DENNIS COLLINS,

Grievant,

v. Docket No. 98-DOH-103

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Dennis Collins, filed this grievance against his employer, the Division of Highways ("DOH"), on April 24, 1997, alleging:

> **Discrimination, I have not received a merit raise or salary increase in years. I am a mechanic III and I have a co-worker who is a mechanic II and makes .09¢ more per hr. than I do with less seniority than I have. Other mechanics in the same class as I am makes (sic) $10.00 plus per hour, and this makes me feel discriminated against. RELIEF SOUGHT: I want to be moved up in pay with other people in my classification, plus back pay for dollars lost over the years due to discrimination.**

This grievance was denied at Levels I and II. At Level III, Grievant confusingly moved for a continuance, and also moved to by-pass Level III because there had been confusion about a possible continuance of a Level III hearing, and certain witnesses were not available. This motion was granted on March 17, 1998, with the result that no lower level hearing was held. This grievance was received at the Grievance Board on April 1, 1998.

Numerous Level IV hearings were scheduled, but were continued by agreement of the parties. A Level IV hearing was finally held on April 6, 1999. This case became mature for decision on May 18, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant states he has never received a merit increase and argues he should have received

several merit increases since 1985 because his evaluations were the same or higher than employees who did receive merit increases. Grievant also argues he had been discriminated against by this failure to grant him these merit increases.

Respondent asserts Grievant has failed to prove his case, and argues the merit increases were properly based on the yearly performance evaluations and other permissible factors. Respondent pointed out the merit increases for one year are based on the performance evaluations from the prior year. For example, Respondent avers Grievant's argument he should have received a merit increase in 1988 based on his evaluation for 1988 is flawed, as the 1988 evaluation was not completed until February 1989, and the merit increases at issue were granted in November 1988. DOH notes that one of the individuals to whom Grievant compared himself, was evaluated and granted merit increases by another evaluator in another organization with a separate amount for merit increases, and the differences in rater evaluation cannot be controlled.

It must be recognized that there seemed to be some confusion about which performance evaluations went with which merit increases. The undersigned Administrative Law Judge notes that at least since 1995, by DOH policy, the merit increases were to be based on the prior year's performance evaluations. The undersigned Administrative Law Judge followed this pattern in assessing whether Grievant had been treated unfairly. Some testimony indicated that this method was not strongly adhered to in earlier years. However, the undersigned Administrative Law Judge continued to use the prior year'sevaluation to assess the next year's evaluations because the merit increases were granted after the performance evaluation had been completed. In other words, because Grievant chose to rely on the performance evaluations to prove his case, then it was necessary for the undersigned Administrative Law Judge to examine when each evaluation was completed, and then assess when it could be applied to or affect the merit increase. Thus, if the 1988 performance evaluation was not completed until 1989, it could not be applied to merit increase granted in 1988.

Because Grievant did not submit many of the performance evaluations of the employees who did receive merit increases, it was very difficult, in fact next to impossible, to assess whether he was discriminated against in many years. Additionally, Grievant frequently

submitted performance evaluations of employees who scored lower than he who did not receive merit increases. Further, the seniority of some of the people discussed, such as Fred Evans, was unknown as they had retired. This factor did not make much difference as his performance evaluations were not submitted either, and he was not compared to Grievant in this decision. (See footnote 2) Grievant also briefly discussed the pay of Austin Sloan, but no further information about this employee was submitted. No information was submitted to indicate the pay equity relationship between Grievant and the employees to whom he compared himself. Also there was no information about the starting salaries ofany employee. There was some testimony by Grievant which indicated he was paid less than other employees, but this testimony frequently did not relate to the performance evaluation data presented by Grievant. For example, Grievant indicated he was paid less than Mr. Paul Adkins, but he did not submit any of Mr. P. Adkins' performance evaluations to indicate when Mr. P. Adkins had received merit increase incorrectly or when Mr. P. Adkins received merit increase that Grievant should have received. (See footnote 3)

The issues of timeliness or laches were not raised by the Respondent, but it was obvious the passage of time had affected the quantity and quality of evidence presented.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by DOH as a Mechanic in Lincoln County since 1978.

2. He began his employment as a Mechanic II and was promoted to a Mechanic III in 1982. Grievant also received a salary advancement or merit increase in 1984.

