SPIRO T. MITIAS,

Grievant,

v. DOCKET NO. 95-PSC-029

WEST VIRGINIA PUBLIC SERVICE COMMISSION,

Respondent.

D E C I S I O N

Grievant, Spiro T. Mitias, a Utility Financial Analyst I with the Public Service Commission ("PSC"), filed two separate grievances on December 27, 1994, one against "David J. Ellis and the PSC", and the other against "Wayne Crowder, Boyce Griffith and the PSC", protesting his transfer from the Utilities Division, Energy Section, to the Motor Carrier and Solid Waste Section, as well as alleging discrimination, disparate treatment regarding salary and promotions, bad faith, and criminal conduct of Wayne Crowder in effecting Grievant's transfer. (See footnote 1) Grievant requested as relief that the transfer be rescinded, that he receive a minimum salary increase of 22% with a promotion to Utility Financial Analyst II, that no transfer or move be required pending thegrievance, and that Mr. Crowder be removed from his present position as Manager of Administration.

David Ellis, Grievant's supervisor and Division Director, issued a combined level one and level two decision on January 3, 1995, indicating he did not have the authority to grant the relief requested. Grievant appealed to level three on January 9, 1995, but did not receive a timely response, and appealed to level four on January 30, 1995. (See footnote 2)

Grievant served two separate discovery requests upon the PSC, which filed objections. A pre-conference hearing was held February 24, 1995, to discuss the discovery requests and other matters relating to the grievances, which were consolidated for hearing and decision. It was apparent through Grievant's discovery requests that he was also grieving his non-selection for the position of Manager of Administration. The PSC objected to the selection and disparate salary issues as untimely. The undersigned allowed discovery regarding the disparate salary issue, but denieddiscovery relating to the selection process, and took that issue under advisement.

Hearings were held on June 7, August 15-17, September 18 and September 20, 1995. The parties were invited to file proposed findings of fact and conclusions of law by October 20, 1995, and briefs in rebuttal by October 27, 1995, at which time this case became mature for decision.

Background

Grievant was hired permanently with the PSC as a Utility Financial Analyst I on December 1, 1989, at a salary of $19,920. (G. Exh. 27).

Boyce Griffith, is, and was at all times relevant hereto, the Chairman of the PSC. David Ellis is the Director of the Utilities Section of the PSC, acting Manager of the Energy Section, and the immediate supervisor of Mr. Mitias. Wayne Crowder is the Manager of Administration for the PSC.

Initially, Grievant was employed in the Motor Carrier Section of the Utilities Division of the PSC under the supervision of Paul Stewart. (Mitias, Aug. 16, 1995 Tr., at 74). (See footnote 3) During Grievant's work under the direction of Mr. Stewart, several incidents occurred which led to acrimonious relations between Grievant and Mr. Stewart.

Early on in Grievant's tenure in the Motor Carrier Section, Mr. Stewart directed Grievant to adopt a position with regard to asolid waste audit case which Grievant felt could not be justified. (Mitias, Aug. 16, 1995 Tr., at 75; Stewart, Aug. 17, 1995 Tr., at 35). In May, 1990, Mr. Stewart completed an evaluation of Grievant giving him a rating of 5.56 which is in the "good" category on the rating scale. (A. Ex. 9). On May 29, 1990, Grievant forwarded a written response to the evaluation noting his disagreement with the ratings he had received from Mr. Stewart. (A. Ex. 9).

At some point, Grievant, along with Don Cook and Fred Goff, fellow employees within the Motor Carrier Section, went to Mr. Stewart's supervisor, Mr. Ellis, and shared their concerns regarding Mr. Stewart's management style. As a result of such discussions, Mr. Ellis spoke with Mr. Stewart and told him there were areas in which he "needed to improve." (Ellis, Sept. 18, 1995 Tr., at 76; June 7, 1995 Tr., at 61).

Subsequent to these discussions with Mr. Ellis, Grievant was transferred in late 1990 from the Motor Carrier Section to the Energy Section of the Utilities Division. (Mitias, Aug. 16, 1995 Tr., at 75).

On October 31, 1990, Bashar N. Khoury, a Chief Utilities Analyst in the Energy Section who supervised Grievant, wrote a letter to Mr. Ellis recommending Grievant be given a raise, stating that Grievant's "ability to learn complex regulatory matters and to complete all of the above cases within a

period of less than two months, speak very highly of him and render his current salary totally inadequate." Mr. Khoury further stated Grievant hadcompleted a number of 30-C cases with "little or no supervision." (G. Ex. 10).

On September 16, 1991, Darrell Preece, Chief Utilities Manager for the Energy Section, also sent a letter to Mr. Ellis requesting a two step salary increase for Grievant. In support of such request, Mr. Preece stated that Grievant was then working on at least ten Rule 30-C cases "most of which were done with little or no supervision." Mr. Preece further stated that "Spiro is capable, has the initiative, has a good attitude, is well received by others and is doing a very good job." (G. Ex. 9). (See footnote 4)

In or about early January, 1994, Mr. Ellis completed an evaluation of Grievant giving him a rating of 8.2, which is near the middle of the "very good" rating category. He stated "Spiro is a valuable and dedicated employee. His willingness to work on new and different assignments is a strong point." Mr. Ellis further stated that "no improvement is required at present job classification but with experience overall notice of regulatory principles will improve." (G. Ex. 8).

Position of Manager of Administration

On October 21, 1992, a job opening for the position of Manager of Administration was posted at the PSC. (G. Ex. 17). This posting was prepared by Elizabeth ("Beth") Sharp, Director of Personnel for the PSC. (Sharp, Aug. 16, 1995 Tr., at 8).

Applicants for the position included Grievant, Ed Elswick, Joe Gollie, Beth Sharp, and Wayne Crowder. (Sharp, Aug. 16, 1995 Tr., at 9-10). Neither Grievant, Mr. Elswick nor Ms. Sharp were granted interviews. (Elswick, June 7, 1995 Tr., at 105; Griffith, Aug. 15, 1996 Tr., at 48-49; Sharp, Aug. 16, 1995 Tr., at 9). Chairman Griffith did, however, interview Mr. Crowder for the position. (Crowder, Aug. 15, 1995 Tr., at 103). In the course of the interview, there was "some discussion" between the Chairman and Mr. Crowder about removing the budget and fiscal aspects from the responsibilities of the position of Manager of Administration. (Crowder, Aug. 15, 1995 Tr., at 103). Mr. Crowder did "not totally" consider himself capable of handling the budgeting, expenditures and financial affairs which were later transferred from the Manager of Administration position to the Director of Data Processing. (Crowder, Aug. 15, 1995 Tr., at 107).

By memorandum dated January 11, 1993, Chairman Griffith informed Ms. Sharp that he was naming Mr. Crowder as acting Manager of Administration. (G. Ex. 18). No WV-ll Personnel Action

Form was prepared in order to place Mr. Crowder in the position of acting Manager of Administration. (Sharp, Aug. 16, 1995 Tr., at 11).

On January 22, 1993, Chairman Griffith forwarded a letter to Ms. Sharp directing her to "[p]lease prepare the necessary paperwork to delete the financial affairs from the job description of Manager of Administration [and add them] to the job description of Director of Data Processing. Once the Civil Service Commissionapproves the changes, I will appoint a permanent manager." (A. Ex. 3). Chairman Griffith eventually appointed Mr. Crowder as Manager of Administration on a permanent basis in February 1993.

According to Chairman Griffith, Grievant met the qualifications for the Manager of Administration position as posted. (Griffith, Aug. 15, 1995 Tr., at 49).

