



REPLY TO:
111 - 19th Street
Wheeling, WV 26003
Telephone: 238-1040

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

JOSEPH PRINCE

v.

Docket No. 89-DOH-042(A)¹

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

D E C I S I O N

Grievant Joseph Prince has been employed by respondent West Virginia Department of Highways as a Highway Equipment Operator III for approximately 13 years and is assigned to the Ohio County District 6. His level four filing advances the following complaint:

Grievant was denied a merit raise in violation of civil service procedures and agency policy. Relief sought is to award grievant merit raise and make whole.

The filing form indicated decisions adverse to grievant at level one December 1, 1988, and at level two December 15, 1988. A level three hearing was conducted January 11, 1989, and the

¹This is one of two separate grievances filed at level four by Mr. Prince in early February 1989, but the two grievances were assigned a common docket number. The issues of each grievance do not arise from a common set of facts and had been handled separately at the lower levels. Hence the decision on each shall be rendered in two formats, that is, (docket number) A and (docket number) B.

hearing committee issued its decision January 13, 1989.² After an earlier scheduled hearing was continued by agreement of the parties, a level four hearing was conducted April 11, 1989,³ and the parties submitted proposed findings of facts and conclusions of law by June 1, 1989.

The basic facts of this grievance are not disputed. On September 15, 1988, the Acting Director of Personnel for the Civil Service Commission issued a memorandum to State department and agency personnel officers that Civil Service Regulations regarding longevity pay increases "are being implemented pursuant to Section 6.10" of the regulation. Three eligibility requirements were as follows:

- Employees must have obtained the maximum pay rate in the salary range for the class without a salary increase in the immediately preceding twelve (12) months.
- Employees must have seven (7) years of uninterrupted state service immediately preceding the date of the longevity increase. A change in an employee's pay grade as a result of promotion, demotion, reclassification or reallocation or action by the Civil Service Commission nullifies the eligibility for the longevity increase until the employee has served one (1) year at the maximum step of the new salary range.
- Employees must have received a satisfactory or better service rating for the most recent evaluation period prior to the longevity increase. When determining who should be recommended for this increase, the same considerations

²The record contains a January 17, 1989, letter to grievant from Fred VanKirk, respondent's Acting Commissioner. Mr. VanKirk stated that he concurred with the level three grievance evaluators.

³The level four hearing was supplemental to the record developed below. Grievant testified briefly and respondent elicited brief testimony from two area administrators, Wayne Kaufman and Morgan Bier. The transcript of the level three proceeding had been submitted previously.

that were involved for the recent merit raises announced [July 1988] should be in effect.

According to the memo, the basic purpose of the longevity increase provision was to provide a means to "reward deserving employees" who would otherwise be prohibited from receiving salary advancements because a) the employee had obtained the maximum step of the pay range and b) the salary schedule had not been revised with a general wage increase since July 1, 1986. The then-Commissioner of Highways, W.S. Ritchie, Jr., followed with a memorandum on October 4, 1988, which reiterated the directive from civil service.

Morgan Bier, the county superintendent, did not recommend grievant for a longevity increase although grievant met basic eligibility requirements. Mr. Bier responded to the grievance at level one December 7, 1988:

I told Mr. Prince that this was not an automatic increase, there was several factors which were to be taken into consideration and that he did not meet all these requirements. They had to be worthy of the increase and that his performance was not up to standard measure. Tom Simms has spoken to him on several occasions.

The legal dispute identified by the parties in this matter is whether the longevity raise was dependent only upon meeting certain threshold eligibility requirements, as grievant contends, or whether a merit factor was present which precluded grievant from receiving the increase based on his work performance, as respondent urges. Assuming respondent is correct that a merit factor existed, issues remain concerning whether grievant's work performance was properly assessed, whether respondent's non-recommendation of grievant for the longevity

increase was proper or an abuse of its discretion under the circumstances, or whether grievant is entitled, on any basis, to the relief he requests.

