BURL R. WILLIAMS, JR.,

Grievant,

v. Docket No. 05-DOH-320

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Burl R. Williams, Jr. ("Grievant"), employed by the Division of Highways ("DOH") as an Equipment Operator 2, filed a level one grievance on October 28, 2004, in which he alleged that he had been improperly denied a merit raise due to absenteeism. Grievant's immediate supervisor lacked authority to grant the grievance at level one. Assistant District Engineer Lloyd Adams denied the grievance at level two. Following an evidentiary hearing at level three, DOH hearing examiner Brenda Craig Ellis recommended that Grievant be awarded a 2 ½% merit raise, effective October 1, 2004, plus interest, and the AH-503 form be removed from his personnel file. However, DOH Commissioner Paul A. Mattox denied the grievance on August 31, 2005. An appeal was filed at level four on September 9, 2005. A hearing to supplement the lower-level record was held on January 31, 2006, in the offices of Grievant's counsel Gerald Lofstead of Byrd, Scrader & Companion, P.L.L.C., in Wheeling, West Virginia. DOH counsel Barbara Baxter appeared by telephone. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, and the grievance became mature for decision at the close of the hearing.

The following facts have been derived from a preponderance of the evidence made part of the record at levels three and four.

Findings of Fact

1. Grievant has been employed by DOH for approximately ten years, and has held the classification of Equipment Operator 2 at all times pertinent to this grievance.

2. On September 30, 2004, Supervisor Sheldon Beauty issued Grievant a Form RL-544 Notice advising him of disciplinary action for excessive use of sick leave from January 2002

through June 2004. Mr. Beauty noted that an employee of nine years could have accumulated 1296 hours of sick leave, but Grievant's balance in June was 407.25 hours. Leave usage was for 34 short term illnesses, 26 of which extended holidays, weekends, or approved annual leave. Consequently, Grievant was placed on leave restriction, which requires a physician's statement for any sick leave, family sick leave, and emergency annual leave, for a period of six months.

3. Because Grievant had been subject to disciplinary action, he was ineligible for a merit raise in 2004.

4. Grievant prevailed in having the Form RL-544 removed from his file after filing a grievance. However, on October 13, 2004, DOH replaced the notice of disciplinary action with a Form AH-503 “Record of Significant Occurrence.” This form indicated that Grievant had performed below expectations by his excessive use of sick leave, particularly in conjunction with weekends and holidays. The AH-503 is not considered a disciplinary action by DOH, however, it was cited as the reason Grievant did not receive a merit increase.

5. Grievant used 130.75 hours of sick leave in 2002. In 2003, DOH charged Grievant with 127 hours of sick leave. DOH's calculation of Grievant's sick leave incorrectly included 32 hours which were not sick leave, leaving his balance at 95 hours for the year. 6. DOH granted merit increases in 2004 based on employees' performance evaluations for the 2003 year. However, employees must not have shown a documented decline in performance since the date of their calendar year evaluations.

7. Grievant was given his 2003 performance appraisal on August 25, 2004. Grievant was rated as “Meets Expectations” in the section “Availability for Work,” including “Employee's attendance supports the expected level of work.” Overall, Grievant was rated as “Meets Expectation” with an alpha score of 2.01.

8. Grievant used no sick leave in from August 16 through September 15, 2004, and therefore, had not been cited for a decline in performance since the date of his calendar year evaluation.

9. DOH had been experiencing excessive sick leave usage in Brooke County since 2002, and while employees were advised to “watch your time,” Grievant had never been counseled, warned, or otherwise notified personally that DOH considered him to be engaging in leave

abuse. All of Grievant's leave requests were approved by DOH.

10. Grievant's performance rating was higher than one other employee who received a merit increase.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Grievant asserts that he was wrongly denied a merit increase due to erroneous calculation of his leave time, and improper application of DOH rules. DOH argues that Grievant used excessive leave, and attendance is a factor that may be utilized in determining the awarding of merit increases.

Merit increases are governed by Division of Personnel Rule ("DOP"), 143 C.S.R. 1 § 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 tiebreakers. *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, 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 rules and guidelines is at times a difficult fit, especially whenthere are 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 Rehab. 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 Res.*, 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*. While attendance can and should be considered when awarding merit increases, an employer must follow the appropriate rules and guidelines. In this case, Grievant's 2003 evaluation did not reflect a problem with his attendance, and he was not cited for leave abuse following the evaluation, prior to receiving the RL-544. That form was removed from his personnel file, and he was eligible for a merit increase. Grievant has established that another employee with a lower evaluation score received a merit increase. Because these salary increases are to be awarded based primarily on meritorious performance, Grievant should have received a merit raise before the employee with the lower evaluation.

The following conclusions of law support this decision.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of

proving his claim by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6.

2. Pursuant to DOH guidelines on merit increases, 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.

3. 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 Rehab. Serv*., Docket No. 89-RS- 051 (May 16, 1989).

4. Grievant has proven by a preponderance of the evidence that the decision to deny him a merit increase in October 2004, was contrary to DOH policy and was arbitrary and capricious.

Accordingly, this grievance is GRANTED, and DOH Ordered to process a 2 ½% merit increase, effective the date others were awarded in the second half of 2004.

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: FEBRUARY 28, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE