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EMPLOYEES GRIEVANCE BOARD**  
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James Paul Geary  
Orton A. Jones  
David L. White

JOANN TYLER

MARK TRACY

JOANNE WARDLE

DIANE STEELE

TOM ROSE

v.

Docket No. BOR87-066-3

WEST VIRGINIA NORTHERN

COMMUNITY COLLEGE

DECISION

Grievants JoAnn Tyler, Mark Tracy, Joanne Wardle, Diane Steele and Tom Rose, were all classified employees employed by West Virginia Northern Community College as of July 31, 1985 when President Guthrie-Morse assumed her office. In March, 1987 they filed a level four grievance alleging a violation of Policy Bulletin No. 52 when they were upgraded in rank in July, 1986 with no accompanying pay raise.<sup>1</sup> A level four evidentiary hearing was conducted April 21, 1987.

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<sup>1</sup> Grievant Steele's inclusion in the grievance is mystifying since she was not one of the employees affected by the alleged wrongdoing. Additionally, grievant Wardle has resigned her classified staff position with the institution since the inception of the grievance. It appears that Steele does not have proper standing in this grievance and Wardle's interest would cease for any time beyond the date of her resignation.

At the onset of the level four hearing, counsel for the respondent moved that grievants be denied a hearing before the Education Employees Grievance Board because the matter had been fully adjudicated via the alternative Board of Regents Policy Bulletin 52 procedure. Counsel argued that grievants had remaining appeal rights to circuit court under Policy Bulletin 52 and a dangerous precedent would be set if grievants could change back and forth between grievance procedures at will and not abide by the procedure they had elected.<sup>2</sup>

Grievants' representative presented evidence and argued that the institution failed to develop and implement grievance procedures other than those provided for by the 1984 version of Policy Bulletin 52 issued prior to the enactment of W.Va. Code, 18-29-1, et seq.; that grievants duly followed the institution's sole written and oral directives as to forms, mechanisms and procedures for pursuing their grievance, and thus, grievants could not elect what did not exist.<sup>3</sup>

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<sup>2</sup> Respondent's counsel requested a continuance a few days prior to the scheduled hearing in order that he might prepare a written motion for the dismissal. The request was denied and deemed to be untimely since hearing notices were issued March 27, 1987.

<sup>3</sup> After oral argument, it was determined that since all the principals to the grievance as well as witnesses were present, the merits of the case would be heard and a ruling on the dismissal motion would be delayed pending submission of written argument by the parties.

Grievants have satisfied their claim of lack of knowledge or means to pursue the alternative grievance procedures set forth in W.Va. Code, 18-29-1, et seq. and promulgated via a November, 1985 revision of Policy Bulletin 52. After careful consideration it is determined that the institution has the greater burden to provide its employees with pertinent information and the means by which to elect an alternative grievance procedure.<sup>4</sup>

Respondent then moved that if it was determined that grievants could proceed under W.Va. Code, 18-29-1, the case should be remanded to the institution for proper lower level disposition. That motion was also denied in the interests of judicial economy. Grievants thereupon presented extensive and detailed evidence regarding their grievance including testimony from several other of the institution's employees and numerous supportive documents.<sup>5</sup> The record and evidence presented reveals that the facts giving rise to this dispute are not in contention.

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<sup>4</sup> A five-page memorandum supporting their position on the dismissal motion was filed by grievants' representative on April 28, 1987 and written supportive argument on the merits of the grievance was received May 4, 1987.

<sup>5</sup> This hearing examiner declined to admit into evidence or review untranscribed tapes of an institutional committee hearing on the matter since three of the witnesses grievants summoned were members of the committee and the grievants had ample opportunity to present their grievance issues and evidence at the level four hearing. However, the written level two committee recommendation was made part of the record as well as the subsequent decision rendered by a Board of Regents official upon review of the record and the committee recommendation. Normally the president of the institution would render this decision but since the alleged grievable act involved the president's administrative duties, grievants requested that an impartial party review and act upon the recommendation and the president complied with their request.

As of August, 1985 twenty WVNCC classified employees had been recommended the previous spring for promotion and appropriate (5%) salary adjustments. Four others were recommended for multiple-step upgrades. At that time the governor had directed that all personnel changes for Board of Regents employees receive approval from his office. Additionally, there was a state-wide moratorium on promotions but for a short period in November, 1985 the governor permitted salary advancements for state employees on the basis of employee merit. Newly installed President Guthrie-Morse sought to improve poor employee morale and seized upon what she characterized as a "window of opportunity." She set forth the mechanics for the employees to receive the salary increase to which they were entitled. The required method for the merit raise was submission of separate WV-11 forms requesting and justifying the 5% salary adjustments for each individual employee.

The affected employees received a blanket letter dated December 16, 1985 and signed by the president. The first paragraph stated:

I am pleased to inform you that your salary has been increased by 5%. Governor Moore has maintained a freeze on all promotions and upgrades for all State employees so recommended. He has approved salary enhancement increases to designated employees. I recommended to the Governor that the employees of West Virginia Northern Community College who were nominated for promotion be granted this increase. (Emphasis added.)

The college has no provision or criteria for merit pay increases for classified employees, thus the salary enhancement, although facilitated by means of a permitted "merit" raise, was based solely upon a previous recommendation that the employees be promoted for additional compensation and the affected grievants were so notified. In December, 1985 the grievants herein did not protest the action nor the means by which it was accomplished.

By letter dated May 1, 1986 and under the president's signature, grievants herein and eighteen others who had received the salary enhancements the previous December were notified:

I am pleased to inform you that your title has been changed to that recommended for you last summer. Your supervisor believes that this title more accurately reflects your responsibilities and duties.

The twenty-two title changes were accomplished via an alteration made of the employees' titles on the institution's Financial Expenditures Report submitted March 3, 1986 to the office of Finance and Administration. This method bypassed required submission of all requested personnel changes to the governor's office for approval. However, the newly-installed president had been previously granted permission to utilize this method to denote pre-approved faculty promotions and necessary reorganizational staff changes when she assumed her administrative duties at the institution and more than fifty such alterations were made on the March report.

When grievants were notified of their upgraded title change (promotion) in May, 1986 and given new contracts in July, 1986 to that effect, they made no protest to the action, the means by which it was accomplished nor to the lack of an accompanying salary increase.

After the moratorium on promotions was lifted, the president recommended further upgrading for each of the four employees previously granted the one-step merit raise/promotion but also recommended for a multi-step increase. She signed a WV-11 on September 30, 1986 for each employee so recommended. Two of these employees had had their title changed on the March, 1986 report but two others had not. The September requests for the first two employees was from step three to four for 5% and six to eight for 10% and this was duly approved. The request for the latter two was from step three to six for 10% and seven to eleven for 15%, the number of steps including the December, 1985 merit raise/promotion not denoted on the March, 1986 report. Even though the September salary request for the latter two excluded a request for the 5% for merit raise/promotion previously given, an administrator in the governor's office noticed the number of steps requested for upgrading and further adjusted the salary increase accordingly. Despite intervention from the president's office pleading that the two employees were not entitled to the additional 5% increment, the staffer in the governor's office would not relent. Thus, as events transpired, two of the original twenty-four employees thereby gained an additional 5% salary

increase. Apparently, word of this matter became known college-wide and in late November, 1986 grievances were filed by the named grievants, Tyler, Tracy, Wardle, Steele and Rose.