Notice to Applicants of Permanent Manager of Administration

Upon the placement of an employee into a permanent position with the PSC, it was the PSC's practice to notify all applicants for the position that the position had been filled on a permanent basis. (Griffith, Aug. 15, 1995 Tr., at 52; Sharp, Aug. 16, 1995 Tr., at 62). Such notification was typically carried out by Sharp in her capacity as Personnel Officer. (Griffith, Aug. 15, 1995 Tr., at 52; Sharp, Aug. 16, 1995 Tr., at 61-62).

Other than Mr. Crowder, none of the other applicants for the position were notified that Mr. Crowder had been placed in the position on a permanent basis. (Elswick, June 7, 1995 Tr., at 106; Griffith, Aug. 15, 1995 Tr., at 54; Sharp, Aug. 16, 1995 Tr., at 24). The only manner in which Ms. Sharp was informed of the permanent placement of Mr. Crowder was through a request by Chairman Griffith that she prepare the necessary paperwork to permanently place him in such a position. (Sharp, Aug. 16, 1995 Tr., at 24).

Because Ms. Sharp was an applicant for the position of Manager of Administration, she did not feel comfortable sending the other applicants letters informing them of the placement of Wayne Crowderin the position on a permanent capacity, and so informed Chairman Griffith. (Griffith, Aug. 15, 1995 Tr., at 52; Sharp, Aug. 16, 1995 Tr., at 61-62).

Although Ms. Sharp received inquiries from other applicants, including Grievant, as to the status of the position of Manager of Administration, she did not feel that it was her place to divulge the placement of Mr. Crowder in such position on a permanent basis. Accordingly, Ms. Sharp never told Grievant or Mr. Elswick that Mr. Crowder had, in fact, been placed in such a position on a permanent

basis. (Sharp, Aug. 16, 1995 Tr., at 27-29).

Mr. Elswick testified he talked to Ms. Sharp and was told he could not file a grievance with regard to the placement of Mr. Crowder in the position of acting Manager of Administration until such placement was in fact made permanent. (Elswick, June 7, 1995 Tr., at 109). Ms. Sharp testified she told Mr. Elswick any action is grievable and that she did not encourage nor discourage him from filing a grievance over Mr. Crowder's placement as acting Manager of Administration. Ms. Sharp did testify that because Mr. Crowder had not been permanently appointed, but was only acting, that she was not sure a grievable "event" had occurred, but left the decision to file a grievance to Mr. Elswick. (Sharp, Aug. 18, 1995 Tr., at 28).

Gary Hoke, EEO Officer for the PSC at all times relevant to this action, informed Grievant that he could not file a grievance with regard to the placement of Mr. Crowder in the position of acting Manager of Administration until such placement waspermanent. (Hoke, June 7, 1995 Tr., at 18-19). Mr. Hoke discussed with other EEO officers whether the placement of an employee in an acting position was a matter which was grievable and was told that only a permanent selection was grievable. (Hoke, June 7, 1995 Tr., at 19).

Retaliation by Crowder

Grievant and Mr. Crowder apparently got along well before they each applied for the position of Manager of Administration. Grievant testified Mr. Crowder had asked him not to apply for the position and he, Crowder, would take care of Grievant by making sure he got supplies and things he needed. Following Grievant's applying for the Manager of Administration position, Mr. Crowder ignored him, refused to talk to him and treated Grievant as if he "never knew" him. (Mitias, Aug. 16, 1995 Tr., at 97-98).

Ms. Sharp told Mr. Crowder that "other applicants" had asked whether the position of Manager of Administration had in fact been filled on a permanent basis. When told by Ms. Sharp that she did not feel comfortable informing the other applicants of his placement in such position, Mr. Crowder became angry at her. (Sharp, Aug. 16, 1995 Tr., at 30-31).

As Manager of Administration, Mr. Crowder became Mr. Elswick's supervisor and over time has stripped Mr. Elswick of many of the duties he previously was responsible for as Buildings and Grounds Supervisor. (Elswick, June 7, 1995 Tr., at 107).

Subsequently, when Mr. Hoke began working at the PSC, Mr. Crowder told him that if he, Hoke,

wanted to get along with Mr.Crowder, Mr. Hoke would have nothing to do with Grievant. (Hoke, June 7, 1995 Tr., at 10-11, 46). When Mr. Hoke began talking with Grievant, Mr. Crowder "cold shouldered" Mr. Hoke. (Hoke, June 7, 1995 Tr., at 11).

In December 1991, following the delivery, by TerraCare, Inc., a vendor of the PSC, of a number of Christmas trees, Mr. Crowder told Mr. Elswick he wanted to get a Christmas tree for Chairman Griffith. Mr. Elswick told him this was not a good idea. (Elswick, June 7, 1995 Tr., at 110).

Mr. Crowder called TerraCare and talked to Pat Nalle. Mr. Crowder told Ms. Nalle he needed another tree like the ones that had been delivered to the PSC, by 4:30 p.m. that day. (Bohach, Aug. 15, 1995 Tr., at 167-68, 176; Nalle, Aug. 15 1995 Tr., at 188). Ms. Nalle characterized Mr. Crowder's request for an additional Christmas tree as "very demanding." (Nalle, Aug. 15, 1995 Tr., at 188). George Bohach, a TerraCare employee who also talked to Mr. Crowder that day about the tree, corroborated this fact by testifying Mr. Crowder was adamant about receiving the tree that day. (Bohach, Aug. 15, 1995 Tr., at 167).

Mr. Elswick understood Mr. Crowder wanted TerraCare to give him the Christmas tree free. When invoices arrived at the PSC for the Christmas tree, Mr. Elswick took them to Mr. Crowder who became upset upon receipt of the invoices. (G. Exs. No. 11, 12 and 13; Elswick, June 7, 1995 Tr., at 111-116). Although Mr. Elswick spoke with individuals at TerraCare, invoices continued to be received for the single Christmas tree. (Elswick, June 7, 1995 Tr., at111-116). The PSC returned the invoice to TerraCare, where it was reissued to Mr. Crowder c/o the PSC. Chairman Griffith denied receiving a tree from Mr. Crowder, and Mr. Crowder denied ever ordering the tree. The whereabouts of the tree remain a mystery.

Despite his denials regarding the tree, Mr. Crowder ultimately paid TerraCare for a single Christmas tree by personal check on June 11, 1992, which he personally delivered to TerraCare's office in Malden, West Virginia. (Nalle, Aug. 15, 1995 Tr., at 192-93). After paying the invoice, Mr. Crowder told Ms. Nalle to tell Kevin Arnold, President of TerraCare, that he would "be sorry." (Nalle, Aug. 15, 1995 Tr., at 193). Upon his return to the PSC, Mr. Crowder told Mr. Elswick of his conversation with Ms. Nalle and told Mr. Elswick that he would "fuck" Kevin Arnold. (Elswick, June 7, 1995 Tr., at 117).

In late November, 1992, the PSC again ordered Christmas decorations including wreaths and poinsettias from TerraCare in the amount of $483.75. (G. Ex. 14). TerraCare forwarded to the PSC a

series of statements requesting payment for the Christmas decorations ordered in November, 1992. (G. Exs. 15 and 16). As late as March 22, 1994, Mr. Arnold sent a letter requesting payment for the overdue invoices stating "for some reason this invoice continues to be overlooked for payment." (G. Ex. 16). Mr. Elswick continually forwarded the statements to Mr. Crowder and to Nancy Wills, an employee in Mr. Crowder's office. When Mr. Ellis delivered his statements to Ms. Wills, she "just kind of laughed, grinned." (Elswick, June 7, 1995 Tr., at 121). On July 31, 1994,TerraCare wrote off the $483.75 charge to the PSC as a bad debt. (Nalle, Aug. 15, 1995 Tr., at 196).