3. Due to a work-related back injury, Grievant has been off work for a total of approximately four years. Grievant was first off on Workers' Compensation from April 28, 1987, to October 5, 1987. Grievant was off on Workers' Compensation the second timefrom January 5, 1988, to June 13, 1988. Grievant was off on Workers' Compensation the third time from October 7, 1993, to August 6, 1996.

4. Grievant did not receive a merit increase from 1984 until January 1998.

5. No evaluations for 1987 were submitted into evidence. Several employees received

merit increases in September of 1988 based on the directions in the Commissioner's memo of July 19, 1988. (See footnote 4)

6. Five performance evaluations for 1988, including Grievant's, were submitted into evidence. (See footnote 5) **These performance evaluations were completed in February 1989. Michael Adkins received a 6.67 on his performance evaluation and received a 2.5% merit increase on November 16, 1989. Randy Adkins received a 7.71 on his performance evaluation and received a 2.4% merit increase on that same date. Grievant received an 8.0 on his performance evaluation and Dorsell Baker received a 7.71; neither received a merit increase during 1989. Other employees in Grievant's unit received various types of merit increases in 1989, but their performance evaluations were not submitted for review. No Commissioner's memo from 1989, discussing the recommendations for awarding merit increases was placed into evidence. 7. Dwight David Kirk received a 5 % merit increase on December 1, 1988, after only eight months of employment, and before he received his first performance evaluation on February 27, 1989. His rating was only a 6.28. His supervisor, Mr. Pauley, did not recommend Mr. Kirk for this merit increase, and it was granted outside the available Lincoln County merit increases for that year.**

8. Grievant was off work on a medical leave of absence for one half of 1988, and Mr. Pauley, Grievant's then supervisor, did not recommend Grievant for a merit increase because he had not worked the full year, and he had employees who had worked the full year and done a good job. Mr. Pauley also indicated Grievant was a good Mechanic, but was not a take-charge type of person.

9. Four performance evaluations for 1989, including Grievant's, were submitted into evidence. These performance evaluations were completed by the new county supervisor, Mr. Tim Pullen, in February 1990. Michael Adkins received a 7.0 on his performance evaluation and did not receive a merit increase during 1990. Randy Adkins received a 6.6 on his performance evaluation and did not receive a merit increase. Grievant received a 7.3 on his performance evaluation and did not receive a merit increase. Other employees in Grievant's unit received various types of merit increases, but their performance evaluations were not submitted for review. (See footnote 6) **The Commissioner's memofrom 1990, discussing the recommendations for the merit increases was submitted into evidence and directed**

supervisors to follow Administrative Operating Procedures, Volume IX, Chapter 15 in the awarding of merit increases.

10. Administrative Operating Procedures, Volume IX, Chapter 15 states merit increases should be based on: "meritorious performance while taking into consideration such factors as equitable pay relationships and length of service." **(See footnote 7)**

11. Three performance evaluations for 1990, including Grievant's, were submitted into evidence. These performance evaluations were completed by the county supervisor, Mr. Pullen, in January 1991. Both Mr. Baker and Grievant received a 8.0 on their performance evaluations, but did not receive merit increases during 1991. Other employees in Grievant's unit received various types of merit increases, but their performance evaluations were not submitted for review. **(See footnote 8)** **The Commissioner's memo from September 1991, discussing the recommendations for the merit increases was submittedinto evidence and directed supervisors to follow Administrative Operating Procedures, Volume IX, Chapter 15 in the awarding of merit increases.**

12. Two performance evaluations for 1991, including Grievant's, were submitted into evidence. Grievant's performance evaluation was completed by the county supervisor, Mr. Pullen, in February 1992. Grievant again submitted the evaluation of Mr. Tabor, who was still stationed at Corridor G. Mr. Tabor did not receive a merit increase in 1992. Again, this fact has no effect on Grievant's performance evaluation in Lincoln County. See nn. 6 & 8, infra. Grievant received a 7.71 on his performance evaluation and did not receive a merit increase. Only two employees in Grievant's unit received merit increases, but their performance evaluations were not submitted for review. The Commissioner's memo from November 1992, discussing the recommendations for the merit increases was submitted into evidence and directed supervisors to follow Administrative Operating Procedures, Volume IX, Chapter 15 in the awarding of merit increases.

13. Grievant submitted only his evaluations for 1992 and 1993. These performance evaluations were completed by Mr. Pullen. These performance evaluations were completed on the new evaluation form, which only rates a employees as Needs Improvement; Satisfactory; or Exceeds Expectations. Grievant received six satisfactories and two exceeds expectations on the 1992 performance evaluation and received eight satisfactories on the 1993 performance

evaluation.

