**MARY LOU ROBERTS, .**

**Grievant, .**

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**v. . Docket Number: 94-DOP-182**

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**WEST VIRGINIA DEPARTMENT OF .**

**ADMINISTRATION / DIVISION OF .**

**PERSONNEL, .**

**Respondents. .**

## DECISION

Mary Lou Roberts (hereinafter Grievant) filed this complaint against her employer pursuant to the provisions of West Virginia Code §29-6A-1 et seq., challenging a decision by her section's administrator not to award her a merit raise. This grievance was filed on February 15, 1994, and was denied at the lower three levels of the grievance procedure. Appeal was made to level four on May 6, 1994, and an evidentiary hearing was conducted on July 26, 1994, at the offices of the Grievance Board in Charleston, West Virginia. Thereafter, the case became mature for decision upon the Undersigned's receipt of the parties' post-hearing briefs on or about August 26, 1994. The majority of the material facts of thecase are not in dispute and shall be set forth below as the Undersigned's formal findings.

### Findings of Fact

1. Grievant is employed as a Personnel Specialist, Senior, with the Division of Personnel's

Staffing Services Section, Applicant Placement Unit.

2. By Memorandum of November 5, 1993, Chuck Polan, Cabinet Secretary of the Department of Administration, notified Steve Stephens, Director of the Division of Personnel, that money for merit raises would probably be available for disbursement on January 1, 1994. Mr. Stephens' recommendation as to which employees should receive merit raises was requested.

3. Mr. Polan stated in this memo that employees who had received any form of salary increase since January 1, 1993, were ineligible for a merit raise. It was also established that only 33% of the Division's staff could be recommended for raises. Further, the memo stated

> In reviewing your recommendations, be advised I will look at the employee's present and proposed salary as compared to peers within the department. You should pay particular attention to an employee's leave usage as I firmly believe that the most talented employee is of marginal value if they are not at work. I am concerned that this increase is truly a merit increase.

Finally, Mr. Polan requested than an explanation accompany any recommendation based upon an employee's performance evaluation score which was lower than another employee's score if the latter employee had not also been recommended for a raise.

4. Mr. Stephens met with his division heads and delegated to them the duty to make recommendations for employee merit raises. Max Farley, Assistant Director of Personnel's Staffing Services Section, made a recommendation to Mr. Stephens that nine of his twenty-seven employees should receive a merit raise and the amount of said raise.

5. The Staffing Services Section is divided into three work Units and each Unit has one or more managers. For purposes of Mr. Farley's recommendation, he recommended that one third of the employees in each Unit receive a merit raise, exclusive of managers. Of the three managers determined to be eligible for a merit raise, he recommended one for a raise. In the Applicant Placement Unit, five employees were recommended for a salary increase.

6. Mr. Farley's recommendations were ultimately accepted without challenge.

7. Grievant was not recommended for, nor did she receive, a merit raise.

8. Grievant's final score on her 1993 performance evaluation was 4.14.

9. The following is a list of employees, by their performance evaluation scores, who received a merit raise:

A. 5.00

B. 4.58

C. 4.43

D. 4.43

E. 4.42

F. 4.29

G. 4.00

H. 4.00

I. 4.00

One of these employees who was given a 4.00 rating is a manager in the Unit.

10. There are four Senior Personnel Specialists, including Grievant, within Staffing Services. Of these four employees, one was granted a merit raise. This employee had the second highest performance evaluation score among the four (4.43), the second highest salary prior to the raise, and the most seniority. After the merit raise was issued, this employee's salary became the highest among the four employees.

11. Mr. Farley's recommendation was not based solely upon performance evaluation scores. There were fifteen other eligible employees within the Unit who had a score equal to or higher than 4.00 who did not receive a merit raise.

12. Mr. Farley's recommendation was based upon both objective and subjective factors. His recommendation was based upon the employee's performance evaluation score and current salary as compared to the other employees. For example, two employees had an evaluation score of 5.00 but only one of them received a merit raise because that employee earned less than the other and had been hired one year earlier. Of the managers, the employee who received a merit raise had the lowest evaluation score of the group (4.00). However, this employee also had the lowest salary even though she had been employed for the second highest number of years.