Transfer of Grievant

Grievant has openly supported the candidacy of Charlotte Pritt for Governor of West Virginia in 1996. (Mitias, Aug. 16, 1995 Tr., at 90). Grievant also has placed Pritt bumper stickers on his car which he parks directly across from Mr. Crowder's car in the PSC parking lot. (Mitias, Aug. 16, 1995 Tr., at 91).

Both Mr. Crowder and Chairman Griffith have voiced support for Lloyd Jackson for Governor in 1996. With regard to Charlotte Pritt, Mr. Hoke testified Mr. Crowder stated something to the effect that "she would be the last person on earth" he would support. (Hoke, June 7, 1995 Tr., at 23). Mr. Crowder further discussed candidate Pritt with Mr. Elswick, and Mr. Elswick testified Mr. Crowder had "not a lot good" to say about Charlotte Pritt. (Elswick, June 7, 1995 Tr., at 122).

In November 1994, Grievant and fellow PSC employee Bob Khoury, arranged a fundraiser at the Aladdin Restaurant in Kanawha City for Charlotte Pritt. The fundraiser was reported in Fanny Seiler's column in the Charleston Sunday Gazette-Mail on November 27, 1994. (G. Ex. 2).

Mr. Crowder saw the November 27, 1994, Fanny Seiler column within a week of its publication, and such article was a subject of conversation within the PSC. (Crowder, Aug. 15, 1995 Tr., at 139). Chairman Griffith was also aware of the fundraiser for Charlotte Pritt in November 1994, having been told of it by another PSCemployee. Chairman Griffith was also familiar with Grievant's support of Charlotte Pritt, having seen a Pritt sticker on Grievant's car in the parking lot of the PSC. (Griffith, Aug. 15, 1995 Tr., at 39-40).

A second Fanny Seiler article regarding the fundraiser for Charlotte Pritt was published in the December 12, 1994, edition of the Gazette, referencing the fact that several PSC employees attended the fundraiser. (G. Ex. 3).

Two days after the publication of the December 12, 1994, article, Chairman Griffith replaced Mr.

Hoke as the Commission's EEO Officer, as reflected in a December 14, 1994 letter from Chairman Griffith. (G. Ex. 1). Chairman Griffith testified that Hoke had been a problem employee and he had had enough of Mr. Hoke.

Mr. Hoke had had a dispute with Mr. Crowder regarding a sexual harassment case in which Mr. Hoke had not been informed by Mr. Crowder that a complaint had been filed. When Mr. Hoke inquired of Mr. Crowder why he had not received the complaint, he was told it had been taken care of and not to "bite the hand that feeds" him. (Hoke, June 7, 1995 Tr., at 44).

The following day, on December 15, 1994, Chairman Griffith directed Mr. Ellis to transfer Grievant from the Energy Section to the Motor Carrier Section, where he would be supervised again by Mr. Stewart. Chairman Griffith, Mr. Crowder, and Mr. Ellis all knew Grievant and Mr. Stewart had had difficulties working together in the past. (Griffith, Aug. 15, 1995 Tr., at 29; Crowder, Aug. 15, 1995 Tr., at 140-41; Ellis, June 7, 1995 Tr., at 60).

The initiation of Grievant's transfer to the Motor Carrier Section directly by Chairman Griffith was unusual. Chairman Griffith could not recall another instance in which he had initiated the transfer of any employee from one section to another. (Griffith, Aug. 15, 1995 Tr., at 16). Mr. Ellis also testified it was unusual for the Chairman to initiate a section to section transfer. (Ellis, June 7, 1995 Tr., at 65).

Mr. Ellis informed Grievant that Chairman Griffith initiated the transfer from the Energy section to the Motor Carrier Section and that he, Mr. Ellis, had no reason to transfer Grievant. (Ellis, June 7, 1995 Tr., at 63, 65). Mr. Ellis testified he was given no reason for Grievant's transfer by Chairman Griffith, but told Grievant the reason was related to the workload in the Energy Section. (Ellis, June 7, 1995 Tr., at 64.) Mr. Ellis stated he "rationalized" the reason for the transfer was related to the workload, and Grievant disputed whether that was the real reason for the transfer. In response, Mr. Ellis stated "I correctly told him that, to some extent, he may be right." (Ellis, Sept. 18, 1995 Tr., at 123).

In response to Grievant's request for an explanation of the transfer, Mr. Ellis returned to Chairman Griffith and suggested either Grievant be permitted to leave his physical office where it was and transfer on paper to the Motor Carrier Section or to simply do Motor Carrier cases while remaining in the Energy Section under Mr. Ellis' supervision. (Ellis, June 7, 1995 Tr., at 73). Chairman Griffith became upset with Mr. Ellis and told him he had directed that Grievant be transferred and he wanted it done.

Mr. Ellis subsequently extended the time in which Grievant was to move to the Motor Carrier Section until December 27, 1994. (G. Ex. 6; Ellis, June 7, 1995 Tr., at 76).

On December 23, 1994, Mr. Elswick was on annual leave from the PSC and received a call from Mr. Crowder. Mr. Stewart's voice was in the background. (Elswick, June 7, 1994 Tr., at 124). Mr. Crowder directed Mr. Elswick to schedule the move of Grievant's office on December 27, 1994, and to begin before 9:00 a.m. on December 27 so that "nobody can stop it." (Elswick, June 7, 1994 Tr., at 125).

On the morning of December 27, 1994, Grievant arrived to find much of his furniture had already been removed from the office and the move was already in progress. The move had begun at approximately 7:30 a.m. on the morning of December 27, 1994. (Elswick, June 7, 1994 Tr., at 125-26).

Grievant requested Mr. Ellis stop the process to allow him to file the present grievance. Mr. Ellis complied with the request, and the physical move has to date, not taken place. (Ellis, June 7, 1994 Tr., at 83).

Despite the fact the move was stopped by Mr. Ellis, Mr. Stewart wrote a memorandum, as recently as August 14, 1995, to Mr. Crowder critical of Grievant for not reporting to him. (A. Ex. 11).

Reason Proffered by Respondent for Transfer

Respondent alleges Grievant was transferred because he spent too much time talking with Mr. Hoke. Mr. Crowder informed Chairman Griffith he believed Grievant and Mr. Hoke were spending too much time together and Mr. Hoke, who was under Mr. Crowder's supervision, was not getting his work done. (Griffith, Aug. 15, 1995 Tr., at 17). Mr. Crowder and Chairman Griffith discussed the possibility of transferring Grievant. (Crowder, Aug. 15, 1995 Tr., at 131-132).

Chairman Griffith stated Mr. Crowder's representations that Grievant and Mr. Hoke were spending too much time together was the sole reason he initiated Grievant's transfer. (Griffith, Aug. 15, 1995 Tr., at 27). Significantly, Chairman Griffith stated Grievant was a good and able employee of the Energy Section, and his work performance did not play a role in the decision to transfer him. (Griffith, Aug. 15, 1995 Tr., at 31). Chairman Griffith admitted Mr. Hoke's performance was more problematic than Grievant, and that he never spoke with Grievant regarding the time he was spending with Mr. Hoke. (Griffith, Aug. 15, 1995 Tr., at 22-24).

Both Grievant and Mr. Hoke testified they were never reprimanded, admonished or spoken to

about the time they spent talking with one another. (Hoke, June 7, 1995 Tr., at 51; Mitias, Aug. 16, 1995 Tr., at 98). Grievant specifically testified that neither Mr. Ellis, Chairman Griffith nor Mr. Crowder ever discussed with him the amount of time he was spending with Mr. Hoke. Further, Grievant was never told the reason he was beingtransferred was due to the amount of time he was spending with Mr. Hoke. (Mitias, Aug. 16, 1995 Tr., at 98).