14. Grievant did not receive a performance evaluation for 1994 or 1995 as he was on a medical leave of absence. The 1995 performance evaluation of Mr. Tabor, who was now working in Lincoln County, was submitted into evidence. This performanceevaluation had been completed by Mr. Pauley in February 1996. Mr. Tabor received six satisfactories and two exceeds expectations on this performance evaluation, and he received a merit increase in October 1996 as the result of this performance evaluation. The directions for the merit pay plan were submitted into evidence, and indicated the merit increases were to be spread across the year and specified which year's performance evaluations were to used to award the staggered merit increases.

15. Three performance evaluations for 1996, including Grievant's, were submitted into evidence. The other performance evaluations were for Mr. Tabor and Mr. Baker. These performance evaluations were completed by the county supervisor, Mr. Pauley, in February 1997, and all three employees were rated the same, receiving five satisfactories and three exceeds expectations. Mr. Baker received a merit increase on October 16, 1997, as the result of this evaluation; Mr. Tabor did not. Grievant received a merit increase as a result of this performance evaluation in January 1998. The Commissioner's memo from June 1997, discussing the recommendations for the merit increases was submitted into evidence and indicated the merit increases were to be spread across the year, and specified the 1996 performance evaluations were to used to award the pay increases. Again, other employees in Lincoln County received merit increases, but these performance evaluations were not submitted into evidence.

16. Grievant filed this grievance on April 23, 1997, and subsequently received a 2.5% merit increase in January 1998, based on the 1996 performance evaluation.

17. The parties stipulated Grievant was a good worker and mechanic, and completed all tasks that were asked of him. 18. In terms of the seniority of the employees whose performance evaluations were submitted, their employment dates are as follows: 1) M. Adkins -- September 21, 1978; 2) R. Adkins _ August 9, 1982; 3) Baker _ December 16, 1982; 4) Tabor _ May 7, 1984; 5) Kirk _ February 2, 1988; 6) Grievant -- May 1, 1978.

19. The starting salaries were not identified for any of the employees, including

Grievant.

20. The Lincoln County organization usually has approximately five to six, five percent merit increases to award each year. These merit increases can be divided into 2.5 percent merit increases if the supervisor wishes to do so.

21. There are only three Mechanics in Grievant's organization; Grievant is the only Mechanic III, and Mr. Tabor and Roger Sowards are Mechanic II's.

22. Grievant's salary is in approximately the mid-point of his salary range.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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).

In accordance with the rules of the West Virginia Division of Personnel, salary advancements must be based on merit as indicated by performance evaluations and otherrecorded measures of performance, such as quantity of work, quality of work, and attendance. W. Va. Div. of Personnel Admin. Rule, 143 C.S.R. 1 § 5.08(a) (1995). (See footnote 9) **See King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). DOH 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 Volume IX, Chapter 15. Typically these factors are used as tie-breakers. Morris v .W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-176 (Aug. 22, 1997). 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 Rehabilitation Serv., Docket No. 89-RS-051 (May 16, 1989).**

"An action is arbitrary and capricious if the agency making the decision 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 is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Servs., 769 F.2d 1071 (4th Cir. 1985). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed 1985). Arbitrary is further defined as being 'synonymous with badfaith or failure to exercise honest judgment.' Id." Trimboli v. W. Va. Dep't of Health and Human Servs./ Div. Of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

As discussed in the Findings of Fact, the evidence presented by Grievant was somewhat sparse and at times not supportive of his contentions. However, each year in contention and the evidence presented will be discussed separately.

A. Yearly merit increases

1. 1988 merit increases (See footnote 10)

Grievant did not prove he should have received a merit increase in 1988, as he did not present any evaluations except his own.

2. 1989 merit increases

The parties appeared to agree that back in the late eighties and early nineties, the performance evaluations were not utilized as much as in the later years. The guidelines for the 1989 merit increases were not submitted into evidence. The guidelines for 1988 merit increases stated the following factors were to be considered when awarding merit increases: proper use of work time, high standard of work quality, consistent performance of classification duties, self-motivation, and good use of work time. These factors were not an exclusive list. The guidelines for the 1990 merit increases directed the supervisors to utilize Administrative Operating Procedures, Volume IX, Chapter 15, which states merit increases are to be awarded based on "meritorious performance while taking into consideration such factors as equitable pay relationships and length of service." If the first set of guidelines were utilized, it must be noted that not all factors to be considered were evaluated by the performance evaluations, such as self-motivation and judgement. Further, other factors could be considered. Given these requirements, and the fact that one of the other employees to whom Grievant compared himself received an evaluation only .19 less than Grievant's, it is difficult to find that decision arbitrary and capricious. It does appear that Grievant has a better

case in comparison to Mr. R. Adkins, as his performance evaluation was a 6.61, compared to Grievant's 8.0, but again certain factors were not evaluated on the performance evaluation. For example, in terms of "self- motivation" which was to be considered, Mr. Pauley stated Grievant was not "a take charge person."