13. Also, when Mr. Farley judged the employees on the basis of their performance evaluation score, he did not treat the scoreson an objective basis because he felt that they were the result of "rater bias"; therefore, he recommended some employees over others who had higher scores based solely upon his opinion of the quality of the employees' work. Further, he considered scores which were close, i.e., 4.43 and 4.42, as being equivalent.

## Discussion

Grievant argues that Mr. Farley's recommendation was not consistent with the administrative guidelines applicable to the issuance of merit raises promulgated by the Division of Personnel. She contends that she was entitled to a merit raise and that Mr. Farley's recommendation was based upon an arbitrary and capricious review of his employees' performance. Even though her performance evaluation score was 4.14, she asserts that, pursuant to this Grievance Board's prior rulings, she is entitled to a merit raise because she is more deserving than at least one employee who received one, i.e., the employees who had received a performance evaluation score of 4.00.

Respondent argues that merit increases are discretionary salary advancements; and therefore, the appointing authority has broad discretion to award them to those employees it deems fit after having evaluated a wide range of staffing, personnel, fiscal and performance variables. It avers that it is not bound to issue merit raises based solely upon a ranking of its employees' numerical performance evaluation scores. In the alternative, it contends that if it is so restricted in the exercise of its discretion, then Grievant cannot establish any damage because herscore was ranked fifteenth out of twenty-seven employees and there were only nine raises to be awarded.

The Division of Personnel has promulgated legislative rules, 143 CSR 1, governing, among many other topics, its compensation plans and salary guidelines. 143 CSR 1.3.82 defines the term "salary advancement" as "[a] discretionary advancement in salary granted in recognition of the quality of job performance." Salary advancements are generally referred to as merit raises. Further, and more importantly, 183 CSR 1.5.08(a) establishes the basis for which all salary advances are to be awarded, and the language of this section reads "[a]ll salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance." Unfortunately, this section provides very little practical guidance in helping administrators exercise their discretionary authority in deciding whom among their employees should receive a merit raise when the number of raises available is limited. At times, the problem manifests itself when the administrator attempts to establish the "pool of employees" from which then to base the merit raise decisions. But more often, once a pool of employees is created, difficulty arises in trying to make such a salary decision based upon various factors thought to be necessary for consideration. Because of the limited scope of the language of Section 5.08(a), it is determined that the language is ambiguous and must, therefore, be

interpreted in order to ascertain its intended meaning.

Often, it is recognized that the only "recorded measures of performance" that administrators of state agencies have available upon which to base merit raise recommendations is the employees' performance evaluation scores. In other cases, there are other indicators of performance which may be in written form, such as, recorded quotas, numbers of clients dealt with or numbers of various other tasks performed. In any event, it is hereby determined that any merit raise award must be based solely and directly upon an evaluation of the employees' job performance and not their tenure, seniority, current rate of pay or appropriate use of leave. All of these additional factors, while they may be indirectly related to the employees' current salary, are not factors which are indicative of the employees' actual job performance for the period in question. (See footnote 1) This is not to say than an administrator may not use other factors such as assignment to a specific class title or assigned area of work to reasonably and rationally develop the pool of employees from which the decision to award a merit raise will be based. However, once this "pool" is created, the final decision must be "based" or supported only upon the employees' already-measured job performance.

This holding is supported by the language "[a]ll salary advancements are based on merit . . . ". This regulation should be read by giving the words used their common and ordinary meaning. The word "are" as used in this provision is considered as establishing a mandatory obligation upon those who make merit raise decisions. The regulation could have been better phrased as "[a]ll salary advancements are [to be] based on merit as reflected by performance evaluations and other recorded measures of performance." From this determination, it can reasonably be inferred that merit raises are only to be based upon an evaluation of the employees' performance and not other non-related factors. And because the rules only specify two merit-indicators upon which such decisions may be grounded, it is determined that this express inclusion of these two factors operates as an exclusion of the consideration of other factors not directly related to performance.