Mr. Crowder testified he began keeping a log of the number of meetings between Grievant and Mr. Hoke, including the time of such meetings. (Crowder, Aug. 15, 1995 Tr., at 114). Although Mr. Crowder acknowledged that keeping such a log would be beneficial, he stated he did not show it to anyone and, in fact, threw it away. (Crowder, Aug. 15, 1995 Tr., at 114-15).

Significantly, the individual responsible for the direct supervision of Grievant, Mr. Ellis, stated he was never told the reason Grievant was being transferred was because of the amount of time he spent with Mr. Hoke. (Ellis, June 7, 1995 Tr., at 66). After discussing with Mr. Crowder the amount of time Mr. Hoke and Grievant were spending together, Mr. Ellis watched Grievant's activity more closely and did not notice Grievant spending an inordinate amount of time with Mr. Hoke or any other employees. (Ellis, June 7, 1995 Tr., at 67-68; Ellis, Sept. 18, 1995 Tr., at 124).

With regard to Grievant's work, Mr. Ellis knew of no time in which Grievant was not generating the amount of work he expected of him. (Ellis, Sept. 18, 1995 Tr., at 125). In fact, Mr. Ellis stated that, where sufficient work was available, Grievant's work generated "would have been 100% or 1,000%." (Ellis, Sept. 18, 1995 Tr., at 125-126). Mr. Ellis further noted that, although the transfer of Grievant has not been completed, Grievant has been performing work on Motor Carrier cases and has expressed awillingness to cooperate in terms of completing whatever work may need to be done. (Ellis, June 7, 1995 Tr., at 83).

Disparity as to Pay and Promotions

Joe Gollie began working at the PSC as a Utility Financial Analyst on February 1, 1989 at a salary of $16,572. Mr. Gollie's salary as of May 1, 1995 was $29,568. Thus, since his hiring, Mr. Gollie has received raises totaling $12,996, and two promotions. Mr. Gollie was promoted to Utility Financial Analyst II on June 3, 1991, and to Utility Financial Analyst III on October 16, 1993. (G. Ex. 29).

Grievant began working as a Utility Financial Analyst I on December 1, 1989 at a salary of $19,920. Although Grievant's salary, at the outset, was higher than Joe Gollie's, his salary as of May 1, 1995 was $28,284. Since his hiring, Grievant has received raises totaling $8,364, and no

promotions. (G. Ex. 27). The current difference between the two is a higher salary of $1,284 and two promotions for Mr. Gollie.

Allocation of Attorney's Cost and Fees

Grievant filed his grievances on December 27, 1994. (G. Exs. 5 and 6). Mr. Ellis, as Grievant's immediate supervisor and as Director of the Energy Section issued combined Level I and Level II decisions in each of Grievant's grievances on January 3, 1995. (G. Exs. 5 and 6).

Grievant appealed the combined decision on January 9, 1995. A copy of the appeal was marked received by the legal division for the PSC on January 9, 1995. (G. Ex. 40). The PSC did not schedulea level three hearing within seven (7) working days of the receipt of Grievant's appeal. Following a memorandum from counsel for Respondent to Chairman Griffith informing him Respondent was out of compliance with the time requirements in the statute, Chairman Griffith attempted to schedule a level three hearing in this matter for Friday, January 27, 1995. (A. Ex. 27). Notice of the hearing was faxed to Grievant's counsel on January 25, less than 48 hours prior to the date set for the level three hearing. (Griffith, Sept. 20, 1995 Tr., at 14). Chairman Griffith acknowledged the scheduling of the level three hearing was not timely. (Griffith, Sept. 20, 1995 Tr., at 14).

Respondent having failed to comply with the statutory guidelines set forth for conducting a level three grievance hearing, Grievant exercised his statutory right to proceed directly to a level four grievance hearing. W. Va. Code § 29-6-3(a).

Discussion

I.

Whether Grievant's Disparate Salary Discrimination Claim Was Timely Filed Under The Grievance Statute?

Grievant has compared himself to Joe Gollie, Bill Flenner, and Wayne Crowder, all employees of the PSC, in his disparate salary discrimination claim. Grievant requested, in a memorandum to Mr. Ellis, dated November 2, 1994, that he be promoted to a Utility Financial Analyst II, stating:

> In order to be treated equally as Joe Gollie, it would require a 21.23% salary advancement on this promotion, which I hope you would recommend to the Chairman. Please remember that I have not been treated equally as Joe Gollie for several years

> and even if I am granted the 21.23% increase I would still be short-changed. However,I am not asking for retroactive salary adjustment but will be happy to catch up on a prospective basis.

Grievant requested information from the Treasurer's Office which showed the history and salary of each employee of the PSC. Grievant testified he received "several of them", and received the most current information in October 1994. (Mitias, Aug. 16, 1995, Tr., p. 156). Grievant specifically compares his salary with Joe Gollie's from February 1989 to the present to determine he has not been treated fairly with respect to salary.

The PSC contends the disparate salary discrimination issue is untimely as Grievant knew in October 1994 of the salary differentials between he and the other employees, yet did not file his grievances until December 27, 1994.

Grievant claims the difference in treatment with respect to salary is a continuing practice which occurs every time Grievant receives a paycheck and thus, it is not untimely filed.

W. Va. Code § 29-6A-4(a) provides:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant, or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

The West Virginia Supreme Court of Appeals rejected the proposition that each new pay check would constitute "the mostrecent occurrence of a continuing practice" in Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990). There, the grievants discovered in 1989 that they had been left off a list of teachers eligible to receive a salary supplement in 1982. The Court found the grievance timely under the "discovery exception" to the time limitation for filing a grievance, but rejected the argument that each pay check was a "continuing practice". Rather, the Court looked to the specific act of leaving those grievants off the supplemental pay list as the triggering event that caused continuing damage, i.e., the wage deficit between the grievants and other teachers.

However, the West Virginia Supreme Court of Appeals in W. Va. Inst. of Technology v. Human

Rights Com'n, 383 S.E.2d 490 (W. Va. 1989), held that:

> Unlawful employment discrimination in the form of compensation disparity based upon a prohibited factor. . . is a "continuing violation," so that there is a present violation of the antidiscrimination statute for as long as such compensation disparity exists; that is, each paycheck at the discriminatory rate is a separate link in a chain of violations. Therefore, a disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if if is filed within the statutory limitation period after such compensation disparity last occurred. (Emphasis added).

The Human Rights Commission discrimination statute prohibits discrimination in the form of compensation disparity based upon a prohibited factor such as race, gender, national origin, etc. The Grievance Board discrimination statute is much broader and simply defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d). The Court recently applied the holding in Institute to the grievance procedure in Martin v. Randolph County Bd. of Educ., No. 22680 (Nov. 17, 1995), thus, each paycheck in a salary disparity case under the grievance statute constitutes a separate violation, and Grievant's discrimination claim is timely filed.

II.

Whether Grievant's Non-Selection Claim Was Timely Filed Under the Grievance Statute?

Respondent also argues that Grievant's non-selection claim is untimely as Mr. Crowder was appointed acting Manager in January 1993, and made permanent in February 1993, but Grievant did not file a grievance until December 1994.

