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RONALD E. BRIGHTWELL, et al. Docket Nos. 89-CORR-019/023/035  
036/159-161/165✓

v.

WEST VIRGINIA DEPARTMENT OF CORRECTIONS

D E C I S I O N

Grievants Brightwell<sup>1</sup>, Victor Butler, Brian Merinar, William Shepherd, Leonard Wellman, Terry Snyder, Michael Coleman, Stephen Henry, Shirley Curto and Joseph Templin are all employed by respondent and assigned to the West Virginia Penitentiary at Moundsville. All were initially employed in 1984 and did not receive discretionary salary enhancements at the completion of their six-month probationary periods; at various times in early 1989 they filed grievances which challenged the propriety of the matter. By agreement of the parties, the

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<sup>1</sup>According to his AFSCME representative, Mr. Brightwell is no longer in the employ of respondent, but it was made clear that he was still a party to the grievance to the extent that monetary relief was requested. AFSCME represented all grievants except Officer Wellman.

grievances were consolidated and heard at level three on March 23, 1989. Not satisfied with the outcome, grievants advanced the matter to level four in April 1989.<sup>2</sup> A level four hearing was conducted June 2, 1989.<sup>3</sup>

At the onset of hearing, grievants indicated that they would rely on the record presented at level three<sup>4</sup> with the additional testimony of one witness. Respondent presented the testimony of Gertrude Campbell, personnel administrator at the penitentiary, as rebuttal to grievants' witness and Lowell Basford, who represented the Civil Service Commission.

The essential facts in this matter are not disputed. Grievants are Civil Service employees. One-step "promotions" and attendant salary enhancements had been generally granted by

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<sup>2</sup>Mr. Brightwell's grievance was originally filed in late 1988 and Mr. Butler's, a short while later. Because the grievances arose on the same facts and issues, they were consolidated at level four on February 21, 1989. An initial level four proceeding was conducted March 2, 1989, at which time the parties determined the grievances had prematurely advanced to level four. Due to the anticipation of more grievances, the parties agreed to remand the Brightwell/Butler grievance to correct the procedural deficiency and to allow other affected personnel an opportunity to file and complete the grievance steps. The Brightwell/Butler matter was remanded by Order dated March 3, 1989 and refiled at level four April 17, 1989. The remaining grievances were all filed at level four in the same general time period.

<sup>3</sup>Grievants expressed a desire to tender proposed findings of fact and conclusions of law and agreed to a submission by July 14, 1989; respondent wished to reserve until July 28, 1989, to file a reply but neither party has filed proposals or requested an extension to date, and both parties are therefore deemed to have waived their right to submit.

<sup>4</sup>The level three transcript was submitted during the level four proceeding.

respondent to its penitentiary employees at the completion of their probationary periods, but grievants did not receive the same raise that other previously-hired employees were granted. According to respondent, when grievants completed their probationary employment at various times in late 1984 and early 1985, a gubernatorial freeze on promotions and salary enhancement was in effect. Respondent sent several applications for "probationary raises," but the requests were for naught. Respondent was directed by state officials to quit sending the requests.

Cecil Lancaster testified at level four on grievants' behalf. He stated that he was initially employed by respondent and assigned to the penitentiary on September 23, 1985. He said that he received a "probationary raise" at the end of his probationary period some six months later, about April 1986.

Mrs. Campbell addressed the account Lancaster gave about his raise. She testified that Mr. Lancaster's salary enhancement was not a "probationary raise," as was granted in the past, but came about as the result of a July 1, 1985, change in the Civil Service pay scale. The new pay plan mandated an entry level salary for probationary employees and an automatic step-up to the regular pay scale at the completion of the probationary period. She explained that all employments are now handled in that manner. She also explained that in July 1985 all employees, including grievants, who had at some time before completed their probationary employment, received a five percent across-the-board salary enhancement.

Mr. Basford also spoke to the matter of discretionary versus mandated salary enhancements. He explained that prior to the pay plan, which created a separate salary scale for probationary and permanent employees, any salary increase accorded an employee at the completion of the probationary period was discretionary on the part of the employer and was determined, in part, on the overall economic status of the agency, i.e., whether funds were available.<sup>5</sup> He stated that hundreds of state employees did not receive the discretionary "promotion" raise due to financial constraints of the employing agency and because of other factors such as an executive salary freeze.

Grievants contended that respondent arbitrarily refused to grant salary enhancements when the freeze was lifted. They argued that even though they received an across-the-board salary increase in July 1985, so did their co-workers who previously received the "probationary raise," and a continuing salary disparity impacts upon them to date. Grievants also argued that their grievances were timely filed since they filed grievances when they first learned that salary matters were grievable under W.Va. Code §§29-6A-1, et seq.

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<sup>5</sup>The new method obviously avoids this problem and thus provides for a uniform, equal and standard means to deal with all new employments.

Respondent argued variously that grievants were precluded from relief due to timeliness, laches, and res judicata.<sup>6</sup> Respondent also urged that, pursuant to W.Va. Code §29-6A-11, the West Virginia Education and Employees Grievance Board lacks jurisdiction to hear grievances arising before July 1, 1988.

The hearing examiner at level three could find no fault on respondent's part; neither could he find a legal basis for which to grant grievants the relief they requested -- an immediate five percent salary increase and back wages. He recommended a "compromise" in the form of a five percent salary increase with no back wages. Whether grievants appealed the decision to level four in advance of the respondent's Commissioner's decision to allow no remedy is unclear. In any event, absent some legal basis on which to rule in grievants' favor, no relief is available at level four.

First and foremost, this Grievance Board is, except under certain specific circumstances, precluded from hearing grievances arising before July 1, 1988. W.Va. Code §29-6A-11 instructs:

This article applies to all grievances arising on or after the effective date of this article [July 1, 1988]. This article supersedes and replaces the civil service grievance and appeals procedure currently authorized under the rules and regulations of the Civil Service Commission upon the resolution of all grievances and appeals pending in

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<sup>6</sup>Several grievants had pursued the matter via the Civil Service grievance procedure. The merits were not considered for the Commission deemed the matter non-grievable.

Due to the final disposition of this grievance, the res judicata and laches issues will not be addressed herein.

the civil service grievance system on the effective date of this article [July 1, 1988].

Furthermore, it cannot be found under the circumstances herein, that the respondent's failure to provide a discretionary salary increase in 1984-85 constitutes a continuing practice giving rise to a grievance, pursuant to Code §29-6A-4(a).<sup>7</sup>

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

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<sup>7</sup>Code §29-6A-4 requires that a grievance must be filed at level one "within ten days of the most recent occurrence of a continuing practice giving rise to a grievance . . . ."

This case can be distinguished from McClanahan, et al., v. Lincoln Co. Bd. of Educ., Docket No. 89-22-151 (July 19, 1989). The grievants in that case, employees of a county board of education, proved an ongoing violation of a statute, specific to education employees, which mandated all employees performing like duties receive equal pay. In McClanahan, the employer was providing an illegal supplementary salary to one group of workers. Respondent in this case did not act in such an arbitrary manner. Moreover, the West Virginia Classified Service is merit-based and, as such, some salary discrepancy might occur between two similarly situated employees, one of whom has received a discretionary merit pay increase. See W.Va. Code §29-6-1 and the West Virginia Civil Service Rules and Regulations.

## FINDINGS OF FACT

1. When grievants commenced employment they were told they would receive a "probationary" merit salary increase if funds were available.

2. Grievants did not receive the anticipated discretionary increase at the completion of their probationary periods of employment in late 1984 and early 1985 due to a statewide freeze on all salary increases at the time.

3. On July 1, 1985, all permanent classified employees, including grievants, received a salary adjustment of \$675 per year or five percent increase of the salary held at the time, whichever was greater.

4. Grievants may experience a salary disparity to date when compared with their peers who had earlier received a "promotional" raise.

5. The matters of which grievants complain arose before the effective date of W.Va. Code §§29-6A-1, et seq.

6. The salary disparity which may affect grievants is not a recurring event because the non-promotion was not an affirmative action on the part of the employer to purposefully create unequal salaries for employees performing like duties.

### CONCLUSIONS OF LAW

1. Absent certain extenuating circumstances, the West Virginia Education and State Employees Grievance Board will not consider grievances based on issues or events which arose prior to July 1, 1988. Code §29-6A-11.

2. When an employee does not receive an expected discretionary salary increase routinely given to other employees at an earlier time, and it is due to circumstances beyond the employer's control, the lack thereof of the salary increase over time does not constitute a continuing practice as contemplated by law, W.Va. Code §29-6A-4(a).

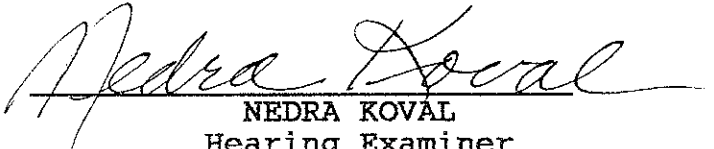
3. Events which precipitated grievants' complaints herein arose prior to July 1, 1988, and grievants' present salary status is not grievable as a recurring practice on respondent's part.

Accordingly, the grievance is **DENIED**.



Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Marshall 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. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: September 29, 1989

  
NEDRA KOVAL  
Hearing Examiner