Also, a reading of the definition of salary advancement, in conjunction with the language of Section 5.08(a), further supports the conclusion that merit raises can only be based directly upon factors relating to job performance and not such factors as salary equity or seniority. Again, a salary advancement is an "advancement in salary granted in recognition of the quality of job performance." In conclusion, merit raise decisions must only be based upon merit as supported by recorded measures of performance, of which performance evaluations are one type.

This conclusion is consistent with the theory behind awarding merit raises in a merit system. Naturally, under a merit system,only employees who deserve such a raise on the basis of their performance should receive said raises. The inclusion of other non-merit factors in the final decision-making process undermines the purposes behind giving merit raises, i.e., to motivate employees, to reward employees, and to keep meritorious employees striving for even better performance. Finally, some non-merit factors which are indirectly related to an employee's job performance, i.e., an employee's use of leave, may have already been considered by the supervisor through that employee's performance evaluation. Therefore, for an administrator, again, to base the ultimate decision solely or largely upon such non-merit factors would be in direct contradiction to Personnel's regulations governing the issuance of salary advancements. For an administrator to base merit pay consideration upon such impermissible factors could also be construed as increasing a benefit afforded a classified employee in violation of Section 21 of Personnel's regulations titled DUTIES OF STATE OFFICERS. (See footnote 2)

In the case at hand, Mr. Farley created a list of his employees by work Unit and, within these three categories, the employees were listed in descending order according to their performance evaluation score. His intent was to award a merit raise to one-third of the employees in each work Unit. For purposes of his review, he also considered the employees who hold the class title of Administrative Service Manager as a separate "pool" of employees, professional employees. Utilizing these lists, he started at the top and made his recommendations based not only on the evaluation scores but also on seniority and a comparison of the employees' salaries. Mr. Farley started at the beginning of each list and continued down the list, by Unit, until the number of raises available for that Unit were given. He considered whether he should give a merit raise to each employee on the basis of whether he considered that they deserved a raise in comparison to all of the employees in the Section.

The following employee data was utilized By Mr. Farley in arriving at his recommendations: (The employees in bold are classified as Administrative Service Managers and where considered to be professional as opposed to clerical or technical employees.)

| Employee | Performance Rating | Date of Hire | Salary | Unit | Raise X=yes |
|---|---|---|---|---|---|

| | | | | | |
|---|---|---|---|---|---|
| A. | 4.29 | 1/1/70 | 19,428 | TST | |
| B. | 4.25 | 8/25/75 | 36,444 | TST | |
| C. | 4.00 | 8/10/70 | 22,608 | TST | X |
| D. | 3.86 | 2/27/86 | 20,520 | TST | |
| E. | 5.00 | 3/22/71 | 21,600 | INT | X |
| F. | 5.00 | 7/24/72 | 30,060 | INT | |
| G. | 4.10 | 9/1/73 | 30,660 | INT | |
| H. | 4.00 | 12/5/77 | 19,920 | INT | X |
| I. | 4.00 | 10/20/69 | 28,740 | INT | X |
| J. | 3.90 | 4/12/76 | 17,244 | INT | |
| K. | 3.90 | 12/12/78 | 20,916 | INT | |

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|---|---|---|---|---|---|
| L. | 4.58 | 1/25/88 | 12,840 | AP | X |
| M. | 4.43 | 4/9/73 | 18,642 | AP | |
| N. | 4.43 | 9/16/86 | 20,628 | AP | X |
| O. | 4.43 | 1/14/74 | 21,240 | AP | |
| P. | 4.43 | 11/16/61 | 29,592 | AP | X |
| Q. | 4.42 | 11/26/84 | 15,168 | AP | |
| R. | 4.42 | 6/7/84 | 19,920 | AP | X |
| S. | 4.29 | 7/23/84 | 19,428 | AP | X |
| T. | 4.17 | 3/4/86 | 13,296 | AP | |
| U. | 4.14 | 7/17/78 | 16,908 | AP | |
| V. | 4.14 | 2/3/86 | 23,604 | AP | |
| W. | 4.13 | 8/25/75 | 36,012 | AP | |
| X. | 4.00 | 3/16/91 | 11,364 | AP | |
| Y. | 3.85 | 6/1/92 | 10,716 | AP | |
| Z. | 2.00 | 3/23/92 | 16,116 | AP | |

Employee "I" is classified as an Administrative Service Manager II and she received the one raise given to the "professional." All of the other employees were treated as "non-professional" employees for the purpose of awarding the remaining eight merit raises.