To date, no notification has ever been sent to any of the applicants, other than Ms. Sharp in her role as Personnel Director, that Mr. Crowder was permanently placed into the position of Manager of Administration. Nonetheless, Ms. Sharp correctly informed Mr. Elswick that any act is grievable, despite her concern that no grievable event had yet occurred. While equitable estoppel is available if the employee's otherwise untimely filing was the result of either a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to

delay filing his charge (Naylor v. W. Va. Human Rights Com'n, 378 S.E.2d 843 (W. Va. 1989), a grievant has some obligation to pursue his rights under the grievance statute. In this instance, Ms. Sharp's representations to Mr. Elswick (which Grievant testified he relied on) were not such that she would"unmistakably have understood would cause the employee to delay filing." Further, neither Mr. Elswick nor Grievant could recall exactly when these conversations with Ms. Sharp occurred, and thus Grievant has not proven he discussed the matter of filing a grievance with her within the timelines of the statute. Grievant's reliance on Mr. Hoke's representations likewise cannot serve to toll the statute of limitations in this case. Mr. Hoke did not begin working at the PSC until June 1993, and was not appointed EEO Office until August 1993. Mr. Crowder was placed in the acting position in January 1993 and made permanent in February 1993. Thus, even if Mr. Hoke informed Grievant he could not file a grievance over an acting position, his advice came at least six months too late for Grievant to have complied with the limitations period. Therefore, the non-selection grievance is deemed untimely filed.

III.

Whether Grievant Has Been Discriminated Against With Regard to Salary Compensation?

In order to establish a claim of discrimination under the Grievance Statute, Grievant must establish a prima facie showing:

(a) that he is similarly situated, in a pertinent way, to one or more other employees;

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/had not, in a significant particular, and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to be the grievant in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (May 20,

1992).

Once a prima facie case has been made, the employer may offer a legitimate, non-discriminatory reason for its actions. If the employer is able to establish such reason, the grievant must then show the employer's stated reason is pretextual. Id.

Chairman Griffith testified there is no reason to treat Grievant and Mr. Gollie differently in terms of promotions. (Griffith, Sept. 20, 1995 Tr., at 5, 17). At various times, Grievant requested promotions from Mr. Preece, Mr. Ellis, and Chairman Griffith. (Mitias, Aug. 16, 1995, Tr., at 81-82). No promotion was forthcoming.

Both Chairman Griffith and Mr. Ellis testified Grievant met the minimal qualifications for promotion to Utility Analyst II as early as December, 1991, about two years after his hire date. (Ellis, June 7, 1995 Tr., at 90; Griffith, Aug. 15, 1995 Tr., at 64). Mr. Gollie was promoted to Utility Analyst II about two and a half years after his hire date.

The Chairman testified he had directed Grievant be promoted to a Utility Financial Analyst II in early 1994. Grievant testified he was approached by Chairman Griffith in or about April 1994 and he inquired whether Grievant had received his promotion. Grievant replied he was not aware of any promotion. (Mitias, Aug. 16, 1995 Tr., at 149). Grievant was subsequently called into Ms. Sharp's office and informed that in order to implement a promotion, he would have to fill out a job description form. (Mitias, Aug. 16, 1995 Tr., at 151). Ms. Sharp informed Grievant it would take several months to process the promotion. Because of the delay inreceiving the raise which would be incident to the promotion, he and Sharp agreed that she would submit the request in the form of a merit raise rather than a promotion. (Mitias, Aug. 16, 1995 Tr., at 151-52). Grievant received the merit raise.

Subsequently, sometime between May and November 1994, Mr. Ellis gave Grievant a job description form to fill out for promotion to the position of Utility Analyst II. (Mitias, Aug. 16, 1995 Tr., at 154). Grievant completed the form and submitted it to Ellis with the November 2, 1994 memorandum requesting a pay raise. (G. Ex. 5; Mitias, Aug. 16, 1995 Tr., at 154-55).

Mr. Ellis took no steps to implement Grievant's request until April 1995, at which time he forwarded a memorandum to Chairman Griffith in which he requested, among other things, that Grievant receive a promotion to Utility Financial Analyst II, the same promotion the Chairman had a

year earlier directed to occur. (Ellis, Sept. 18, 1995 Tr., at 154). At the present time, nearly one year after Grievant submitted the job description form to Mr. Ellis, Grievant has not yet received a promotion to position of Utility Financial Analyst II. (Ellis, Sept. 18, 1995 Tr., at 154). The Chairman testified there are other employees who are more in need of a raise, including a woman who has a "difficult financial situation." (Griffith, Aug. 15, 1995 Tr., at 77).

Mr. Ellis testified to and presented two "priority" charts which he developed to assist him in determining which of his employees will receive recommendations for merit or other salary increases. It appears that Mr. Ellis' desire is to rotate hisemployees to assure that each of them, if deserving, will receive such raises. The first chart is dated April 28, 1993 and lists Mr. Gollie as having had a 35.59% pay increase from 1989 to 1992 with 16 months having passed since his last increase. Accordingly, Mr. Gollie is ranked with a priority score of 30 and is eighth in priority on the list. Agency Ex. 20. Grievant is listed as having had a 23.01% salary increase from 1989 to 1992. With four months having past since his last salary increase, Grievant is given a priority score of -8 and is 65th in ranking of priority.

The second chart, dated December 22, 1993, shows Mr. Gollie has received a total increase from 1989 to 1993 of 55.56%, and that only six months has now passed since his last increase. Mr. Gollie is ranked 14 in priority on the December 22, 1993 list. Grievant is shown as having received, again, 23.01% increase in salary from 1989 to 1993. The last pay increase reflected for Grievant was in December 1992, and thus it had been 12 months since Grievant had received a pay increase. Still, Grievant is listed with a priority score of 0 on the December 22, 1993 list. Thus, Mr. Ellis' method of determining which employees will receive recommendations for salary increases, based on a rotation theory, does not seem to effectuate the desired result and actually demonstrates the arbitrary and capricious manner in which salary increases have been allocated to Grievant and his co-workers.

Finally, while denying Grievant has been discriminated against with regard to salary, Respondent nevertheless contends Grievant did not make proper use of his time and leave at the PSC,presumably as a rationale for his lack of promotion. Mr. Preece, who supervised Grievant in the fall of 1992, testified he was unable to sign Grievant's time sheets because of discrepancies between Grievant's own time records and those maintained by the PSC. (Preece, Sept. 18, 1995 Tr., at 26-27).

Mr. Preece admitted, however, that it was possible that the records maintained by the PSC could

have reflected that an employee was absent or unable to be located at a time when they were in fact within another part of the PSC building, in the bathroom, in a conference room or in a meeting with another employee. (Preece, Sept. 18, 1995 Tr., at 39).

Mr. Preece further verified he signed a sheet on March 31, 1993 at 4:20 in the afternoon which prematurely reflected Grievant had left at 4:40 that afternoon, a time which had not yet taken place. Mr. Preece agreed the document "was purporting to tell the future." (Preece, Sept. 18, 1995 Tr., at 40-42; G. Ex. 37). Mr. Preece testified this document was not his. In fact, Mr. Crowder testified he appointed a new hire to follow Grievant around to monitor his time, and this prophetic document belonged to that person.

Despite the discrepancy between the records maintained by Mr. Preece and those maintained by Grievant, Mr. Preece wrote a letter of support recommending Grievant for the position of Manager of Administration in November, 1992, which was at or near the time in which the time discrepancy took place. (Preece, Sept. 18, 1995 Tr., at 37). Mr. Preece stated in this letter that "Spiro has thedesire, the personality, the intelligence and the experience to do an outstanding job as Manager of Administration. This letter comes with the highest recommendation that I would give anyone and with the belief that you will give Spiro a fair opportunity for the position. I sincerely believe that he would be of great assistance to you in your everyday responsibility of running the Commission". (G. Ex. 34). Mr. Preece's recommendation was dated November 6, 1992, and was addressed to Chairman Griffith.