At level three, grievant stated that he thought that he did not get the pay increase because he had filed grievances in the past and that was why Mr. Bier was not giving him the raise.⁴ Grievant was asked whether he could recall from the level one proceeding if Mr. Bier had told him what specific requirements for the increase had not been met. Grievant related that Bier mentioned his work record "went in on that" and that he "couldn't run the grader." He said Bier told him the increase was not "handed to you as a gift." He then stated that Mr. Bier had also brought up an incident about a past work assignment but that Bier's account of the event was not factually correct and none of his co-workers had lodged a complaint about the matter. Grievant also took exception to Mr. Bier's written response on the level one grievance about Tom Simms. Grievant testified that Mr. Simms, grievant's immediate supervisor, had not spoken

⁴Grievant did not elaborate on past-filed grievances. It is noted that he did file a grievance on another matter over a week after the grievance herein was filed, but he did not attempt to establish any relationship between the two separate personnel actions giving rise to the grievances. Grievant did not, for example, even state when he had learned of or been informed that he would not receive the longevity increase, subject of the instant grievance.

to him about his work. Grievant challenged Mr. Bier to show documentation about such matters.⁵

In further testimony, grievant said that it would be difficult for him to estimate the amount of time he spent grading because he also drove a truck, ran an endloader and backhoe and performed other duties.⁶ Grievant also testified that he had been with the Department of Highways for 13 years and had gotten only one raise the whole time he was there, when they made him a general foreman. He said that after awhile the position was eliminated and he was "put back on the operator's" as before. He also stated that every time raises would come up, including merit raises, he was told he could not get one because he was "redlined."⁷

At level three, grievant also called upon several of his co-workers to testify about his work abilities as a grader. Paul Ritchea, Equipment Operator II, testified that he hauled spreading materials to the areas where grievant was grading a dirt road. Mr. Ritchea stated that he had worked with five or six different grader operators, and "grievant's work was just as good, maybe even better than a lot of them." Mr. Ritchea said

⁵It is unclear why Mr. Bier responded to the grievance at level one inasmuch as Mr. Simms was grievant's immediate supervisor.

⁶Mr. Bier, at one point in testimony, said that the grading operation was probably one-third to one-half of grievant's work.

⁷According to the parties, a "redlined" employee has attained or exceeded the top wages for his or her classification.

that his opinion on the matter was based on the quality of the finished work. He stated that a lot of the roads would have potholes even before they were finished.

Donald Monroe, another operator II, testified on grievant's behalf. He slags the road during a resurfacing procedure. He said that he had worked with all three of the present graders as well as another grader who was no longer doing that work. He opined that grievant was one of the best, "at least he fills the potholes in." He stated that grievant's quality of production outweighed the quantity and remarked that the county wanted mileage before they wanted a good job.

Henry Hercules proclaimed he was a "Grader Operator Class III." He said he had been doing such work for 17 years⁸ and characterized himself as the best and the fastest grader operator. Mr. Hercules said that grievant's "abilities of operation" was "all right" but that he thought grievant worked too slow in the grading operation. He agreed that because of his experience and actual time in running the grader, he was more efficient than grievant, who had only had nine years experience on that task.

⁸The testimony was a bit confusing, but apparently Mr. Hercules was no longer functioning as a full-time grader operator and was instead driving a truck. The testimony seemed to indicate he did not work on grading with grievant but had occasion to observe grievant's work when he would bring materials on the truck.

Mr. Hercules also stated that he could not operate the crane and he would run the grader on occasion when grievant was needed as crane operator so both machines could remain operational.

Mr. Bier testified on respondent's behalf. He said that he considered all five factors for merit raises to determine whose name should be advanced for the longevity increase (T3.17) and that he told grievant his performance was not up to the "standard measure."⁹ Mr. Bier submitted a two-page handwritten document which supposedly logged the miles, or portions thereof, of county dirt roads graded by grievant and two other trainee graders for each workday in August 1988. He pointed out two instances where the trainees collectively "outdistanced" grievant by two-hundredths and six-hundredths of a mile. Mr. Bier was asked whether grievant was lacking in performance standards other than grading and whether other standards were considered. Bier responded that the grading operation was the only one that he used (T3.21).