As previously noted, in addition to Mr. Farley basing his decision on such non-merit factors as seniority and current salary, he also based his comparison of the employees in each Unit to the employees in the other Units who had similar evaluation scores. He believed that one of his supervisors gave higher performance evaluation scores than the other two; therefore, he used his judgement in awarding some of the raises to employees in the applicant placement Unit who had lower performance evaluation scores than employees in the other Units who also had received araise because he felt that the some of the scores of the employees in the applicant placement Unit would have been higher had those employees not been in that Unit.

Regarding Mr. Farley's methodology, he testified as follows:

> The first consideration was the performance rating score. It was also because of the fact that I have several different raters and that I have so many jobs that are apples and oranges in terms of comparisons really significantly different type of duties and in some cases even when they are similar it would be like comparing different kinds of apples. I elected to, that I could, to apportion increases in the same rate that I got them, a third per Unit, to the degree that I could. I just started at the top looking at the performance rating, passing over individuals whose pay I thought was commensurate with their performance and their contribution to my section and I simply ran out of opportunity before I got to Mary Lou. (Emphasis added).

Tr. level three, p. 16. Again, at the level four hearing, when Mr. Farley was asked how he considered non-merit factors in his determination, he testified as follows regarding his subjective evaluation of the employees' performance scores compared to the various non-merit factors: "As a tie breaker when I couldn't tell the difference, when people had identical scores or had as nearly as I could tell were identical performance." The impact of Mr. Farley's decision-making process was that, in some instances, performance evaluation scores were completely disregarded in favor of his subjective determination as to the meritorious performance of the employees.

The undersigned finds no problem with the fact that Mr. Farley divided his employees by Unit. Further, it was also reasonable for him to have considered his managers as a separate section for purposes of awarding raises to one/third of his employees by Unit. However, once this initial determination was made, he then made the merit raise decisions based largely upon what has been referred to as "salary equity," and also his own subjective opinion of the employees' performance as compared to each another. Mr. Farley testified that "performance relative to pay was the supreme consideration." Upon a closer review of Mr. Farley's method, it becomes readily apparent that his decisions were not consistent with any set procedure and were not consistent with the language of

Section 5.08(a).

First, it is understood that even performance evaluation scores are the result of a subjective decision-making process. As a part of the typical process, the division administrator is required to review and approve the evaluation after the employee's supervisor performs the evaluation. There is no evidence to indicate that this normal procedure was not followed within Mr. Farley's Section. However, only when Mr. Farley was given the responsibility of awarding merit raises did he take any action based upon his belief that at least one of his supervisors had rated his/her employees higher than the other. As a result, he discounted those evaluation scores and substituted his judgment as to the quality of the performance of the employees in that Unit in relation to the other employees. This approach compounded the problem which is inherent in any system that is meant to reward employees on the basis of a decision grounded upon objective factors which have a component of subjectivity built into them. It appears to the Undersigned that the time for Mr. Farley to havedealt with this so-called "rater bias" was when he initially reviewed and approved the performance evaluation scores and not when merit raise decisions were to be made based upon those scores. At this point in time, verification of these scores seems meaningless and cannot be offered.

In looking at the facts in another light, Mr. Farley did not follow his own scheme of trying to compare employees who had been rated by one supervisor to employees rated by another. Mr. Farley evaluated the managers in his Division, therefore, there could not have been any "rater bias" to overcome. However, among the three managers who were eligible to receive a merit raise that he evaluated, he gave the raise to the one with the lowest evaluation score who also had the lowest salary of the three. This decision is not consistent with the requirement that merit raises be given to employees based upon quality of work or merit. It is clear that in this comparison, the merit raise was given solely based upon a comparison of salaries and not merit, rater bias, or any other factor.

In contrast, in the testing section, the non-professional employee who received a merit raise had an evaluation score of 4.00 while another employee in that Unit had a score of 4.29. Also, the employee who was rated as a 4.00 had a higher salary than the employee rated at a 4.29 and also has seven months less seniority. In this scenario, the employee with the lowest salary was not given a raise even though he/she had the highest evaluation score. Oneconclusion which can be drawn from this is that Mr. Farley did not follow his own procedure or the same factors consistently.

Another flaw in the decision-making process occurred when Mr. Farley attempted to break "ties"

among the employees who had equal evaluation scores. When Mr. Farley began to consider the employees in each section, he looked at the performance evaluation scores and compared and contrasted the salary and tenure of each employee in the Unit who had the same score. For example, employee E. and F. both had an evaluation score of a 5.00, Mr. Farley considered these employees to be tied and so he looked to the other non-merit factors to break the tie. In this case, he again gave the raise to the employee who made the lowest salary. However, he then did not consider employee F. for a raise, afterwards, in comparison to any other employee. The effect of this method was that an employee who received a performance evaluation score of 5.00 on a scale of 1.00 to 5.00 did not receive a merit raise while seven other employees with lower scores did receive a raise. Of these seven employees, one was even in this employee's section while one other was in the same classification. This result is totally unreasonable under any system which is designed to reward meritorious performance.

This "tie-breaking" method was used in two of the three sections and resulting in three employees not receiving merit raises who had performance evaluation scores higher than two employees who did. In just comparing these five employees, two of them also had lower salaries than other employees who received a raise. Further, the one employee with a score of 4.43 who had thelowest salary of any employee with the same rating was not granted a raise, while employees with scores of 4.42 and 4.29, both had a higher salary and less seniority, received raises.

Even if one looks at the employees based solely upon class title, there exists arbitrariness and capriciousness in the results. In the Applicant Placement Section, one employee classified as a Personnel Specialist with a performance evaluation score of 4.29 received a salary advancement while another employee who had a score of 4.43 did not. Among these two employees, the employee who received the raise had the lower salary of the two. Again, in the Internal Placement Unit, one employee with a 4.00 ranking received a raise while another employee with a ranking of 4.10 did not.

Given Mr. Farley's explanation of the manner in which he created the employee pool and the decision to start at the top of the list in each section and continue to the bottom until the raises for that section had been given, in order to be consistent and be in compliance with Section 5.08(a), he should have simply given the raises to the top scores in each section. Then, he would not have needed to break any ties because the nine raises would have been exhausted with the last one having gone to the last employee in the Applicant Placement Unit who had a 4.43 rating. While

the undersigned recognizes that Mr. Farley attempted to exercise his discretionary authority in a manner which he felt was both reasonable and fair to all of his employees, the result fell far short of these goals. Given the applicable language ofPersonnel's administrative regulations dealing with salary advancements, it is impossible to imagine how any employee under consideration for a merit raise could be denied such raise out of nine when that employee had received a perfect 5.00 score on his performance evaluation for the relevant time period. The evidence demonstrates that this decision was improperly based solely upon consideration of this employee's salary and not upon his quality of work. Even assuming that there existed "rater bias" in this section, as Mr. Farley infers, the process was still flawed. A statistical comparison of the average scores given by the supervisors in the three Units reveals that the lowest average was 4.10 while the highest was 4.28. This difference of eighteen/hundreds of a point is hardly evidence of any significant bias which should have resulted in Mr. Farley having relied upon his opinion of the quality of work over the evaluation scores. In conclusion, Mr. Farley's decision-making process is determined to have been inconsistent with the applicable administrative regulations promulgated by Personnel, and therefore, the merit raise decisions were awarded based upon an arbitrary and capricious exercise of discretion.