Grievants charged in their November, 1986 filings that the college president discriminated against them when two employees received proper remuneration for promotion, but they did not upon their "promotions" via the March-May-July, 1986 actions.<sup>6</sup> In the level four filing they further allege violation of Policy Bulletin 52 and other personnel policy guidelines issued by the Governor of West Virginia.<sup>7</sup> Grievants suggest that the president's actions were calculated to either deprive them of an additional 5% increase or to provide two employees with a greater increase than all others, or both. Grievants' representative argues on page nine of her brief:

The grievants have been injured by the differential processing chosen by the respondent for their promotions to the extent that they did not receive the promotion raises that others received. Because the procedure used to promote the grievants violated established policies and procedures, while the procedure under which others received promotion raises conformed to established policies and procedures, the grievants are rightly entitled to receive promotion raises, any intent of the respondent notwithstanding.

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<sup>6</sup> It is again noted that grievants focus on provisions mandating a 5% salary adjustment for a one-step promotion but did nothing to assert this right in July, 1986 after the completion of all procedures to designate earlier "merit" raises in lieu of promotion as the promotion in fact. Grievants were not concerned about the matter until they became aware of the two employees who received a windfall in November, 1986.

<sup>7</sup> The president does not dispute that the "rules were bent" to effect the salary increments, merit raise/promotions, which were granted in lieu of technical promotions disallowed at the time.

The institution's president denies any intention to deprive grievants or unjustly reward others. While she admits that her actions regarding the original merit raise/promotions circumvented the written requirements of the governor's office, she also testified that had she not acted upon the opportunity to enhance her employees' salaries as she did in November, 1985 the employees would have had no possibility for salary advancement until September, 1986 when the moratorium on promotions was lifted. She now questions the wisdom of her benevolent action since two employees unintentionally received an unwarranted extra 5% increase thus precipitating the instant grievance.

Charges by grievants that the college president intended to deprive them and reward others have not been supported by the evidence. Indeed, the evidence demonstrates a good faith attempt on the part of the president to provide grievants a monetary enhancement at a time when there was no means to do so than by the means she elected to use, i.e., her recommendation of them for a merit raise. Grievants knew full well that the merit raise was their promotion in fact and their failure to timely protest the promotion actions of May and July, 1986 is evidence of their acceptance of the situation. Since grievants were not entitled to any additional salary adjustments, there was no reason for any personnel action on their behalf in September, 1986.

Notwithstanding what may have been poor judgement on the part of the president to effect salary increases for twenty-four classified employees via the method she utilized, the erroneous

omission of a subsequently noted adjustment for two of those employees on the March, 1986 financial expenditures report was the direct cause of their unwarranted windfall in September, 1986. Such omission can only be construed as a good faith error, and the purpose of the grievance procedure is not to punish an education entity when a good faith error has occurred but to make grievants whole. Jeanne Fisher v. Mercer County Board of Education, Docket No. 27-86-112. Here, as found in the grievance proceedings below, grievants have not suffered a damage, rather they received a benefit sooner than could otherwise have been effected.<sup>8</sup>

In addition to the foregoing narration, the following specific findings of fact and conclusions of law are incorporated herein.

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<sup>8</sup>In a case involving somewhat similiar issues, this Board could find no "fair or equitable" rationale to compel an educational entity to compound one mistake with another when one group of employees received a benefit as a result of error. Sims and Gallina v. Preston County Board of Education, Docket No. 39-86-082-2. In Sims and Gallina grievants had not been credited, for salary purposes, for years of prior experience as state employees while later hired employees were erroneously given credit for experience as Board of Regents employees. The grievants were not entitled to the employment credit and their request for salary adjustment was denied notwithstanding the windfall erroneously received by the latter employees.

## FINDINGS OF FACT

1. On July 31, 1985 when President Guthrie-Morse assumed her office at West Virginia Northern Community College, grievants Tyler, Tracy, Wardle and Rose and sixteen other classified employees had been recommended for a promotion and 5% salary increase; four others were recommended for multiple-step increases.

2. At that time all personnel changes had to be approved by the governor's office and there was a state-wide freeze on promotions and related personnel actions. The president identified poor employee morale resulting from the institution's inability to provide deserved and long-awaited salary advancements.

3. In November, 1985 for a period of a few days, the governor permitted state agencies and institutions to submit the names of candidates for merit raises and justification thereof.

