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WILLIS KEMPER

v.

Docket No. 91-DOH-155

WEST VIRGINIA DIVISION OF HIGHWAYS

D E C I S I O N

The grievant, Willis Kemper, is employed by the West Virginia Division of Highways (DOH) as a Heavy Equipment Operator II. Mr. Kemper filed a level four grievance on April 26, 1991, stating as follows:

I, Willis Kemper, feel I am being treated unfairly by not getting a merit raise.
Relief; [sic] Receive merit raise, define merit raise procedure, and in any other way be made whole.

The grievant requested that the level four decision be rendered on the record below.¹ Proposed Findings of Facts and Conclusions of Law were submitted on July 24, 1991, and at the

¹The grievance was initiated on December 18, 1990, and a level one denial was issued on December 19, 1990. The level two denial was issued on January 24, 1991. A level three hearing was held on March 14, 1991 and a decision denying the grievance was subsequently issued. Fred VanKirk, Commissioner and State Highway Engineer, adopted the level three decision on April 12, 1991.

request of the undersigned a joint stipulation was filed by the parties on November 4, 1991.²

Several regulations and policies govern the granting of merit increases by the DOH. The West Virginia Division of Personnel Administrative Regulations, at Section 6.09, state in pertinent part that "[a]ll salary advancements shall be based on merit as reflected by service ratings and other recorded measures of performance." The West Virginia Division of Highways Administrative Operating Procedures, Volume IX, Chapter 15, Section C (Rev. August 15, 1981) at pp. 1-2, state, in pertinent part, as follows:

MERIT INCREASE POLICY

1. Purpose:
The purpose of this policy is to provide for granting merit increases to a limited number of employees (both hourly and salaried) based upon meritorious performance, while taking into consideration such factors as equitable pay relationships and length of service.
2. Performance Appraisal:
There must be a completed current performance appraisal report on file in the Personnel Division for each salaried employee recommended for increase under this policy.

Additionally, it has been held that an employer's decision on the granting of merit increases will generally not be

²It is noted that this grievance was, for efficiency purposes, combined at the level three hearing with a similar grievance, filed by another Division of Highways employee. At the conclusion of that hearing, the representative of both grievants requested that a separate decision be issued for each grievant weighing the individual merits of each case. In keeping with this request, separate level four decisions will also be issued for Willis Kemper and in the matter of Tallman v. W.Va. Div. of Highways, Docket No. 91-DOH-162.

disturbed unless shown to be unreasonable, arbitrary and capricious or contrary to law or properly established policies or directives. Osborne v. W.Va. Div. of Rehab. Serv., Docket No. 89-RS-051 (May 16, 1989).

The facts underlying this grievance are undisputed. DOH Commissioner VanKirk issued a memorandum, dated November 27, 1990, informing all Division Directors and District Engineers that limited funds for merit increases had become available and that processing for these increases was to begin immediately. The Upshur County organization of the DOH subsequently obtained merit increases for eight of its employees. The grievant, Willis Kemper, did not receive an increase.

At the time VanKirk's memorandum was distributed, 1990 performance evaluations for Upshur County DOH employees had not been completed and were not, in fact, done until well after the merit increases at issue were granted. Accordingly, the only recorded performance appraisals available for review were those completed for the year 1989. Nevertheless, the Upshur County District Engineer, Marvin Murphy, as well as the County Maintenance Superintendent, Hayes Cutright, testified at the level three hearing that the 1990 merit increases were based upon the perception of the candidates' 1990 performances as well as the 1989 ratings. Mr. Cutright, who made the actual selection for

increases, also testified that he considered when an employee had last received a merit raise in his winnowing process.³

The grievant asserts that the previously quoted Division of Personnel regulation requires merit raises to be granted on the basis of recorded measures of performance and, therefore, only the 1989 performance ratings should have been considered by Upshur County DOH in its determination of meritorious performance. The grievant further asserts that, based upon his 1989 evaluation, as well as his length of service and pay equity considerations, he is more entitled to a merit increase than some employees who received such a raise. The respondent contends that it complied with its merit increase policy in awarding these raises and did not abuse its discretion or act in an arbitrary or capricious manner and that the grievant has shown no greater entitlement to a merit increase than did those employees who received increases.

The first issue which must be addressed is whether DOH erred in considering the undocumented perception of its employees' 1990 performances in granting the merit pay increases at issue. As stated, Division of Personnel rules specify that merit is to be assessed by "service ratings and other recorded

³Although a merit increase must be based upon exemplary work performance, the past distribution of merit increases is apparently a factor considered by DOH under the "equitable pay relationships" portion of its policy.

measures of performance."⁴ Based upon the unambiguous language of this regulation, the undersigned finds that merit increases must be based upon some recorded measure of performance. Accordingly, the DOH was in violation of Section 6.09 when it admittedly utilized unsubstantiated impressions of its employees' performance as a basis for the distribution of merit increases, rather than relying upon their evaluations.