Under further cross-examination, Mr. Bier said five people were "put in" for the raise and all received the raise although two others were eligible for the raise. When asked why those two were not granted the raise, he declined to answer except to say one was a "DUI"¹⁰ and the other was a "bad performance." Mr. Bier said he was not aware of grievant's overall performance evaluation, he did not have the evaluation document, and he did not know what grievant's performance evaluation was. He said he

⁹Mr. Bier's explanation of the standard measure was not illuminating: "Performance standards for each classification the work he could do out of our performance standard book."

¹⁰It is assumed that Mr. Bier was referring to the acronym for driving under the influence of liquor.

did not have any records of disciplinary action in regard to grievant's performance, but Mr. Simms had those documents.

Further questions arose about the compilation of road-grading productivity for August 1988. Mr. Bier said he chose the month of August to compare grievant's work with others' because it was the only month in which he had other operators doing the same type of work in the same type of weather and conditions exactly equal. When asked more closely about the daily production standards or maintenance standards, Mr. Bier responded that he could not equate the grading activity, Number 262 on the performance standard, and do a daily production evaluation: "This standard, activity 262, [paragraph] for paragraph, word for word, line for line, does not correspond to what we are doing out on the county roads." Mr. Bier said he was comparing grievant operator-to-operator, not comparing him to the Department of Highways maintenance standards. When asked whether merit considerations precluded comparing one person against another, Mr. Bier responded that that was not what he had done but that he compared performance against performance, not man against man.

Thomas Simms was also called to testify on respondent's behalf. Simms said that he had held the Assistant Ohio County Superintendent position since April 1988, and that his position before the promotion was that of "operator III," and that included operating the grader. He said he did not know why three people did not receive longevity increases, he had made no recommendations on any of those three to Mr. Bier as far as

their performance, and all he had supplied to Mr. Bier was their "MT-XII's."¹¹ Mr. Simms was asked about the matter referenced in Mr. Bier's level one decision, that is, about speaking to grievant. Simms' response was that he had papers that could show what he discussed with grievant about his performance. He proffered a document dated January 5, 1989:

To Whom It May Concern:

I hear by witness that the Asst. Supt., Thomas O. Simms, told Joseph G. Prince, that he was not doing up to the daily production standards set by the DOH Performance Standards.

He, also was told that Glen Ritchea and Ronald Markle were blading and pulling ditches, which are measured by road miles and that they were out performing him on running those particular pieces of equipment.

The document was signed by Ronald Markle.¹² Mr. Simms said that he brought the letter to show that he had discussed the grievant's work with him. When asked about the advisability of discussing one employee's work in front of another or other employees, Mr. Simms replied that the encounter described had nothing to do with a reprimand but it was just a friendly

¹¹These documents were not produced or identified as to their significance. If they were official records of work performance and production, it is not understood why copies of grievant's official production records were not placed into the evidence.

¹²There was some discussion at the hearing about the propriety and validity of the document since it was dated after the grievance was filed and since it did not refer to any specific dates. This examiner cannot give much weight to this document for obvious reasons. Mr. Markle was one of the parties whose work was compared with grievant's on Mr. Bier's handwritten log.

discussion.¹³ Mr. Simms said that in his opinion grievant was not keeping up with the other grader operators but, as far as quality, grievant had a tendency to put out good work.

In his level four proposed findings of fact and conclusions of law, grievant contends that respondent did not follow proper regulations when it denied him the longevity increase either by exceeding eligibility requirements or by inadequately evaluating his work performance on the exceeded requirements. Grievant stated that respondent "should adhere to the intent of the grievance procedure by showing a serious attempt to resolve issues at the lowest possible level" ¹⁴

Respondent denies wrongdoing in the grievance matter and states that grievant wrongly equates eligibility with mandate and wrongly argues that grievant was denied something everyone else got. It concluded by urging that grievant failed to prove any grounds upon which relief could be granted in the grievance.

The preponderance of the evidence in this grievance dispute overwhelmingly favors grievant's position, in most respects, and, at the very least, does suggest some bad faith on the part

¹³There was some further dialogue and discussion on the record about written performance standards but no documentation was submitted as to what the performance standards were. It seems that the written materials subject to discussion described performance standard of the physical operation of the grader but not production standards. Production standards were not explained more concisely but Mr. Simms nonetheless affirmed that they were Department of Highways standards.

¹⁴This presumably was a reference to the level three decision, a summation of which will be found in this Decision, infra.

of respondent or its agents with respect to resolving the grievance. In essence, the level three hearing board determined that:

- Management did not intend to purposefully violate agency practices and procedures;
- five factors to consider merit raises were proper considerations for the longevity increase but only the second justification was considered;
- management's appraisalment of one component of grievant's duties was insufficient in duration and scope; and
- grievant should be given full and proper consideration for the longevity increase.

The record basically supports the hearing panel's level three conclusions and the undersigned was assured by respondent's counsel at level four that the recommendation to reassess the grievant for the salary advancement was carried out. However, respondent's witnesses at level four did not discuss a reevaluation procedure and, in fact, defended respondent's original action on the longevity increase.

Mr. Wayne Kaufman, District Engineer, testified at level four about his knowledge of pertinent factors which were to be considered for the longevity increase; submissions to his office of eligible employees; and recommendations made by Mr. Bier from Bier's area of responsibility. He stated that a computer search produced eight names of persons who met basic eligibility criteria and those names were originally submitted to him. Despite grievant's persistence on the matter, Mr. Kaufman could not recall specifics about when he received the list of eight or when subsequent eliminations were made. Kaufman said that after lists started arriving at his office, he advised all county

of respondent or its agents with respect to resolving the grievance. In essence, the level three hearing board determined that:

- Management did not intend to purposefully violate agency practices and procedures;
- five factors to consider merit raises were proper considerations for the longevity increase but only the second justification was considered;
- management's appraisalment of one component of grievant's duties was insufficient in duration and scope; and
- grievant should be given full and proper consideration for the longevity increase.

The record basically supports the hearing panel's level three conclusions and the undersigned was assured by respondent's counsel at level four that the recommendation to reassess the grievant for the salary advancement was carried out. However, respondent's witnesses at level four did not discuss a reevaluation procedure and, in fact, defended respondent's original action on the longevity increase.

Mr. Wayne Kaufman, District Engineer, testified at level four about his knowledge of pertinent factors which were to be considered for the longevity increase; submissions to his office of eligible employees; and recommendations made by Mr. Bier from Bier's area of responsibility. He stated that a computer search produced eight names of persons who met basic eligibility criteria and those names were originally submitted to him. Despite grievant's persistence on the matter, Mr. Kaufman could not recall specifics about when he received the list of eight or when subsequent eliminations were made. Kaufman said that after lists started arriving at his office, he advised all county

superintendents that merit factors were to be used in making the longevity salary increase recommendations. According to Mr. Kaufman, three names, including grievant's, were removed from the original eligibility list and all five remaining employees were granted the increase. He testified that two of the three persons that were eliminated "were not in line for the increase" and one had been granted the merit increase in July which brought him to "redline" but also disqualified him. Comparing Kaufman's testimony to Mr. Bier's at level three, that one employee was eliminated for a drinking offense (see footnote 10), grievant's contention that he was the only eligible employee who did not receive the increase was correct. Respondent had every opportunity to support its assertion at level four that otherwise eligible employees did not receive the increase based on poor performance, but it did not do so, and the evidence of record preponderates that grievant was the only employee denied the increase due to performance factors.

At level four Mr. Bier again stated that he considered all five merit factors when he withdrew grievant's name from the eligible list. The July 1988 merit factors were as follows:

The Department of Highways' formal policy on Merit Increases allows for a limited number of employees to receive increases for meritorious work performance. Factors which are to be taken into consideration include, but are not limited to the following.