The next question to be addressed focuses upon Grievant's request for relief. Grievant contends that because Mr. Farley's decision-making process was flawed, she is entitled to damages in the form of a raise equal to the amount she would have received had she been granted a merit raise because she is more entitled to said raise than one or more employees who were granted a merit raise. This request for relief is, however, inconsistent with the outcome which would have occurred had Mr. Farley made his merit raise recommendations based upon the principles Grievant contends are legally applicable to the issuance of merit raises. Given the facts of the case, it is determined that Mr. Farley's arbitrary exercise of his discretionary authority resulted in harmless error to Grievant.

Had Mr. Farley based his merit raise recommendations solely upon the performance evaluation scores (because there do not appear to have been any other recorded measures of performance) then Grievant would not have been close to receiving a merit raise being that only the top nine employees in the Section would have been chosen, and only the top five would have come from Grievant's Unit. Given Grievant's own argument, at least ten employees would have had to have received a merit raise in Grievant's section before she would have been eligible. Overall, thirteen employees within Staffing Services had a higher performance evaluation score than Grievant;

therefore, there is no theory upon which Grievant can rely which would support her requested relief. To award Grievant damages, in the form of a salary increase in the amount of the merit raise given to the employees who were awarded same through Mr. Farley's arbitrary and capricious decision-making process, would only appear to compound the problem and not be fair to any of the employees in the Staffing Services Section. The cases which Grievant cite in support of her request for damages can be distinguished in one important manner: in none of those cases wasthe entire decision-making process determined to be flawed as has been determined herein. Therefore, Grievant's request for relief must be denied.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. 143 CSR 1.3.82 defines the term "salary advancement" as "[a] discretionary advancement in salary granted in recognition of the quality of job performance."

2. Further, 183 CSR 1.5.08(a) establishes the basis for which all salary advances are to be awarded to classified employees. The language of this section reads "[a]ll salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance."

3. The language of 183 CSR 1.5.08(a) is ambiguous as written.

4. Upon interpreting the provisions of 183 CSR 1.5.08(a), it is determined that merit raises must only be awarded to classified employees based upon the employee's performance evaluation and/or other recorded measures or indicators of performance.

5. The decision-making process which was used by Mr. Farley, at issue herein, was flawed because his recommendations for merit raises were based upon factors which are not contemplated under 183 CSR 1.508(a). Further, his decisions were arbitrary and capricious as he did not weigh the same factors equally in each case and, as he subjectively compared and contrasted the quality of work of hisemployees, disregarding the employees' performance evaluation scores.

6. Mr. Farley's errors in making recommendations for merit raises among his employees were harmless error as they related to Grievant. Grievant has not shown that she would have been entitled to a merit raise under the theory upon which she rests her case.

Therefore, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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**ALBERT C. DUNN, JR.**

**Administrative Law Judge**

**December 2, 1994**

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Footnote: 1 *This is not to say that it would be unreasonable for an administrator to use these non-merit factors in order to "break a tie." For example, if an administrator has one raise left to award and that raise must be given to one of two employees who have identical performance evaluation scores or other recorded measures of performance, then a decision based upon such non-merit factors as seniority or salary equity would not violate Personnel's regulations because the employee who would be receiving the raise would still have a higher ranking in relation to recorded measures of performance than the other employees with whom he/she was not tied.*

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Footnote: 2 *This administrative regulation states, in pertinent part,*

> *Duties of State Officers: Pursuant to WV Code §29-6-12, all agencies' officers and employees shall comply with and aid in all proper ways in carrying out the provisions of WV Code 2129-6-1 et seq., as amended, the rules, regulations, and orders thereunder. . . . All officers and employees shall comply with all rules, regulations, policies and orders of the Director or the Board and shall not increase nor diminish any benefits afforded any classified employee by such rules, regulations, or orders.*

*Mr. Polan also stated that any employee who had received a salary increase within the last year was not eligible to receive a merit raise. This limitation is also questionable as it may constitutean impermissible decrease in employee benefits. Personnel's regulation, section 5.08(d)* ***only*** *disallows merit raises from being awarded to employees who have had more than* ***two*** *increments in any twelve month period.*