Once a violation of a regulation is found, it is necessary to fashion an appropriate equitable remedy. Inasmuch as it appears that the only recorded measures of performance available for the period in issue were the 1989 appraisals, a review of the grievant's performance, as well as the performance of those employees who received merit increases, as reflected by these appraisals, must be undertaken and a determination made as to whether the grievant was more entitled to an increase than one of the successful candidates.

A review of the record reveals that the grievant had a higher 1989 performance rating than four of the employees who

⁴The use of recorded measures of performance, whether through performance appraisals or other documents, in awarding merit increases appears to serve at least two functions. In the first instance, assuming such recorded measure has been properly communicated to the employee, it ensures that an employee has the opportunity to monitor his or her own performance and, if necessary, take appropriate steps to increase the likelihood of receiving a merit increase. Second, and perhaps more importantly, it provides an objective standard which can be referred to by both employer and employee when questions arise regarding the assessment of an employee's performance and the subsequent distribution of merit increases. This is particularly useful in light of the mandate that an employer must not act unreasonably, arbitrarily or capriciously in its decisions regarding such increases.

received a merit increase, here designated as A, B, C and D. While grievant's performance appraisal was 7.14 in 1989, employee A had a rating of 6.67, B had a rating of 6.0, C had a rating of 6.86 and D had a rating of 7.00.⁵

The grievant must show that he is more entitled to a merit increase than another employee who received a raise in order to prevail. The record indicates that employee C, who holds the same job classification as grievant, received a lower performance appraisal than grievant. Considering only merit, grievant clearly should have received the increase rather than C. In addition, the evidence shows that although C has greater seniority than grievant, he also earns a higher salary than grievant and did so prior to the 1990 increases.⁶ Even considering the factors of length of service and equitable pay relations as established by DOH, it appears that they balance out or neutralize each other, leaving only meritorious performance as a point of comparison between grievant and C. Accordingly, the undersigned finds that, based upon his documented meritorious performance, the grievant is more entitled to a

⁵It is unnecessary to identify by name those DOH employees who are being used for comparison purposes. It is noted that the 1990 performance appraisals, performed approximately three months after the merit increases were granted, reflect that grievant received a 6.85 rating, A a 7.11 rating, B a 7.16 rating, C a 7.14 rating, and D a rating of 8.0. It is also noted that the respondent offered no explanation as to why the grievant's overall rating was reduced in 1990. In fact, Mr. Cutright testified that the grievant "is a good worker, an outstanding worker. He does anything that I ask him to do."

⁶In addition, the record indicates that the grievant and C both last received raises in the late fall of 1988.

merit increase than at least one employee who received a raise, and that DOH acted arbitrarily and contrary to a properly established policy or directive in not granting the grievant the same.⁷

In addition to the factual and legal determinations contained in the foregoing discussion and analysis, the following formal findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. In late fall of 1990 the Respondent West Virginia Division of Highways awarded merit increases to eight employees.
2. The grievant, an Upshur County based DOH employee, did not receive a merit increase.
3. Performance appraisals evaluating the employees for their performance in 1989 were the only recorded measures of performance available at the time the merit increases were distributed.
4. The grievant had a higher 1989 performance rating than four of the employees granted increases, including employee C, who holds the same job title as the grievant.
5. The grievant, although less senior than employee C, has a lower salary than employee C.

⁷While it is noted that the grievant has requested that the merit raise procedure be defined, such procedure is currently defined by the previously cited regulations and policies. Accordingly, such relief is not available.


CONCLUSIONS OF LAW

1. All salary advancements shall be based on merit as reflected by service ratings and other recorded measures of performance. West Virginia Division of Personnel Administrative Regulations, §6.09.
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. Osborne v. W.Va. Div. of Rehab Serv., Docket No. 89-RS-051 (May 10, 1989).
3. The grievant proved by a preponderance of the evidence that he was more entitled to a merit pay increase than another employee granted such increase. See Byrd v. W.Va. Div. of Highways, Docket No. 91-DOH-128 (Oct. 8, 1991).
4. DOH acted arbitrarily and contrary to a properly established policy or directive in not granting grievant a merit pay increase.

The grievant is, therefore, **GRANTED**, and DOH is hereby ordered to grant grievant a merit pay increase retroactive to the effective date of the increases at issue, comparable to the increases awarded other employees on that date.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va.

Code §29-6A-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.


CATHY RIDER CULHANE
ADMINISTRATIVE LAW JUDGE

January 30, 1992