With regard to the issue of Grievant's use of leave, Mr. Ellis, who during the majority of time relevant to this grievance was Grievant's supervisor, stated Grievant made proper use of his leave time. (Ellis, Sept. 18, 1995 Tr., at 145). Significantly, in Grievant's evaluation for 1993, Mr. Ellis gave him an "8" or "very good" in the category entitled "Use of Time: Punctual reporting to work and proper use of leave." (G. Ex. 8). Thus, Respondent's attempts to use Grievant's use of time as an excuse for the salary and promotion differential must be deemed pretextual, as even the one person who was particularly affected by this alleged poor use of time, Mr. Preece, still wrote Grievant a glowing recommendation for the position of Manager of Administration. Further, Grievant's own supervisor, Mr. Ellis, obviously had no problem with Grievant's use of time, and Respondent's attempts to now resurrect that issue as a rationale for not promoting him is merely an attempt to reinvent history.

Grievant has established a prima facie case of discrimination with respect to promotions when

compared to Mr. Gollie's record,dating from the time the Chairman first ordered Grievant to be promoted to Utility Financial Analyst II in early 1994. Grievant has proven he is similary situated to another employee, Mr. Gollie, and that he has been treated by the PSC in a manner the other employee has not, i.e., despite repeated letters recommending him for promotion, and a directive from the Chairman to promote him, no promotion has been forthcoming, while Mr. Gollie has received two. Grievant has established that such differences are unrelated to actual job responsibilities of his and Mr. Gollie's as they both perform the same duties as auditors of rate cases within the PSC.

Respondent has attempted to portray Grievant as a problematic employee who falsifies time sheets, does not report to work on time, and disrupts fellow employees. However, none of these reasons withstand scrutiny, as evidenced by Mr. Preece's glowing letter of recommendation of Grievant despite the timesheet dispute, and Mr. Ellis' continuing praise of Grievant as an excellent and responsible employee. Thus, Grievant has shown Respondent's reasons for not promoting him are pretextual.

It appears the different treatment of Grievant and Mr. Gollie began when Mr. Gollie was promoted to Utility Financial Analyst II in June 1991, after Grievant had already been recommended for promotion by Mr. Khoury, and not too soon before being recommended for the Manager of Administration position by Mr. Preece.

While there is no requirement that employees within the same classification or pay grade receive the same salaries, as an employee's salary history can include adjustments such as meritincreases, salary increases upon promotion, demotion, lateral class change or reclassification, such salary adjustments cannot be made in an arbitrary and capricious manner. Largent v. W. Va. Div. of Health, 452 S.E.2d 42 (W. Va. 1994); see also Saidi v. W. Va. Dept. of Trans., Docket No. 95-DOH-106 (June 13, 1995). It is evident that Grievant's denial of promotions has been arbitrary and capricious, and Respondent has not demonstrated a legitimate, non-discriminatory reason for such differences.

The West Virginia Supreme Court of Appeals in Martin, supra, held that a Grievant's retroactive relief in a salary disparity discrimination case may be limited to fifteen days prior to filing of the grievance if the discrimination can be traced to a specific act or event. In this instance, the salary disparity between Grievant and Mr. Gollie began when Mr. Gollie was promoted to a Utility Financial Analyst II in June 1991. Therefore, Grievant's retroactive relief is limited to fifteen days prior to filing his grievances on December 27, 1994.

IV.

Whether Grievant's Transfer Was Arbitrary and Capricious?

An agency has the right to transfer its employees geographically where there is a need if they are placed in the same classification and pay grade and are not demoted or reduced in pay. If the employee refuses to adhere to the transfer without good reason, he can be dismissed by the employer for such action. Zigmond v. Civil Service Com'n, 155 W. Va. 641, 186 S.E.2d 696 (W. Va. 1972); Childers v. Civil Service Com'n., 155 W. Va. 69, 181 S.E.2d 22 (W. Va. 1971).

A transfer of an employee from a position in one organiza-tional sub-division of an agency to a position in the same or comparable class in another organization sub-division of the same or another agency may be made at any time by the appointing authorities concerned. Johnson v. W. Va. Dept. of Health and Human Res., Docket No. 93-HHR-239 (Oct. 7, 1993). However, while it is recognized that state agencies have the broad general authority to transfer employees, this power is not without restraint and must be exercised in a manner which is reasonable and not arbitrary or capricious. Jewell v. W. Va. Dept. of Health and Human Res., Docket No. 93-HHR-281 (Jan. 21, 1994); Phares v. W. Va. Dept. of Public Safety, Docket No. 91-CORR-275 (Dec. 31, 1991).

A.

Whether Grievant's transfer was motivated by political reasons?

Grievant alleges his transfer was motivated in part by his political affiliation and support for Charlotte Pritt, and the transfer was retaliatory on the part of the Chairman and Mr. Crowder, because he would be placed under the supervision of a manager whom it was well known did not like him.

Employment decisions to transfer public employees that are based on party affiliation and support constitute "an impermissible infringement on the First Amendment rights of public employees." Akers v. W. Va. Dept. of Highways, 188 W. Va. 698, 703, 425 S.E.2d 840, ___ (W. Va. 1992), citing Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). The only exceptions to this rule are the employment changes effectuated for the purpose of enabling the hiring

of certain high-levelemployees on the basis of their political views "necessary to loyally implement . . . [an administration's] policies." Id.

There is no allegation that Grievant's position as a Utility Financial Analyst is one of those positions for which political affiliation is appropriately a prerequisite. Thus, the inquiry is limited to whether Grievant's transfer was based on his party affiliation and support.

Grievant and others threw a fundraiser for Pritt at the Aladdin Restaurant in November 1994. Two articles appeared in the Fanny Seiler column of the Charleston Gazette, on November 27, 1994, and December 12, 1994, about the fundraiser, naming Grievant as the organizer, and noting that several employees of the PSC were in attendance. G. Exs. 2, 3.

Grievant was told by Mr. Ellis, his immediate supervisor, that he was being transferred from the Energy Section to the Motor Carrier Section on December 15, 1994, three days following the last article by Fanny Seiler. The manager of the Motor Carrier Section was Mr. Stewart, for whom Grievant had previously worked. It is undisputed the two did not get along.

Mr. Hoke testified Mr. Crowder expressed his support for Lloyd Jackson on numerous occasions, and that Ms. Pritt would be the last person on earth he, Mr. Crowder, would support. Hoke, June 7, 1995, Tr., at 22.

Mr. Crowder told Mr. Elswick he supported Mr. Jackson for governor and he, Mr. Elswick, should "get on board" cause he was going to be a winner. Mr. Crowder also commented on Pritt, but"not a lot of good" was said about her. Elswick, June 7, 1995, Tr., at 122.

Chairman Griffith testified he supported Lloyd Jackson as a candidate for governor because he is from Lincoln County, as is Griffith. Grievant and Mr. Hoke are also from Lincoln County. In fact, the Chairman and Grievant often rode to work together from Lincoln County. Chairman Griffith returned from a national convention of the National Association of Regulatory Utilities Commissioners in November and learned that a fundraiser had been given for candidate Pritt at the Aladdin Restaurant. Chairman Griffith had accompanied Grievant to the restaurant and knew the owners were friends of Grievant's. Griffith, Aug. 15, 1995, Tr., at 40. Chairman Griffith testified that he did not have any conversations with Grievant about his support for Pritt, nor did he draw any conclusions one way or the other about Grievant's involvement in the Pritt fundraiser. Griffith, Aug. 15, 1995, Tr., at 41-42.

Mr. Crowder testified he never had a conversation with Mr. Elswick or Mr. Hoke about supporting Jackson for governor and they were lying. Crowder, Aug. 15, 1995, Tr., at 137-38. He testified he

heard rumors Grievant had sponsored a fundraiser for Pritt, saw the Fanny Seiler articles at the time they were printed, and knew they were the subject of some discussion around the PSC. Crowder, Aug. 15, 1995, Tr., at 140.