1. Consistently performing duties above the standard measure for the classification.
2. Maintaining a high standard of work quality.
3. Self-motivation.
4. Exercising good judgement in work performance.
5. Proper use of work time.

Mr. Bier's testimony was essentially that, Factor 1, in his opinion, grievant did not perform consistently; Factor 2, he had a "citizen's complaint" about grievant's work;¹⁵ Factor 3, based on grievant's August 88 work record, he did not think he was self-motivated; Factors 4 and 5, grievant was average or sub-standard. This testimony can be accorded little credibility since Mr. Bier's opinions were not explained in any specific or concrete terms relating to his own or other persons observations of grievant's performance or documentation thereof. He further agreed that he testified at level three that the 18-day August 1988 grading productivity document was his only source of assessment as to grievant's job performance.

The August 1988 milage/production data prepared by Mr. Bier to support his conclusions about grievant's work performance is seriously flawed. Despite Mr. Bier's insistence that a fair analysis could be made because all three men worked on similar county dirt roads which were graded every two years, the document shows that grievant and the other workers worked on different sections of the road with different graders and, at times, on an assignment (code number) other than grading.

¹⁵This evidence cannot be given consideration under the circumstances. Grievant objected to the testimony after Mr. Bier began to discuss the specifics of a supposed conversation with a person who called him to complain of the poor quality of some grading attributed to grievant. Grievant was especially concerned since the matter had never been conveyed to him. Mr. Bier said the complaint was memorialized but he did not have the paper with him. The undersigned was at a loss to understand respondent's lack of documentation at the level four proceeding.

Further, there is no information as to whether the different sections were equal in all respects, i.e., overall general condition, flat as opposed to hilly or straight as opposed to curved. Moreover, each man had widely diverse production rates on the same section of the road on different days and no analysis was made as the acceptability or quality of the completed work.

Insofar as it can be found that grievant's performance in all aspects of his job was not originally nor at anytime thereafter given due consideration, the question remains whether grievant should be awarded the longevity increase. The evidence again preponderates in grievant's favor for two reasons.

While merit may be a factor in all salary advancements, the July 1, 1987, Civil Service Regulations distinguish various applications and implementations for its "pay plan." Listed below are several pertinent portions of Section 6:

6.01 Purpose and Intent-To attract qualified employees and retain them in the classified service, the Commission shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various state agencies and on comparability to pay rates established in other public and private agencies and businesses. The intent of the Commission is to recommend to the Governor a pay plan with annual adjustments for cost-of-living increases and additional funds for merit increases.

6.04 Implementation of Plan

(f) Salary Adjustments

c. An incumbent whose salary falls above the maximum rate of the new range shall maintain his current salary and shall be ineligible for salary advancements.

6.09 Salary Advancements

(a) Upon Merit-All salary advancements shall be based on merit as reflected by service ratings and other recorded measures of performance.

(f) Exceptionally Meritorious Service-In cases of an employee's exceptionally meritorious service, salary advancements of more than one step in the range or at intervals of less than the regularly prescribed period are permitted. However, no employee shall receive salary advancements of more than two steps, including advancements for exceptionally meritorious service, in any twelve (12) month period.

6.10. Longevity Increases

(a) Eligibility-An employee with seven years of total state service who has attained the maximum in the range for the class without a salary increase in the immediately preceding twelve months shall be eligible for a longevity increase as prescribed in the adoption of a new pay plan.

(b) Additional Longevity Increases-In the same manner, an employee otherwise not receiving a salary increase in each succeeding 12 month period shall be eligible for a longevity increase.

Respondent's directive to Division Directors on the July 1988, merit increase stated, "The merit increase control amount for your organization will be forwarded as soon as possible." Thus the July 1988 merit increases were limited and incurred competitive analysis of employee performance in the selection process. The directive in that vein from Civil Service to each agency was distinctly different from the longevity increase announced in September 1988:

It should be understood that the longevity increase is discretionary with the appointing authority depending on the number of eligible employees and the availability of funds in the agency budget.

This portion of the September 15, 1988, CSS directive strongly suggests that, in keeping with the purposes for the salary adjustment noted supra in this Decision, and in conformance with other Civil Service regulations above cited, all eligibles with satisfactory performances should have been considered and awarded the longevity salary advancement if the agency budget

was adequately funded. Respondent presented no evidence that its funds were restricted with respect to the longevity increases and, in fact, did not dispute grievant's assertion on his opening statement at level four that Highways had an "excess of funds" in the department.

Next, the evidence proffered by those who directly observed grievant's work must be given consideration inasmuch as respondent's evidence on the matter was inadequate. Respondent had an opportunity to correct its failure to properly assess grievant, but no evidence was presented that a proper assessment was done after the level three decision¹⁶ and it would not be fair for grievant to bear the burden of further delay on the matter.

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

FINDINGS OF FACT

1. Grievant is an Equipment Operator III in the Ohio County organization of District 6 of the Department of Highways (DOH). Grievant's immediate supervisor is Thomas Simms, Assistant County Superintendent. Simms is familiar with grievant's job performance as are grievant's co-workers who work closely with him.

¹⁶It is noted that respondent would not have had to comply with the level three decision since grievant appealed the matter. However, respondent said the recommendation to reevaluate grievant had been implemented.

2. In September 1988, the Civil Service System (CSS) set forth guidelines to implement longevity increases as per its Compensation Plan and Salary Regulations of July 1, 1987. CSS regulations and advisories suggest longevity increases should be awarded to eligibles and basically limited by agency financial constraints only.

3. Morgan Bier, DOH's Ohio County Superintendent, was responsible for making the recommendations on the longevity increases but withdrew grievant's name from the eligibility list.

4. During grievant's thirteen-year service with respondent DOH, he had never received a permanent salary advancement, the reason being that he was "redlined" at the maximum allowable salary for his classification. The 1987 provision and 1988 implementation of a longevity salary increase provided him an "open window" for a salary enhancement.

5. Mr. Bier's sole determination that grievant was not deserving of the increase due to work performance characterized as average or substandard was not supported by credible evidence.

6. The preponderance of the evidence shows grievant's work to be of good quality and that he is entitled to the longevity increase in keeping with the overall compensation goals of the classified service.

CONCLUSIONS OF LAW

1. It is incumbent upon a grievant to prove the allegations constituting a grievance by a preponderance of the evidence. Virden v. W.Va. Dept. of Highways, Docket No. 89-DOH-037 (May 31, 1989); Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 28, 1988).

2. Grievant established by a preponderance of the evidence that the assessment of his job performance to determine his eligibility and entitlement to a longevity salary increase did not conform to established Civil Service regulations that salary advancements "shall be based on merit as reflected by service ratings and other recorded measures of performance."

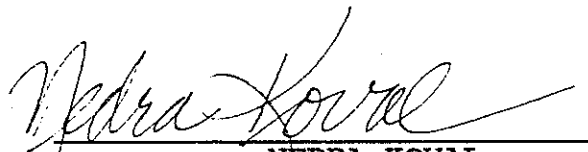
3. State agencies must comply with properly established personnel regulations. See e.g., AFSCME v. Civil Serv. Comm'n, 341 S.E.2d 693 (W.Va. 1985); Hooper v. Jensen, 328 S.E.2d 519 (W.Va. 1985); Swallop v. Civil Serv. Comm'n, 304 S.E.2d 25 (W.Va. 1983).

4. The evidence preponderates that grievant fully met the eligibility requirements for a longevity salary increase including quality work production and that he is entitled to the increase on the basis of CSS' published goals for a meaningful salary plan and the stated spirit and intent of the 1988 longevity salary increase.

Accordingly, this grievance is **GRANTED** and respondent West Virginia Department of Highways is Ordered to provide grievant the same longevity salary increase awarded to the five other Ohio County recipients from the date said increases were effectuated.

Either party or the West Virginia Civil Service Commission may appeal this decision 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 §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: July 31, 1989



NEDRA KOVAL
Hearing Examiner