docket No. 91-DOH-128 (Oct. 8, 1991). There is no question that the tone of Grievant's email to Mr. Kelley, her supervisor, was

insubordinate. It is astonishing how many employees feel they are entitled to respond to their superiors “in-kind” when they are admonished or criticized about their job performance. Unfortunately for Grievant, this simply is not the case, and Grievant should be thankful she was not disciplined by Mr. Kelley for her email. She has failed to show that Mr. Kelley's revocation of her merit raise was unreasonable, arbitrary and capricious, or contrary to law or policy.

Finally, Grievant alleges she deserves a promotion and salary increase because Debbie McGinnis, another Programmer Analyst III who was hired after her, is receiving a higher salary. The West Virginia Supreme Court of Appeals has held that while W. Va. Code § 29-6-10 requires that “employees who are doing the same work must be placed within the same classification,”

> . . . within that classification there may be pay differences if those differences are based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other specifically identifiable criteria that are reasonable and that advance the interests of the employer.

Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994).

Mr. Kelley was on the team that hired Ms. McGinnis. He testified she had extensive Project Leader experience, stellar recommendations, and impressive academic credentials. He testified they offered her a lower salary initially, and eventually negotiated the higher salary with her, noting that in order to get her to come on board, they had to be competitive with market forces.

The Division of Personnel's Administrative Rule § 5.04(b) provides:

> Entry Salary - The entry salary for any employee shall be at the minimum salary for the class. However, an individual possessing pertinent training or experience above the minimum required for the class, as determined by the Director, may be appointed at a pay rate above the minimum, up to the mid- point of the salary range, unless otherwise prescribed by the Board. For each increment above the minimum, the individual must have in excess of the minimum requirements at least six months of pertinent experience or equivalent pertinent training. The Director may authorize appointment at a rate above the mid-point where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class.

DEP articulated legitimate reasons for the difference in Ms. McGinnis' and Grievant's salaries, namely, market forces, education, and experience. Furthermore, DEP did not contravene Administrative Rule § 5.04(b) inasmuch as it permits hiring at up to the mid-point of the salary range, given Ms. McGinnis' experience.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, Grievant bears the burden of proving the allegations in her grievance by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. 88-ENGY-015 (Nov. 2, 1988); Procedural Rules of the W. Va. Education and State Employees Grievance Board, 156 C.S.R. 1 § 4.21.

2. Merit raises are entirely discretionary, and an employer's decision on merit raises 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. Dept. of Transp., Docket NO. 91-DOH-186 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehab. Serv., Docket No. 91-DOH-128 (Oct. 8, 1991).

3. Grievant has failed to prove by a preponderance of the evidence that Mr. Kelley's revocation of his recommendation for a merit raise based upon her insubordinate behavior was unreasonable, arbitrary and capricious, or contrary to law or policy. 4. The West Virginia Supreme Court of Appeals has held that while W. Va. Code § 29-6-10 requires that “employees who are doing the same work must be placed within the same classification,”

> . . . within that classification there may be pay differences if those differences are based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other specifically identifiable criteria that are reasonable and that advance the interests of the employer.

Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994).

5. The Division of Personnel's Administrative Rule § 5.04(b) provides:

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6. Grievant has failed to prove by a preponderance of the evidence that DEP's stated reasons for hiring Ms. McGinnis as a Programmer Analyst III at a higher salary than Grievant's violated any

law, rule, regulation, or policy.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 20, 2002

Footnote: 1

ITO functions as a support agency for various offices within DEP. AML is one of these offices. Grievant's position is directly funded by AML to work on their project(s), but she is stationed with ITO and answers to ITO management. If ITO has money in its overhead account for merit raises, then that money can be used to fund the raises. If ITO has no available funds in that account, it can request that AML (or whatever office it has a contract with) provide funding for a merit raise for an individual. This is why Mr. Kelley approached AML regarding Grievant's merit raise.

Footnote: 2

Once AML agrees to fund a merit raise, the process begins. However, ITO cannot tell employees they are actually receiving a merit raise until the official paperwork (WV-11) returns to ITO from administration, budgeting, and the Governor's office (for signature approval). Up until the WV-11 is received in ITO, "there is nothing on the table." (LIII Tr., p. 32).