**KENNETH M. FERGUSON,**

**Grievant,**

**v. DOCKET NO. 95-DOH-080**

**DEPARTMENT OF TRANSPORTATION/DIVISION**

**OF HIGHWAYS and DIVISION OF PERSONNEL,**

**Respondents.**

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

Grievant, Kenneth M. Ferguson, filed the following grievance on December 8, 1994:

> During calendar year 1994, there have been two (2) opportunities for employees making $20,000+ to receive "merit" increases. Within the Division of Transportation Planning, such "merit" increases were ultimately granted in an arbitrary & capricious manner contrary to properly established procedures and decisions.
>
> Relief Being Sought: I feel it only proper to receive merit increases in the full amount recommended by my immediate supervisor & approved by my Division Director; note that in one case I received no increase & in the other I received 1/2 of the amount recommended.

The grievance was denied at Levels I and II of the grievance procedure, W. Va. Code § 29-6A-1, et seq., and grievant perfected his appeal to Level III. However, due to some confusion in the Department, a Level III hearing was not scheduled until March 21, 1995. The Level III decision was rendered on April 25, 1995, two days before Grievant's Level IV hearing. The Level III hearingexaminer granted the grievance in part, and denied it in part. The portion of the grievance which was denied is the subject of the Level IV appeal.

The material facts in this case are not in dispute and are set forth below as appropriate findings of fact.

Findings of Fact

1. Grievant is employed in the Long Range Planning Section of the Transportation Planning Division of the West Virginia Department of Transportation ("DOT").

2. On May 18, 1994, Secretary of the Department of Transportation, Charles L. Miller, proposed a Department of Transportation Merit Pay Plan for those employees whose annual salary exceeded $20,000 per year. Secretary Miller's memorandum to all DOT organizations outlining the plan states: "The merit pay plan will provide you with a means of considering a specific number of your most meritorious employees in each of subordinate organizations whose current annual salary meets the above noted ($20,000.00 per year)" and sets forth a salary scale by which raises will be granted. LIII G Ex. 2.

3. The memorandum further states: These raises will be effective June 16, 1994 . . . To guide you in administration of your merit pay plan, please follow these guidelines:

1. Give appropriate consideration to those employees who have not had the opportunity to receive an increase in the past twelve months.

2. Do not consider those employees who have been employed with the agency for less than one year.

3. Return the listing of employees with those to be considered, observing the above guidelines, marked in the space provided, by June 6, 1994, to the Human Resources Division. . . ."

4. Grievant was one of the employees recommended by his superiors for a merit pay increase. LII G Ex. 2.

5. The merit raises became effective on June 16, 1994. Grievant was deemed not eligible to receive a merit increase at that time. LIII G Ex. 2. He first became aware of that fact when he received his next paycheck. LIV, Ferguson. (See footnote 1)

6. On September 30, 1994, Secretary Miller issued another DOT Merit Pay Plan to be effective November 16, 1994, with the following guidelines:

> Increases of 2.5% and 5% may be granted to employees you have found to be meritorious in their job performance. The only restrictions regarding who may be granted a raise are those spelled out in the Division of Personnel Administrative Rule. Specifically, no employee may be granted a salary advancement in excess of 10% within a twelve-month period, and no employee who is at or above the maximum pay for their classification is eligible. . . ." LIII G Ex. 3.

7. Grievant was again recommended by his superiors for the full 5% merit pay increase. LIII G Ex. 3.

8. Grievant received a 2.5% merit pay increase effective November 16, 1994.

## Discussion

Grievant challenged both the June 1994 and the November 1994, merit pay plans in his grievance filed on December 8, 1994. The Level III hearing examiner granted the portion of the grievancechallenging the November 1994, merit pay plan, and awarded Grievant another 2.5% merit increase, bringing his increase up to the total recommended amount of 5%. However, the hearing examiner denied the portion of the grievance challenging the June 1994, merit pay plan, as untimely. Respondent raised the untimeliness issue again at Level IV.

Grievant relies on this Board's decision in Ellis v. W. Va. Div. of Energy, Oil and Gas, Docket No. 91-ENGY-181 (Jan. 13, 1993), for support that his grievance was not untimely. In Ellis, the Grievant filed a grievance in 1991 over merit increases he did not receive as far back as 1986. The ALJ held that, because there was no evidence Grievant was aware that merit raises had been given, either when or to whom, other than a suspicion that others might have received them, the discovery rule in Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990), was applicable.

In the instant case, the June 1994 merit pay plan became effective on June 16, 1994. Grievant testified he first became aware that he did not receive a merit increase as part of that plan when he received his next paycheck sometime in July 1994. Nevertheless, Grievant did not challenge that decision until December 1994. Accordingly, his grievance over the June merit increase in November is untimely.

## Conclusions of Law

1. A grievance must be filed within the times specified in W. Va. Code § 29-6A-4. Because Grievant knew in July 1994, that he had not received a merit increase in June, 1994, but did not filea grievance over the matter until December 1994, Respondent has proven that Grievant failed to file within the time specified by the statute.

Accordingly, this grievance is **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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**MARY JO SWARTZ**

**Administrative Law Judge**

**Dated: May 19, 1995**

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*Footnote: 1* *Testimony from the Level IV hearing will be referenced as "LIV, _____(name of witness)".*