



**REPLY TO:**  
101 Harper Park Drive  
Suite D  
Beckley, WV 25801  
Telephone: 255-6155

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

**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**  
GASTON CAPERTON  
Governor

**Offices**  
240 Capitol Street  
Suite 508  
Charleston, WV 25301  
Telephone: 348-3361

**VICKI PETRY**

**v.**

**Docket No. VR-89-017**

**WEST VIRGINIA DIVISION OF REHABILITATION SERVICES**

**D E C I S I O N**

Grievant, Vicki Petry, is employed by the West Virginia Division of Rehabilitation Services (DVR) as a secretary assigned to its District IV Mullens office. She filed a grievance at Level I on or about October 14, 1988 alleging,

The additional 15% of the employees granted EMS's reflected on the September 30, 1988 paychecks were all in the Beckley District and Branch Offices. It appears these EMS's were granted in a discriminatory manner and showed favoritism to the personnel in the Beckley offices.

RELIEF SOUGHT: An EMS granted immediately with pay retroactive to September 16, 1988 and to be made whole in every way.

After denials at Level I, and at Levels II and III following a hearing held December 12, 1988, grievant appealed to Level IV on January 10, 1989. The parties subsequently agreed that a decision could be made on the record developed at Level II

and it was submitted by February 10, 1989. By letter dated January 26, 1989, Mr. Lowell Basford, Acting Director of Personnel for the West Virginia Civil Service System (CSS), requested a copy of the record and the opportunity to submit comments and evidentiary material. No such material was forwarded and all parties were advised to submit proposed findings of fact and conclusions of law by May 5, 1989. Grievant submitted proposals by that date but none were received from DVR or CSS.

The facts giving rise to the grievance are undisputed. In August 1988 Mr. Gerald Scott, Supervising Counselor in charge of DVR Mullens Office, was notified by DVR's central office that fifteen percent (15%) of the agency's employees would be given extra-meritorious service (EMS) raises of five percent (5%). Mr. Scott was asked to recommend two persons in his office for the raises even though it was likely that only one employee in each office would be awarded one. Mr. Scott verbally recommended grievant and Ms. Kay King but after being instructed to recommend only one in writing, he submitted Ms. King's name. Mr. Scott was notified that Ms. King was awarded the raise and discovered, after the issuance of September 15 paychecks, that an additional fifteen percent (15%) of employees had been given the raise. In District IV all of the second round of raises were awarded to employees in DVR's Beckley Office.<sup>1</sup> The parties agree that

---

<sup>1</sup>The Beckley Office is apparently DVR's main office in District IV. This office also maintains a branch office but its location was not specified. It is conceded that the raises were awarded to employees in these two offices.

a September 24, 1987 memorandum to directors and office managers from DVR's Personnel Administrator provide the criteria upon which recommendations for merit raises are to be made. That memorandum emphasizes job performance but allows consideration of other factors, including education/skills improvement, past disciplinary actions, current inequities in pay due to past freezes on raises and the number of merit pay increases awarded particular employees.

Grievant maintains DVR's action in awarding all of the second set of raises in District IV to the Beckley Office constitutes a prima facie case of discrimination on its part and DVR has the burden of producing evidence that she was not entitled to a raise pursuant to the guidelines contained in the memorandum. Grievant cites Shepherdstown V.F.D. v. West Virginia Human Rights, 309 S.E.2d 342 (W.Va. 1983), in support of her position. DVR's position is difficult to discern. The findings and conclusions at lower levels either ignore or discount any inequity in the award of raises in District IV and are focused upon grievant's failure at those levels to show that her job performance entitled her to a raise.<sup>2</sup> Although a response to grievant's assertion concerning the burden of production of evidence was requested

---

<sup>2</sup>Mr. Scott, in his response at Level I, stated he had no authority to grant the relief requested but did note that "[I]t does appear that after the initial 15 percent of employees was granted raises the additional 15 percent may have been selected in a different manner".

of DVR's representative by the Level III grievance evaluator, none was made. DVR declined to present any evidence and the only evidence offered concerning grievant's job performance was her own brief testimony and Mr. Scott's assertion that he had followed the guidelines when he determined grievant and Ms. King qualified for the raise.

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

#### FINDINGS OF FACT

1. Grievant is employed by DVR as a secretary in its District IV Mullens Office. District IV consists of offices located in Fayetteville, Beckley, Mullens, Princeton and Welch.

2. In August 1988 grievant's supervisor, Gerald Scott, determined that she qualified for a merit raise pursuant to agency guidelines for the award of such raises. Mr. Scott recommended grievant for a raise but subsequently withdrew her name after being advised that only one employee within the Mullens Office would be awarded one. Ms. Kay King, another secretary in the Mullens Office, was awarded the raise.

3. In September 1988 DVR granted merit raises to an additional 15% of its District IV employees, all of which employees were located in the Beckley Office.

### CONCLUSIONS OF LAW

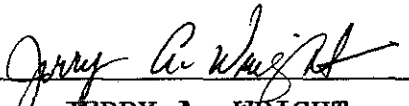
1. An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious, or contrary to law or properly-established policies or directives. Osborne v. West Virginia Division of Rehabilitation Services, Docket No. 89-RE-051 (May 16, 1989).

2. The allocation of the second round of merit raises within DVR's District IV was not based on established guidelines and was therefore arbitrary and capricious.

3. Grievant met all the criteria contained in DVR's guidelines for the award of a merit raise and has shown that DVR's arbitrary allocation of raises to its Beckley Office prevented her from receiving such.

Accordingly, the grievance is **GRANTED** and the West Virginia Division of Rehabilitation Services is hereby **ORDERED** to grant the grievant a 5% raise and to further compensate her for any loss of wages she may have incurred dating back to September 15, 1988.

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

  
JERRY A. WRIGHT  
Chief Hearing Examiner

Dated: June 30, 1989