If the second set of guidelines were used, then it would appear that Grievant was more deserving of the merit increase than Mr. R. Adkins, as he had a better performance evaluation and had greater seniority. However, there was no data submitted on the pay equity issue and this was a factor to be considered. As for Mr. M. Adkins, his seniority date is only three and one half months less than Grievant, and they would be seen as equal in this area. Again, no information was submitted on the pay equity issue as regards Mr. M. Adkins.

Overall, given the information presented, or lack thereof, the undersigned Administrative Law Judge cannot find these merit increases awarded so long ago were arbitrary and capricious. This fact is especially true when Mr. Pauley testified he gave the raise to the employees who had a good evaluation for the entire year, instead of to theemployee, Grievant, who had only worked six months. Again, no evidence was presented to demonstrate that Mr. Pauley's consideration of this factor was incorrect.

3. 1990 merit increases

Although Grievant presented several evaluations for several employees from 1989, only one of these employees received a merit increase in 1990. This employee was Mr. Tabor who was then working with another organization and was evaluated by a different supervisor, Mr. Hall. The fact that Mr. Tabor's evaluations were equal to or lower than Grievant's is not dispositive of the issue. Ratliff v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-004 (Jan. 31, 1997). They were rated by different evaluators, and the undersigned will take administrative notice that the evaluation of employees, even on the same form, will vary somewhat from rater to rater as the assessment of employees' performance is not an exact science. Id. Further, Grievant did not call Mr. Hall for any testimony to demonstrate that his evaluations and assessments of Mr. Tabor were like Mr. Pauley's or Mr. Pullen's.

4. 1991 merit increases

On the 1990 performance evaluations, Grievant and Mr. Baker received the same score. Neither Mr. Baker nor Grievant received a merit increase. No evidence was received to

demonstrate who got merit increases, and how many merit increases were available in 1991.

5. 1992 merit increases

The only 1991 performance evaluation submitted by Grievant other than his own was that of Mr. Tabor, and Mr. Tabor did not receive a merit increase in 1992. 6. 1993 and 1994 merit increases

Grievant only submitted his evaluations for 1992 and 1993, and he was rated satisfactory or exceeds expectations in all categories. He did not receive a merit increase. It is noted that some Lincoln County employees did receive merit increases, but their performance evaluations were not submitted into evidence.

7. 1995 and 1996 merit increases

Grievant was off work during 1994 and 1995, and he did not receive performance evaluations. Grievant did submit the evaluation of Mr. Tabor for 1995, who was now with Lincoln County. Mr. Tabor received satisfactories or exceeds expectations in all categories and was granted a merit increase. The performance evaluations of the other individuals who received merit increases were not submitted.

8. 1997 merit increases

Grievant submitted the performance evaluations of three employees for 1996; Mr. Tabor, Mr. Baker, and his own. These employees were all ranked the same with three exceeds expectations and five satisfactories. Mr. Baker received a merit increase in October 1997, and Grievant received a merit increase the following quarter in January 1998, on the basis of these performance evaluations. It should be noted that Mr. Pauley was directed to spread the merit increases over the 1997-1998 time period. Grievant's merit increase was received after he filed this grievance. Mr. Tabor did not receive a merit increase as the result of these performance evaluations.

As has been previously stated by this Grievance Board, it is not arbitrary and capricious to find that between two employees who received the exact same rating on theirperformance evaluations, that one is a better employee than the other. Setliff v. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-262 (July 24, 1998). This is especially true when the rating categories are as broad as those used in the DOH performance evaluations. Thus, the fact Mr. Baker received his merit increase prior to Grievant cannot be considered arbitrary and

capricious.

It could be argued that Grievant only received his merit increase because he filed this grievance. Given that Grievant presented evidence that other employees had been told in the past that if they filed a grievance they would never receive a merit increase, this seems unlikely or at least contradictory to Grievant's theory. It is also possible Grievant's filing this grievance caused DOH to examine Grievant's work history and evaluations with the finding that Grievant deserved a merit increase.