After consultation and networking with other college presidents and state officials, and with little time to spend on a decision-making process, the president recommended merit raises for the twenty-four classified employees earlier designated for promotion including grievants Tyler, Tracy, Wardle and Rose.

4. Merit raises do not constitute a means by which classified employees at West Virginia Northern receive salary upgrading thus

no criteria exists for which to determine meritorious work performance. The merit raises recommended for grievants and the twenty other classified employees were predicated upon their prior nomination for promotion and they received notice to this effect in December, 1985.

5. Twenty-two employees who had received the merit raise/promotion in December, 1985 were notified in May, 1986 that their titles were being adjusted accordingly; they received new contracts in July, 1986 designating the title changes. Grievants herein made no protests to these actions or claims that they deserved an additional 5% promotional salary increase.

6. State policy provides that all personnel changes must be accomplished via submission of a WV-11 to appropriate state officials but the newly-installed president of WVN had been given permission to make blanket personnel adjustments via a financial expenditures report for pre-approved personnel changes granted prior to her assumption of the presidency or as the result of her staffing reorganization. In March, 1986 she used this method to also designate the December merit raise/promotion-in-fact for twenty-two classified employees. The act admittedly "bent the rules" but administrative notice can be taken of respondent counsel's argument that salary advancements for deserving state employees via a merit raise has long been the norm when promotional activity is frozen or otherwise limited.

7. In September, 1986 when promotions were again permitted via regular and normal means, the names of four classified employees who had originally been recommended for multiple-step upgrades (and had received the earlier one-step salary enhancement) were submitted for further adjustments via a WV-11.

8. The two employees who had not had their title adjusted on the financial expense report in March, 1986 were each granted an additional unrequested 5% salary increase by a staffer in the governor's office. When grievants herein learned of this action in November, 1986 they filed their grievance.

9. On February 9, 1987 the majority of a three member grievance committee found violation of policy and procedure but that the deviations did not result in injury to grievants; grievants "are in the same position that they would have been had policy and procedures been followed correctly." A Board of Regents vice chancellor upheld the committee's recommendation stating, "the (merit raise/promotion) action was taken in the best interests of the employees (grievants) and these employees currently have the same title, paygrade and salary which they would have had if the correct process had been followed under normal circumstances."

10. Grievants who were affected by unorthodox means to secure a premature merit raise/promotion did not protest that action in December, 1985 nor upon its completion in May or July, 1986. Although two employees subsequently received a windfall during a personnel action as the result of earlier institutional error or bad judgment grievants herein offer no precedent in law or equity whereby they should receive an additional undeserved salary advancement.

#### CONCLUSIONS OF LAW

1. The purpose of W. Va. Code, 18-29, et. seq., is not to punish an educational entity when a good faith error has occurred but to provide a fair and equitable remedy in a grievance procedure whereby a damaged grievant is made whole. Jeanne Fisher v. Mercer County Board of Education, Docket No. 27-86-112.

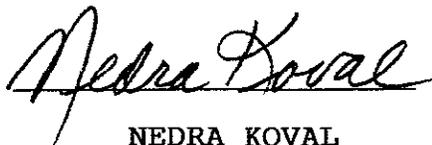
2. Grievants herein suffered no damage when the unorthodox actions of his or her employer to effect a merit raise/promotion-in-fact was a benefit endowed far in advance of when normal circumstances and normal actions would permit and there was no timely protest of the processing action therefrom.

3. In this case where an error of omission has occurred in the processing of employee merit raise/promotion-in-fact and two employees subsequently receive an unwarranted and unrequested windfall, it would not be fair and equitable to require a college president to compound the error and recommend further unwarranted promotions for twenty-two employees who did not also receive a windfall due to the error. See, Sims V. Gallina v. Preston County Board of Education, Docket No. 39-86-082-2.

Accordingly, this grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the court.

DATED: August 17, 1987

  
NEDRA KOVAL  
Hearing Examiner