



Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

RICARDO C. MARTIN

v.

Docket No. CID-88-073

**W.VA. GOVERNOR'S OFFICE OF
COMMUNITY & INDUSTRIAL DEVELOPMENT**

DECISION

Ricardo C. Martin, a staff member of the Employment and Training Division (ETD) of Respondent West Virginia Governor's Office of Community and Industrial Development (GOCID),¹ submitted the following grievance at Level I on October 17, 1988:

I have been denied a merit pay raise on grounds that appear to be a violation, misapplication or misinterpretation of the statutes, policies, rules, regulations or written agreements under which I am employed with the agency named above. The denial of a merit pay raise on the stated grounds creates a potential substantial detriment to or interference with effective job performance. The relief I seek is restitution for the physical, emotional, psychological and economic damages I have experienced.

¹ Grievant's specific job title since 1987 has been JTPA (Job Training Partnership Act) State Monitor.

Jacob E. Reger, as Grievant's immediate supervisor and ETD Director, denied the grievance at both Levels I and II. Relief was also disallowed at Level III² and the matter was submitted for Level IV consideration, on the record, on December 21, 1988. The parties presented briefs and proposed findings of fact and conclusions of law by February 28, 1989. Thereafter, Grievant requested the opportunity to submit additional evidence, and this was allowed. That information, and materials relating thereto, was filed by

² "T. ___" references in this Decision are to the Level III transcript and pages thereof.

Although Level III evaluator Thomas H. Pendleton made every apparent attempt to be professional and helpful, the undersigned is concerned about certain particulars of the processing of this grievance there. Pendleton, Director of Respondent's Administrative Office, was the person who originally "alerted. . . [Reger] that. . . [he] would have the opportunity to submit recommendations for a merit increase, which should . . . be limited to 15 percent of. . . staff." T. 7. Even more troubling are his Decision comments, at p. 2, suggesting conflicts of interest within the grievance procedure are somehow acceptable "since the first three levels. . . must be handled within the agency." Cf. W.Va. Code §29-6A-7 (all parties must act in good faith at all times to resolve the grievance at the lowest possible level). Further, he revealed rather clear prejudice at pp. 6-7 when he opined that an immediate supervisor's determination about merit raises should not be reviewed unless evidence of abuse is "overwhelming." It additionally seems that Pendleton considered information about Grievant and GOCID merit pay other than that adduced at Levels I, II or III. Finally, witnesses at Level III were not placed under oath or affirmation, and Grievant and Reger presented much of their "testimony" via opening and closing comments. In fairness to Grievant, all statements made at the Level III meeting will be presumed sincere.

It is further noted that Grievant did not appeal Pendleton's closure of the hearing, see W.Va. Code §29-6A-3(m), or denial of certain discovery requests, see n. 3.

the parties on or before May 22, 1989, and the matter is now ripe for resolution.³ Although both Grievant and Respondent presented rather general evidence covering a span of years, this grievance more specifically focuses on and relates to Grievant's denial of a merit increase in September 1988.

At Level III, Grievant limited his request for relief to "a well-deserved merit based pay raise. . .no less than a 7.5 percent merit raise." T. 7. He also testified that he had not received a quality increase since 1980 and that on three occasions he had submitted his name for such consideration with no response. He stated, without corroboration, that a number of GOCID personnel had received one or more merit raises and/or promotions during that period, including one employee demoted just prior to being granted a performance-based increase and another whose similar raise closely followed a written reprimand.

Reger testified that he used guidelines "from Dudley and Redline" memoranda⁴ in making merit pay determinations,

³ This late-submitted evidence was at least part of that denied Grievant under a questionable lower-level procedure. Pendleton, as evaluator, rejected Grievant's document request without GOCID, as party-respondent, taking any stand thereon. Any error is now moot, in that Grievant stated in his May 2, 1989, correspondence with this Grievance Board, "I believe with the inclusion of the evidence referenced [herein]. . ., this case may be fully mature for final disposition at this level."