It is clear that selecting who will receive merit increases is at times difficult, especially when there are a limited number of raises to be awarded, numerous employees have demonstrated satisfactory performance, and employees are rated so similarly. Obviously, many employees have good evaluations and would be deserving of a merit increase. Unfortunately, there will always be a limited number of merit increases to award, and management decisions have to be made about who should receive them, utilizing the evaluations and the guidelines. See Bittinger v. Bureau of Employment Programs, Docket No. 98-BEP-164 (Dec. 7, 1998).

The merit increases awarded by the county supervisor appear to be based on performance evaluations and assessments by the employees' supervisors. This action is consistent with the directions from DOH and DOP. Some of this information was difficultto obtain after so long a time, and Grievant did not call Mr. Pullen as a witness. Mr. Pullen served as Grievant's county supervisor and evaluator from 1989 to 1994. Grievant's supervisor during a portion of the time prior to 1989 and after 1994, Mr. Pauley, stated Grievant's evaluations were fairly done, and one of the major reasons he had not received a merit increase in 1989 was because Grievant had been off work for six months, and the evaluation was for a shorter period of time that the other individuals he considered.

Grievant did not establish his evaluations were substantially superior to those employees to whom he compared himself, nor did he demonstrate he was more deserving of a merit increase than they.

As has been frequently stated by this Grievance Board, "[a]n 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, supra.

Here, Grievant failed to meet his burden of proof and demonstrate DOH's actions violated any policy or were arbitrary or capricious. No one disputes Grievant received satisfactory evaluations, and was a good worker, but unfortunately for Grievant, there were limited funds available. Indeed, the one time Grievant and Mr. Tabor were rated by Mr. Pauley in 1996, they both received exactly the same score and Grievant received the merit increase.

B. Discrimination

Additionally, Grievant alleged discrimination. Although this issue has been inherently discussed in other parts of this decision, it will be discussed specifically now. W. Va. Code § 29-6A-2(d) defines discrimination as "any differences in the treatment ofemployees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;**

and,

> **(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.**

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant does not have the evidence to support his case. Unfortunately, Grievant has not been able to demonstrate he was similarly situated to the individuals to whom he compared

himself, due to the incomplete data provided at hearing. The fact that he makes less than other individuals to whom he compared himself, standing alone without additional information, does not meet the required burden of proof. No data on the starting salaries of Mr. Tabor or Mr. P. Adkins was submitted, nor were any of Mr. P. Adkins' performance evaluations placed into evidence. Of course it is understood that the four merit increasesMr. Tabor received before he switched to the Lincoln County organization would certainly affect his rate of pay. Without knowing key data, such as starting salaries, and without proof that the merit increases these employees received were flawed, it cannot be shown that the merit increases were inappropriately given and are the reason for the salary disparity.

C. Mr. Kirk's 1988 merit increase

Grievant did demonstrate Mr. Kirk's 1988 merit increase was inappropriately given. The evidence was clear this merit increase was not recommended by his supervisor as is required by the guidelines. Additionally, he received a 5% merit increase, twice the other merit increases. Further, he had not been employed for even a full year at the time he received this increase, as he was hired on February 2, 1988, and received the merit increase on December 1, 1988. Mr. Pauley did not even complete Mr. Kirk's first performance evaluation until February 27, 1989. Thus, it is clear the merit increase of Mr. Kirk was incorrect and could not have been based on his performance. The issue then becomes what action should be taken to resolve this improper act.

Unfortunately, Grievant has not demonstrated Mr. Kirk's receiving this increase created an entitlement or a legal right on Grievant's part to a merit increase. This increase was given only to Mr. Kirk, at a time outside the normal merit increase period. Thus, it is unclear what effect, if any, Mr. Kirk's receiving this increase had on Grievant's failure to receive a merit increase. Further, there was no indication that Mr. Kirk's receiving this increase affected the number and amount of merit increases available for the LincolnCounty employees several months later. Mr. Kirk was not called to testify to shed some light on why he received this increase.

