CHARLES SELF, et al.,

Grievants,

v. Docket No. 03-DOH-003

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Charles Self, Ralph Carson, Charles Lunsford, Clarence Workman, David Campbell, David Turner, Keith Gillum, Gary Workman, and Timothy Finley, (Grievants), employed by the Division of Highways (DOH) as Transportation Workers III - Bridge Maintenance Craftworkers or Transportation Workers IV - Welders, filed a level one grievance on September 9, 2002, in which they alleged favoritism when another employee was granted additional merit increases. For relief, Grievants requested an immediate 2½% salary increase and an additional merit increase prior to another being given to that employee. The grievance was denied at all lower levels, and appeal to level four was made on January 3, 2003. An evidentiary hearing was conducted in the Grievance Board's Elkins office on March 19, 2003, at which time Grievants were represented by Bernard Mauser, Esq., and DOH was represented by Belinda Jackson, Esq. The matter became mature for decision on April 30, 2003, the due date for submission of proposed findings of fact and conclusions of law. (See footnote 1)

The following facts are derived from the record primarily developed at level three.

Findings of Fact

1. Grievants Self (hire date 10/97), G. Workman (7/97), Turner (1/97), Lunsford(9/75), and Campbell (7/75), are employed by DOH as Transportation Workers IV - Welders, pay grade 14. Grievants Carson (3/91), Gillum (10/88), C. Workman 6/90), and Finley (6/95), are employed by DOH as Transportation Workers III - Bridge Maintenance Craftworkers, pay grade 12.

2. Jeffrey Steele has been employed by DOH as a Transportation Worker III - Bridge Maintenance Craftsworker since January 1996.

3. During 2002, Grievants each received a 2½% merit increase, with the exception of

Grievant Finley who received two merit increases. During the same time period, Mr. Steele received three merit increases, two in April and one in September.

4. Division of Personnel (DOP) Administrative Rule, § 5.8(a) requires that "all salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance." The DOH Merit Increase Program for 2002-2003, provides that performance evaluations and other recorded measures of performance are the primary basis on which merit increases are to be distributed, with equitable pay relationships and length of service to be considered as secondary factors.

5. The merit increases granted to Mr. Steele were in compliance with DOP and DOH criteria.

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 § 4.21 (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.

Grievants assert that awarding Mr. Steele three merit increases within a five month period constitutes favoritism. DOH argues that the increases were properly allocated.

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." To establish a prima facie case of favoritism, Grievants must prove by a preponderance of the evidence:

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

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

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

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Once Grievants establish a prima facie case of favoritism, the burden shifts to Respondent to

demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Grievants may then show the stated reason to be pretext.

Grievants have made a prima facie case of favoritism by establishing that another employee assigned to the Bridge Department received three merit increases during a period of time in which they received only one or two such increases. Bridge Engineer Richard White explained that every attempt is made to give each employee a merit raise during a two-year cycle. By the fourth quarter of 2001, every employee had received amerit increase since July 2000, and one increase remained to be awarded. In his level one response, Mr. White stated that he “remembered that the new welders had been raised above Jeff and he had reminded Tom not to forget about him, so I gave the last merit to Jeff.” Thus, the additional increase given in April 2002, was to correct an inequity between Mr. Steele and the welders. Because Mr. Steele had the second highest evaluation for 2002, Mr. White opined that while he could have delayed giving him another increase, he could not be skipped.

Although merit increases are to reward performance, DOH awards them in a rotational manner so that they are more accurately “cost of living” increases. Because of this practice, Grievants have come to erroneously assume they are entitled to the increases in a set order. While Mr. White's effort to maintain an equitable pay relationship between Mr. Steele and the welders may be misdirected, given their different pay grades, the evidence does not support a finding that his decision regarding the merit increases was based upon favoritism.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

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 § 4.21 (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.

2. 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.”

3. To establish a prima facie case of favoritism, Grievants must prove by a preponderance of the evidence:

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

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

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

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Once Grievants establish a prima facie case of favoritism, the burden shifts to Respondent to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Grievants may then show the stated reason to be pretext.

4. Grievants established a prima facie case of favoritism; however, DOH offered a legitimate reason for the difference in treatment.

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.

DATE: JUNE 3, 2003

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Neither party elected to file proposals.***