While the transfer coincidentally occurred shortly after the fundraiser, Grievant has not proven by a preponderance of theevidence the transfer was motivated by his political affiliation and support for Charlotte Pritt. The Chairman testified he supported Jackson for governor, but did not indicate any malice or hostility toward Grievant for supporting Pritt. Indeed, both the Chairman and Grievant hail from Lincoln County, and the Chairman was responsible, in part, for Grievant obtaining a job at the PSC and recommended his promotion. Also, Mr. Hoke, who supported Jackson, was also removed from his EEO position by the Chairman at the same time Grievant was ordered transferred. There is not sufficient evidence that any of the Chairman's actions with regard to the Grievant were politically motivated, nor is there any evidence that Mr. Crowder's actions toward Grievant were politically motivated.

B.

Whether Grievant's transfer was motivated by Wayne Crowder's desire to retaliate against Grievant for seeking the Manager of Administration position?

Grievant also alleges that Mr. Crowder's actions against him, culminating with the transfer, were, in part, retaliatory because Grievant had applied for the same position that Mr. Crowder ultimately received, Manager of Administration, and Grievant had been discussing filing a grievance over his non-selection for the position. Grievant presented evidence to show Mr. Crowder orchestrated the transfer of Grievant and manipulated the Chairman to go along with it, and that this action was the latest in several actions taken against Grievant by Mr. Crowder.

During the time Mr. Preece was Manager of the Energy Section, he testified he had problems with a few employees, includingGrievant, over timekeeping. Mr. Preece refused to sign some of Grievant's timesheets because there were discrepancies between Grievant's time and a log Mr. Preece was keeping. Mr. Preece talked to Mr. Crowder about the problem and Mr. Crowder testified he hired someone to follow Grievant around and keep a log of his comings and goings. However, Mr. Crowder ceased this practice after a couple of weeks because "it wasn't working." Evidence presented indeed confirms it was not working. Apparently the individual hired to follow Grievant kept a log purporting to

tell the future and had Grievant logged out of the building some twenty minutes before that time had actually arrived. Mr. Preece testified he initialed a correction on the log to indicate Grievant was still in the building even though the log was not his. Soon thereafter, Mr. Crowder ceased having Grievant followed.

Mr. Hoke testified that within a few weeks after his coming to the PSC, Mr. Crowder, his immediate supervisor, told him to stay away from Grievant if he wanted to get along. Despite this warning, and perhaps even because of it, Mr. Hoke established a friendly relationship with Grievant. It is undisputed that Grievant and Hoke spent time together, especially in Mr. Hoke's office, which was in direct view of Mr. Crowder's office. Mr. Hoke and Grievant testified they discussed Grievant's non-selection for the Manager of Administration job, and the possibility of filing a grievance over the non-selection. In addition, it appears Grievant and Mr. Hoke met within view of Mr. Crowder in part to antagonizehim because of his admonitions to Mr. Hoke not to spend time with Grievant.

Mr. Crowder became very upset with Mr. Hoke and Grievant, and testified Mr. Hoke was not getting his job done because he spent too much time with Grievant. There is no contention Grievant was not getting his job done. In fact, his immediate supervisor, Mr. Ellis, testified Grievant was an excellent employee, and did not notice any problem with Grievant's production.

However, despite his unhappiness with Mr. Hoke, Mr. Crowder never talked to him or told him he was spending too much time with Grievant. Mr. Crowder started keeping yet another log indicating the time spent between Grievant, Mr. Hoke and another PSC employee, Bob Khoury. Mr. Khoury was acting as Grievant's representative in the meetings with Mr. Hoke about the non-selection grievance. At some point, Mr. Crowder decided to throw that log away as well, and again, never spoke with Mr. Hoke or Grievant about their time together. Subsequently, Mr. Crowder went directly to the Chairman and complained that Mr. Hoke was spending too much time with Grievant and not getting his job done. The Chairman told him to work it out himself. Crowder then went to Mr. Ellis, Grievant's supervisor, and asked him to speak to Grievant. Mr. Ellis testified he watched Grievant's activities for awhile after speaking with Mr. Crowder but did not notice anything he perceived to be excessive or out of the ordinary, and so he did not talk to Grievant.

Mr. Crowder went again to the Chairman, suggesting Mr. Ellis hadn't done anything to remedy the situation with Grievant. It was at this time Mr. Crowder suggested to the Chairman that Grievant be transferred across the street in order to stop the meetings between Hoke and Grievant. The

Chairman approved the transfer and ordered that it take place. Interestingly, despite Grievant's request for a reason for the transfer, none of the reasons stated above were ever given him until depositions were taken in the course of these proceedings. Mr. Ellis testified he "rationalized" the reason was due to the decreased workload in the Energy section, but admitted the Chairman had never expressed workload as a reason for the transfer.

The PSC attempts to portray Mr. Crowder as the victim, suggesting that Grievant, Mr. Hoke and other employees deliberately antagonized him. The undersigned cannot accept the PSC's portrayal of Mr. Crowder based on observations made during these proceedings. Mr. Crowder's overriding response to any accusation made by any witness in these proceedings was that they were "lying". It seems everyone was lying, and apparently conspiring against Mr. Crowder, including the employees of TerraCare. Grievant presented evidence regarding Mr. Crowder's relationship with TerraCare to illustrate that Mr. Crowder is capable of, and has, retaliated against individuals with whom he has a disagreement. It is a far-reaching theory that Grievant, Mr. Hoke, Mr. Elswick and perhaps others, created a scenario to portray Mr. Crowder as an overbearing administrator, and managed to induce one of the PSC's vendors,TerraCare, to participate in the conspiracy. The undersigned found Mr. Crowder to be evasive and hostile in his testimony, and concludes he would react in an unfavorable manner if he perceived his position to be in jeopardy.

Mr. Crowder's change in attitude towards Grievant, Mr. Elswick and Ms. Sharp after receiving the position of Manager of Administration serves to confirm the undersigned's belief that Mr. Crowder would react in a negative way to suspicions that those individuals were going to file grievances over their non-selection for his position.

Moreover, the undersigned finds Mr. Crowder manipulated the Chairman to order Grievant's transfer with his story of Grievant and Mr. Hoke spending too much time together. If, in fact, Mr. Hoke was not adequately performing his job at the PSC, the correct resolution would not be to transfer Grievant, but to caution Mr. Hoke about his responsibilities, and if that did not work, to transfer Mr. Hoke.

The evidence that there was little or no work in the Energy Section at the time does not justify penalizing Grievant by moving him to a section under a manager known to be hostile to Grievant in order to correct a situation with Mr. Hoke. Mr. Ellis testified Grievant could have done the Motor Carrier work at his own desk within the Energy Section and that it was not necessary to physically

move him across the street to take on those cases.

Finally, that the "workload" rationale for transferring Grievant was pretextual became evident during these proceedingswhen the Chairman testified it would not be necessary to transfer Grievant once Mr. Hoke retired. Mr. Hoke experienced serious medical problems in early 1995 and retired from the PSC in Spring 1995. Despite Mr. Hoke's retirement, and the Chairman's directive that the transfer not take place, it is apparent that directive was never implemented. As late as August 14, 1995, during the course of hearings in this matter, Mr. Stewart issued a memorandum reprimanding Grievant for not properly reporting to him. Clearly, the Chairman's directive that the transfer not take place was never communicated to Mr. Stewart. To add insult to injury, Respondent then attempted to use Mr. Stewart's memorandum as evidence to paint a picture of Grievant as being problematic and uncooperative. This attempt shows an inability of Respondent to admit it made a mistake in ordering Grievant's transfer and to remedy the situation.

The undersigned finds Grievant's transfer was the latest in a series of actions instigated by Mr. Crowder to retaliate against Grievant for applying for the Manager of Administration position and was clearly arbitrary and capricious.

V.

Whether Respondent Acted in Bad Faith In Failing To Schedule A Level Three Hearing Within the Statutory Framework?