Additionally, it appears impossible and impractical to formulate an appropriate remedy given the length of time that has passed, and the lack of clarity in the information. Nonetheless, it is noted that giving a merit increase to an employee who has not even received an evaluation, affects all other employees in the unit, as it reinforces the belief, stated

at hearing, that the issue when awarding merit increases is not how well you do your job, but who you know. Accordingly, Grievant has failed to demonstrate how the awarding of a merit increase to Mr. Kirk in 1988 now entitles him to a merit increase.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Grievant has the burden of proving his case by a preponderance of the evidence in a nondisciplinary matter. Tucci v. W. Va. Dep't of Transp./W. Va. Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995).

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." Terry v. W. Va. Div. of Highways, Docket No. 91-DOH- 186 (Dec. 30, 1991).

3. In accordance with the rules of the West Virginia Division of Personnel, salary advancements must be based on merit, as indicated by performance evaluations and other recorded measures of performance, such as quantity of work, quality of work, andattendance. W. Va. Div. of Personnel Admin. Rule, 143 C.S.R. 1 § 5.08(a) (1995). See King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995).

4. Grievant did not prove DOH violated any statute, policy, rule, regulation, or applicable written agreement, or acted in an arbitrary and capricious manner when it awarded merit raises in relation to Grievant from 1985 to April 1997.

5. Grievant has failed to meet his burden of proof and demonstrate he was more deserving of a merit increase than the employees to whom he compared himself. Ratliff v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-004 (Jan. 31, 1997). See Roberts v. Dep't of Admin./Div. of Personnel, Docket No. 94-DOP-182 at 18 (Dec. 1, 1994).

6. Grievant has failed to meet his burden of proof and demonstrate Respondent did not follow its Merit Increase Policy when awarding the merit increases.

7. Grievant has failed to demonstrate discrimination in the awarding of merit increases.

8. Grievant demonstrated Mr. Kirk incorrectly received a 5% merit increase in 1988.

9. Grievant did not demonstrate that the awarding of Mr. Kirk's merit increase in 1988

entitled him to a merit increase.

Accordingly, this grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing partymust 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: July 27, 1999 _____

Janis I. Reynolds

Administrative Law Judge

Footnote: 1

Grievant was represented by Attorney Dwight Staples, and Respondent was represented by Attorney Timbera Wilcox. Respondent's post-hearing proposals were submitted by Attorney Krista Duncan.

Footnote: 2

Some testimony was given about Mr. Evans also being off work with an injury, and still receiving a merit increase, but as no other evidence or documents were submitted to clarify the situation further, it was unclear when this happened, how long Mr. Evans was off, what his seniority or rate of pay was, or what rating he received on his performance evaluations. The evidence that was submitted was considered insufficient to meet Grievant's burden of proof on the issues in this case.

Footnote: 3

It is noted that Mr. P. Adkins has two years more seniority than Grievant and has received three merit increases during his tenure with DOH. His staring salary was unknown. Mr. P. Adkins was one of the employees Grievant complained about in his statement of grievance, as making more money than he.

Footnote: 4

Grievant argued the 1988 merit increases were based on the 1988 performance evaluations. This argument is not accepted as the 1988 performance evaluations were not completed until February 1989, and the merit increases were granted before that performance evaluations were completed.

Footnote: 5

The situation involving one of these employees, Dwight David Kirk, will be discussed separately.

Footnote: 6

Grievant also submitted the performance evaluation of Conrad Tabor, who received a 7.14 on his performance evaluation and a 2.5% merit increase. Although Mr. Tabor currently works with Grievant, at the time he received this merit increase he was at stationed with the Corridor G organization and his supervisor was Hiram Hall. As will be noted later in this decision, it is next to impossible to compare different evaluators, especially when these individuals are not called as witnesses nor are the evaluations fortheir other employees placed in evidence. It may very well be that Mr. Hall is a low evaluator compared to Mr. Pauley and Mr. Pullen. This situation will be discussed in more detail later as it pertains to the law.

Footnote: 7

Although Grievant submitted many of the memos announcing that year's merit increases, and the restrictions for granting that year's merit increases he did not attach the referred to operating policy, Volume IX, Chapter 15. Since this policy is frequently cited in Grievance Board cases, the undersigned Administrative Law Judge takes administrative notice of this policy and has cited it to clarify the record.

Footnote: 8

Grievant again submitted the performance evaluation of Mr. Tabor, who continued to work with the Corridor G organization. As previously stated, this performance evaluation is inapplicable to the merit increases awarded in Grievant's organization.

Footnote: 9

It is noted that there have been several different versions of this Rule over the years. Only the most recent version was submitted into evidence.

Footnote: 10

The merit increase of Mr. Kirk will be discussed in Section C.