⁴ Lysander Dudley and John Redline are former top GOCID administrators.

but not exclusively. These memoranda, which are incorporated by reference into this Decision, are reproduced as Appendix A hereto. Reger's standards "include, but are not necessarily limited to, creativity and ingenuity in completing tasks, attitude, self-initiative, motivation to seek additional training, and performance above and beyond the call of duty." Level III decision, p. 3; see also p. 8. He admitted he would not have been comfortable, based on Grievant's performance, recommending a September 1988 merit raise, but explained that the limitation on funds available was also a factor. T. 9-10. He did not cite specific instances of Grievant's performance which he considered pertinent in this regard.

By way of clarification, it should be noted that Reger, as ETD Director, is responsible for conveying all divisional merit raise recommendations to a higher authority. He has certain staffers working directly under him and for them he is the initial decisionmaker on merit pay qualification. With regard to ETD employees immediately supervised by Section Chiefs, the Chiefs effect the recommendations, but they are reviewed by Reger prior to further action thereon.

Grievant averred that he had always been rated complementarily by formal evaluations, but conceded Reger had commented, in an October 1987 annual review, that Grievant "[n]eeds to work at maintaining a positive attitude about his division." T. 5. Grievant mentioned accomplishments he deemed deserving of merit pay, including his solicitation of

West Virginia State Superintendent of Schools Tom McNeel's assistance in developing JTPA participants' reading skills; his negotiations with the United States Immigration and Naturalization Service on citizenship reporting requirements; his coordination with the United States Department of Labor on JTPA compliance monitoring; and his administration of the Northern Panhandle Industry Council.⁵ He declared, "In my objective judgment I have shown creativity, ingenuity, and self-initiative in my job." Id.

Jim Calvert, Respondent's former Assistant Director of Employment Security, testified that in October 1987, Reger transferred responsibility for the areas of employment security and JTPA coordination and linkage, previously within Clyde Price's audit section, to Grievant's unit. The reason for the switch, according to Calvert, was that "we were not getting the answers and so forth out of Clyde's unit." T. 11. He stated that Grievant, statewide, had 19 Job Service offices to coordinate, and that when he undertook the new duties, he "immediately" got the communication problem "cleaned up" and there was "very good cooperation after that." T. 11. Calvert complimented Grievant's work

⁵ Grievant also submitted voluminous documentary evidence related to his work with Respondent.

and expressed surprise that it had generated neither a merit increase nor a promotion since 1980.⁶

Cecil Roberts, ETD Financial Officer and Section Chief, denied receiving a merit-pay memorandum from Reger, but thought he remembered getting "something from Mr. Dudley," T. 13. He explained that no one had ever provided him with specific guidelines on how to make merit increase recommendations, and thus, "it . . . [is] my judgment call." T. 16. He characterized Grievant as "excellent" and "the most knowledgeable person I know as far as program administration." T. 13. He professed not to being surprised that Grievant's status had not been upgraded since 1980, since "I know what everybody makes salary-wise in the building." Id. He added that Reger has never overridden any of his merit pay recommendations, but that they have discussed each one.

Jim Bell, ETD Property Officer, testified that in his eleven years with GOCID, he did not recall being advised how he could enhance his merit pay chances. He opined that there is "very little room for advancement here. . . [y]ou are more or less on your own." T. 17. He continued that annual employee evaluations are not "much more than the paper they are written on." Id. He referred to Grievant as "one of the most knowledgeable guys in the business" but

⁶ Reger asked Calvert questions about "Frazier" and "Charlie." Unfortunately, not enough background was given about these two or their situations for the undersigned to meaningfully review the information.

conceded it did not "surprise me a bit" to hear he had not been given a pay raise since 1980 "because I have not received one either." T. 18.

Charlie Washburn, Supervisor III and State Monitor, declared when he was a GOCID manager he was never given criteria for merit raise recommendations, or information on how other administrators handled this situation.⁷ He testified that he got a quality raise for a period with "the lowest performance evaluation that I had gotten in years" but that several months later, he was the only GOCID employee to suffer a downgrade. T. 20. Washburn explained that he had over twenty years' experience working with the federal and state labor departments and that Grievant was "one of the most thorough, professional and complete individuals when it comes to a job task that I know." T. 20. Washburn cited Grievant's last-minute assumption of responsibility for a major portion of an employment security conference, necessitated by Washburn's heart attack, see n. 7, as an example of superior attitude and resourcefulness. He opined that Grievant deserved merit pay but that he was not surprised such had not been awarded since he was aware of no set "basis to give the. . .raise." T. 21. He added that when he had submitted his employees for such pay-hikes

⁷ At some point before the Level III hearing, Washburn had a heart attack and moved to a position under Grievant's supervision. Prior to this, he had reported to Clyde Price in the audit unit.

and they were turned down, he never was advised as to why. He did say that evaluations were used to punish poor performance but never to reward excellent service. Finally, Washburn confirmed that "difficulties in the [audit] unit. . .and the Bureau of Employment Security" was the catalyst for JTPA monitoring functions being shifted to Grievant in 1987. T. 21. See n. 7.

ETD Section Chief IV Paul Skaff said that Reger had never provided him with merit raise recommendation criteria, but that former GOCID Director Redline had distributed such several years ago. Skaff did not recall the inclusion of "doing work above and beyond the call of duty" or "working outside one's stated job description." T. 23. He exhibited surprise that Grievant had not been granted a merit raise or promotion since 1980 "[b]ased on our working relationship." T. 24. Skaff opined that ETD's policies "are associated with legally-founded aspects of a merit based system of personnel administration. . .[t]hrough the State Civil Service System." T. 23.

Sharon Higginbotham, Field Representative III for ETD, said she had never seen "a list of criterion [sic]. . .to determine which employee to recommend for a merit raise." However, she has not referred subordinates for merit pay consideration as part of her regular duties. She does directly supervise five people, but has at no time been asked her opinion on whether they deserve such consideration. She opined that the system is quite unfair and

"depends on whether. . .anybody likes you." T. 26. She believes annual evaluations are a "big joke." Id. Based on her experience working under Grievant for five years, she labelled him as "always. . .[knowing] the answer. . .or where to go and get it." Id. Specifically, she cited Grievant's leadership with the Northern Panhandle Private Industry Council project, which she rated "very astounding." T. 27. She was "very shocked" to learn Grievant had been deemed worthy of neither a merit raise nor a promotion since 1980, but guessed "that it just has not been your turn." Id.

John Williams, ETD Planning Manager and Section Chief, testified that there is no upward mobility in ETD and that Reger had never given him merit pay guidelines. He explained that when he makes recommendations, he "formulates in. . .[his] mind" whom he feels qualified. T. 31. He agreed with Skaff that ETD's practices are legally founded upon Civil Service regulations, but did not "believe that we implement[ed] the procedures properly. . .[and] therefore, we do not get many of the benefits of Civil Service." T. 28.

Williams estimated that Grievant and he "together. . .have created probably 50 to 75 percent of all of the procedures. . .in the building." T. 29. He stated he believed all GOCID employment security personnel were very happy when Grievant assumed a leadership role in their area and remarked each Northern Panhandle Center staff member had been given bonuses since "the program has gotten off the

ground very well" under Grievant. T. 29-30. Williams concluded his remarks by stating "if you [Grievant] do not deserve a merit raise, I do not know anyone who does." T. 30.

Level III Evaluator Pendleton concluded, in part, as follows:

Mr. Martin's argument is correct that for a good merit-based system to be effective. . .it must consist of criteria that are clear, widely known, and equally applied. . . .

The evidence is strong . . . that an effective system accepted by the employees for evaluating staff for merit increases is lacking. . . [A]nnual evaluations. . .[are] a joke and not taken seriously, too many employees. . .[are] working out of job classifications, and a significant number of employees know nothing about the merit raise process. Some of these are being corrected. . .Others must be addressed. . .A major effort will be required to correct it.

Level III Decision, pp. 5-6.

At the Level III hearing, Grievant conceded that "competition for merit raises is not between employees" but then, puzzlingly, stated, "I think competition for merit raises is, in a manner of speaking between employees when you apply criterion to all of it." T. 33. Evaluator Pendleton responded, "When you give it a quota, you do have some kind of comparison. It is still based upon absolute standards, but it is [s]till some comparison." Id. The evidence most recently submitted by Grievant includes a listing of fourteen ETD staffers who received merit

increases in 1987 or 1988, along with a one-sentence justification and Grievant's analysis thereof.⁸

The undersigned concurs with the quoted portions of the Level III Decision. Grievant has clearly demonstrated that no precise guidelines exist upon which all ETD administrators base merit pay recommendations, and that significant personnel problems exist within the Division. He has also proven that he is a highly professional and valuable employee. However, he has not shown by a preponderance of the evidence that he necessarily would have received a merit pay increase in September 1988, or at another time, if the system had not been flawed. There is no indication that the one-sentence reason given is the only stated justification for the fourteen employees' receipt of merit pay or is fair basis for comparing their performance with Grievant's as developed in detail during this proceeding. Furthermore, Grievant's immediate supervisor Reger noted what he perceived to be an attitude problem on Grievant's part in his 1987 evaluation, apparently the last before the fall 1988 merit increases were awarded. The record does not reflect that Grievant protested this evaluation or sought the

⁸ Due to the outcome herein and the reasons therefor, particularly as explicated in the body of this Decision immediately infra, no basis for including these employees' names or the statements as to why they received merit pay is perceived.

removal of this statement therefrom, but does reveal "attitude" to be one of Reger's merit pay categories of review.

While objective criterion and their uniform application are desirable in arriving at merit pay recommendations, subjective evaluation of candidates may also be an appropriate ingredient.⁹ Moreover, such would appear to be a requirement when financial limitation or some other quota is imposed upon the system. This was perhaps recognized in the Redline memo in the following language:

Competition. . .shall be predicated on performance standards[,] not between employees. . .[However,] [i]t is possible that a division will have more than [the allowed]. . .percent of its staff eligible for consideration.

It goes without saying that administrators must take care to exercise reason and not to wield their discretionary authority in an arbitrary or capricious fashion. And, it is noted that Reger's stated standards, Level III Decision, pp. 3, 8, leave him vast leeway. However, Grievant has simply failed to establish that Reger did not adequately apply appropriate criteria, including that outlined in Appendix A, in comparatively reviewing Grievant's and other ETD employees' performance to decide which individuals to name, or Section Chiefs' recommendations to approve, for September 1988 merit raises. This is true whether the comparisons

⁹ At the Level III hearing, Grievant argued, "unless the system is applied equally to each individual across the board, then the system is invalid." T. 29. This statement is simply too broad to be accurate.

made were employee-to-employee, based on the standards, or employee-to-standards.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant was not recommended for a merit pay raise in September 1988.

2. Grievant's immediate supervisor applied stated criteria in determining which staff members to recommend for merit increase consideration.

CONCLUSIONS OF LAW

1. It is incumbent upon a grievant to prove the allegations of his complaint by a preponderance of the evidence. Harvey v. WVGOCID, Docket No. CID-88-061 (Feb. 27, 1989).

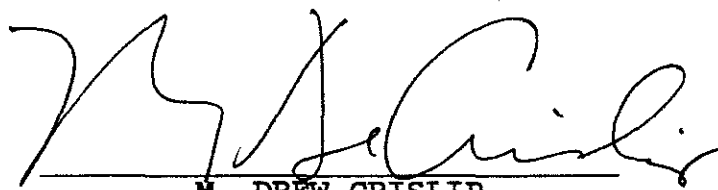
2. The criteria utilized by Grievant's immediate supervisor, while quite broad, were not clearly unreasonable and were not applied in an arbitrary or capricious manner. See id.

3. Grievant has failed to establish that he was entitled to a merit increase in September 1988, or at any other time.

Accordingly, this grievance is **DENIED**.

Either party or the West Virginia Civil Service Commission may appeal this Decision to the Circuit Court of

Kanawha County 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 Hearing Examiners is a party to such appeal and should not be so named. The Grievance Board must be promptly advised of any intent to appeal so that the record can be prepared and transmitted to the Court.



M. DREW CRISLIP
HEARING EXAMINER

Dated: August 15, 1989



STATE OF WEST VIRGINIA
GOVERNOR'S OFFICE
OF

COMMUNITY AND INDUSTRIAL DEVELOPMENT

CHARLESTON, WV 25305

APPENDIX A

Page 1

ARCH A. MOORE, JR.
GOVERNOR

MEMORANDUM

TO: Division Directors

August 15, 1985

FROM: John G. Redline *JGR*

RE: Salary Advances

Effective immediately, the policy for granting salary advances for employees of CID shall be:

1. Performance Standards - Competition for advancement shall be predicated on performance standards not between employees. Each manager/supervisor shall react with employees on the following criteria:

- a) Self initiative
- b) Cost efficiency
- c) Productivity - measured by work product
- d) Attendance
- e) Attitude
- f) Completion of tasks
- g) Additional job training directly related to performance.

2. Allocation of funds for Advances - Each quarter, if merited, ten percent of the employees of the agency shall be considered for increases. Some divisions may not have any employees eligible for consideration. It is also possible that a division will have more than 10 percent of its staff eligible for consideration.

3. Procedure to Recommend Salary Advances - Each quarter a CID short form evaluation shall be completed for each employee (copy attached). These forms will be returned to the Personnel Office. As a result of the evaluation, those employees meriting salary advances shall be submitted to the Director of CID for final decision. In completing the short form evaluation, each manager/supervisor shall candidly, honestly, and fairly review employees' performance. No employee will be considered by the Director of CID without a current short form evaluation.

In recommending employees for merit increases, division directors should evaluate employees on the quality of work performance judged to deserve reward or honor by performance standards criteria. Promotions are to be recommended only when there is a change in the status of an employee, including an increased level of duties and/or responsibilities. All promotions and merit increases must meet Civil Service regulations.

4. Probationary Employees - The Personnel office shall advise each division on the fourth month anniversary of a probationary employee. This notification will remind division directors of the necessity to evaluate probationary period performance. If a probationary employee's review indicates a salary advance, then this recommendation will be considered by the director from quarterly merit reviews.



**GOVERNOR'S OFFICE
COMMUNITY AND INDUSTRIAL DEVELOPMENT**

MEMORANDUM

TO: Division Directors

(DATE)

October 7, 1986

FROM: Lysander L. Dudley, Sr.
Director, Industrial Development

L.L.D.

RE: Salary Advances

Effective December 1, 1986, we will reestablish our policy of granting quarterly salary advances. The following guidelines will be used.

1. Each quarter, all Division Directors will submit a list of employees to be considered for a meritorious salary increase. The number of employees that each Division Director can submit is limited to 10 percent of the Division's permanent, full-time staff.
2. Merit increases are limited to 2 steps for covered employees and 10 percent for exempt employees.
3. Probationary (merit) increases for employees who have completed their 6-month probationary period will not be counted as a part of the 10 percent limit, but must still be submitted along with the regular quarterly increases.
4. In recommending employees for merit increases, Division Directors should evaluate employees on the quality of work performance judged to deserve reward or honor. All merit increases must meet Civil Service regulations.
5. Promotions to fill vacancies will continue to be made when they occur. Promotions in place are still restricted.

Please submit your recommendations to the Personnel Office by Tuesday, October 14, at 5:00 p.m. Indicate whether the increase is for $\frac{1}{2}$, 1, $1\frac{1}{2}$, or 2 steps. Show why each person you submit deserves an increase. For recommendations above one-step, or 5 percent, you must demonstrate that the employee deserves an Exceptionally Meritorious Service (EMS) reward.



**GOVERNOR'S OFFICE
COMMUNITY AND INDUSTRIAL DEVELOPMENT**

MEMORANDUM

TO: Division Directors

(DATE)

January 8, 1987

FROM: Lysander L. Dudley, Sr.
Director, Industrial Development *L.L.D.*

RE: Salary Advances

On March 1, 1987, we will give another round of merit increases. The following guidelines will be used.

1. All Division Directors will submit a list of employees to be considered for a meritorious salary increase. The number of employees that each Division Director can submit is limited to 10 percent of the Division's permanent, full-time staff.
2. Merit increases are limited to 2 steps for covered employees and 10 percent for exempt employees.
3. Probationary (merit) increases for employees who have completed their 6-month probationary period will not be counted as a part of the 10 percent limit, but must still be submitted along with the regular quarterly increases.
4. In recommending employees for merit increases, Division Directors should evaluate employees on the quality of work performance judged to deserve reward or honor. All merit increases must meet Civil Service regulations.

Please submit your recommendations to the Personnel Office by Friday, January 16, at 5:00 p.m. Indicate whether the increase is for $\frac{1}{2}$, 1, $1\frac{1}{2}$, or 2 steps. Show why each person you submit deserves a merit increase. For recommendations above one-step, or 5 percent, you must demonstrate that the employee deserves an Exceptionally Meritorious Service (EMS) reward.

LLDSr/dda