Grievant alleges Respondent acted in bad faith in failing to schedule a level three hearing within seven days after receipt of Mr. Ellis' combined level one and two decision on January 9, 1995. The Chairman attempted to schedule a hearing on January 25, 1995. The Chairman testified he was unaware a lower level decision had been rendered until he received a memorandum from PSC's counselinforming him that Grievant had retained counsel to represent him in this matter. At that point, he immediately sent a notice of hearing to Grievant's counsel, indicating he would be amenable to rescheduling the hearing to accommodate Grievant if necessary.

Grievant exercised his statutory right to advance his grievance to level four once the level three hearing was not timely scheduled. Grievant has not shown any undue prejudice or harm from this delay. In addition, Grievant has not proven the PSC was acting in bad faith or that it had no intention of ever responding to Grievant's appeal. Many appeals in the grievance process are untimely filed or

hearings not timely scheduled, and this Grievance Board attempts to treat both employees and employers fairly in the process. Thus, the undersigned finds Grievant has not proven by a preponderance of the evidence that Respondent was acting in bad faith in failing to schedule a timely level three hearing, and his request for attorneys' fees (See footnote 5) and costs is denied.

Based upon the foregoing narrative and discussion, it is appropriate to make the following findings of fact.

Findings of Fact

1. Grievant began working for the PSC in December 1989 on a permanent basis at a salary of $19,920. Grievant has received some raises, and despite several recommendations, including a directivefrom the Chairman, has received no promotions. His salary as of May 1, 1995, was $28,284.

2. Joe Gollie began working for the PSC in June 1989 on a permanent basis at a salary of $16,572. Mr. Gollie has received some raises and two promotions. His salary as of May 1, 1995 was $29,568.

3. Grievant and Mr. Gollie perform the same work and have the same job responsibilities.

4. Grievant knew in October 1994 that his salary was different from other employees with whom he compared himself. Grievant did not file his grievance until December 27, 1994.

5. Grievant, Mr. Elswick and Ms. Sharp were among the applicants for the Manager of Administration position, which was ultimately awarded to Mr. Crowder.

6. Despite never being notified that Mr. Crowder had been placed permanently in the Manager of Administration position, Grievant knew in January 1993 that he had been placed in the position on an acting basis.

7. Mr. Crowder's treatment of Grievant, Mr. Elswick and Ms. Sharp changed for the worse after he became Manager of Administration.

8. Mr. Crowder became angry with Grievant for spending time with EEO Officer Gary Hoke, with whom Grievant was discussing filing a grievance over his non-selection for the Manager of Administration position.

9. Mr. Crowder kept logs on Grievant's timekeeping and whereabouts in an attempt to "get something" on Grievant, but was unsuccessful.

10. Mr. Crowder utlimately succeeded in manipulating the Chairman to order Grievant's

transfer from the Energy Section to the Motor Carrier/Solid Waste Section, under the supervision of Paul Stewart, whom it was well-known did not like Grievant.

11. Grievant's own supervisor, Mr. Ellis, had no reason to transfer Grievant. In fact, Grievant was not a problematic employee.

12. Despite repeated requests, Grievant was never told the reason for the transfer was his spending time with Mr. Hoke until depositions were taken as part of these proceedings.

13. Chairman Griffith ordered the transfer be rescinded once Mr. Hoke retired because the reason for the transfer no longer existed.

14. Despite the Chairman's order, the transfer was not rescinded and as late as August 14, 1995, Mr. Stewart issued a memorandum reprimanding Grievant for not properly reporting to him.

15. Respondent attempted to use this memorandum to portray Grievant as a problematic employee, knowning full well the transfer had been ordered rescinded by the Chairman.

16. Grievant's transfer was not motivated by political reasons, but rather by Mr. Crowder's dislike of Grievant and desire to retaliate against him for applying for the Manager ofAdministration position and subsequently considering filing a grievance over his non-selection.

17. Chairman Griffith directed that Grievant be given a promotion in early 1994 to Utility Financial Analyst II. The promotion was not processed. Ultimately, Ms. Sharp called Grievant into her office to discuss the promotion and told Grievant it would take months to process. Grievant and Ms. Sharp agreed she would submit a merit increase request at that time so that Grievant could benefit from the salary increase at that time. The promotion, however, was never processed again.

18. Mr. Ellis gave Grievant a job description to fill out sometime between May and November 1994 for promotion to Utility Financial Analyst II. Grievant submitted the completed form to Mr. Ellis on November 2, 1994.

19. Mr. Ellis did not forward the promotion request to the Chairman until April 1995, the same promotion the Chairman himself had directed occur nearly a year before. Still, to date, the promotion has not been acted upon by the PSC.

20. The PSC did not schedule Grievant's level three hearing in a timely manner under the grievance statute.

Conclusions of Law

1. Grievant bears the burden of proving his claims by a preponderance of the evidence. W. Va. Code § 29-6A-6.

2. Grievant has established a case of discrimination for failure to promote and disparate salary, which has been timely filed under the grievance statute. Martin v. Randolph County Bd.of Educ., No. 22680, ___ S.E.2d ___ (W. Va. 1995); W. Va. Inst. of Tech. v. Human Rights Com'n, 383 S.E.2d 490 (W. Va. 1989).

3. Respondent established that Grievant's non-selection claim was untimely filed under the grievance statute, W. Va. Code § 29-6A-3.

4. Grievant has failed to establish by a preponderance of the evidence that his transfer was motivated by political reasons.

5. Grievant has established by a preponderance of the evidence that his transfer was motivated by Mr. Crowder's desire to retaliate against him for applying for the Manager of Administration position, and was clearly arbitrary and capricious.

6. Grievant has failed to establish by a preponderance of the evidence that Respondent acted in bad faith in failing to schedule a level three hearing in a timely manner under the grievance statute.

Accordingly, this grievance is **DENIED** in part and **GRANTED** in part. Respondent is hereby **ORDERED** to:

1. Officially rescind Grievant's transfer and remove all memoranda and directives regarding the transfer of Grievant from the Energy Section to the Motor Carrier/Solid Waste Section, including the August 14, 1995, reprimand, from Grievant's personnel file, and

2. Immediately promote Grievant to a Utility Financial Analyst II, including a five percent (5%) salary increase, effective fifteen days prior to the filing of the grievances, or December 12, 1994.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 14, 1995

Footnote: 1 *Although individuals were named in the original grievances, this Board does not recognize individuals as "Respondents" in grievance proceedings. Therefore, the PSC is the only named Respondent in this grievance decision.*

Footnote: 2 *W. Va. Code § 29-6A-4(c) provides grievants five days from the receipt of the level two decision to file a written appeal with the chief administrator of the grievant's work location. The chief administrator shall hold a hearing within seven days of receiving the appeal, and issue a written decision within five days of such hearing. The evidence shows Grievant's appeal of the combined level one and level two decision was received in the Chairman's office on January 9, 1995; however, a hearing was not scheduled until January 25, 1995, following receipt of a memorandum from PSC's legal counsel that Grievant had hired legal counsel to represent him. The Chairman then scheduled a hearing for January 27, 1995, which Grievant's counsel objected to based on short notice. The delay in scheduling Grievant's level three hearing is the subject of Grievant's claim of bad faith on the part of the PSC.*

Footnote: 3 *References to "Tr." refer to the level four hearing transcript.*

Footnote: 4 *Mr. Preece subsequently resigned his position as Manager of the Energy Section, and Mr. Ellis has been serving as the Acting Manager since that time.*

Footnote: 5 *It is therefore not necessary to address whether the Grievance Board can award attorney's fees under W. Va. Code § 29-6A-7 ¶3, where it is determined that a party has acted in extreme bad faith.*