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**DENCIL BOARD**  
**RICHARD WHEELER**

**Docket No. 91-DOH-211**  
**Docket No. 91-DOH-210**

**v.**

**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/  
DIVISION OF HIGHWAYS**

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

The grievants, Dencil Board and Richard Wheeler, filed level four appeals on May 30, 1991. Mr. Board stated his grievance as "I would like to know why that Engle, Lane and Wilson got a merit raise and I didn't. Why so much Favoritism is [shown toward] Drillers and Helpers." Mr. Wheeler's grievance was stated as "I feel the merit raises that were given out were given on favoritism and so is the overtime work. I feel I should get a raise. The overtime work should be given out as equal as possible." Although filed as two separate grievances, these matters were consolidated for purposes of hearing and decision.<sup>1</sup>

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<sup>1</sup>Both grievances were denied at level one and two. A consolidated level three hearing was held on April 15, 1991 and a denial subsequently issued. Each grievant indicated on his level four grievance form that the matter could be submitted on the record below. Counsel for the respondent then requested that the parties agree to and make a part of the record certain  
(Footnote Continued)

The grievants are drillers in the Materials Control, Soil and Testing Division (MCSTD) of the Division of Highways (DOH). In late 1990, the MCSTD of DOH received a limited amount of funds for the purpose of granting merit increases. The granting of merit increases by DOH is accomplished pursuant to several rules, regulations and policies. The West Virginia Division of Personnel Administrative Regulations, at Section 6.09, state in pertinent part that "[a]ll salary advancements shall be based on merit as reflected by service ratings and other recorded measures of performance." The Division of Highways Administrative Operating Procedures, at Volume IX, Chapter 15, Section C (Rev. August 15, 1981) state, in pertinent part, as follows:

MERIT INCREASE POLICY

1. Purpose:

The purpose of this policy is to provide for granting merit increases to a limited number of employees (both hourly and salaried) based upon meritorious performance, while taking into consideration such factors as equitable pay relationships and length of service.

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(Footnote Continued)

The parties were unable to reach such an agreement, the grievances were consolidated on July 16, 1991, and a level four hearing held on August 12, 1991. In late October, 1991, this case was transferred to the undersigned for decision due to the resignation of the administrative law judge who heard the case. The parties were given an opportunity to object to this procedure and did not do so. After review of the level four hearing tapes, it became evident that a malfunction of the recording mechanism had occurred during the level four hearing. This information was communicated to the parties, via their representatives, and an opportunity to supplement the record offered. By correspondence received from the grievants' representative on November 18, 1991, the undersigned was informed that no supplementation of the record was needed. Neither party filed proposed findings of fact and conclusions of law.

2. Performance Appraisal:

There must be a completed current performance appraisal report on file in the Personnel Division for each salaried employee recommended for increase under this policy.

In addition, an employer's decision on merit increases will generally not be disturbed unless the grievant shows by a preponderance of the evidence that the decision is unreasonable, arbitrary and capricious or contrary to law or properly established policies or directives, Osborne v. W.Va. Div. of Rehab. Serv., Docket No. 89-RD-051 (May 16, 1989).

Once respondent was informed that merit money was available, all MCSTD supervisors were instructed to provide recommendations for those subordinates who they believed were deserving of a merit raise. Each recommendation was to be accompanied by a written justification for the candidate.

The grievants' immediate supervisor, Roger Campbell, recommended merit increases for all five of his drillers, including the grievants. His justification, for the entire group, was as follows:

Most of the drillers have been here for a number of years (14-16). Other than the cost of living increases, the only raise they've received was a reclassification from helper to driller. Based on their experience, duties and responsibilities and the hard work involved in all kinds of weather, I believe that the five drillers should be given merit increases. These are Manor [sic] Lane, Rodney Engle, Carl Wilson, Rick Wheeler and Dencil Board. If only part of these men can be given increases they should be given in the order listed.

Mr. Campbell submitted and discussed this justification, as well as the candidates, with his immediate supervisor, Barney Stinnett, head of the geotechnical section of MCSTD.

Mr. Stinnett, who had three supervisors and approximately sixteen employees working for him, then consolidated Mr. Campbell's and the other supervisors' recommendations into one list. In a memorandum to Gary Robson, Director of MCSTD, Mr. Stinnett reiterated Mr. Campbell's comments and added "If we cannot give all the drillers raises due to the available money, I think we should start raising some at a time and would agree with Roger's order."<sup>2</sup> Mr. Stinnett then submitted a total of eleven candidates for merit increases, designating them as follows:

Rated order (by Stinnett)

- |                   |                       |
|-------------------|-----------------------|
| 1. Rodney Ferrell | 7. Dencil Board       |
| 2. Marion Lane    | 8. Glenn Ekelman      |
| 3. Rodney Engle   | 9. Ali Ghayhisar      |
| 4. Roger Campbell | 10. Richard Dickerson |
| 5. Carl Wilson    | 11. Jim Fisher        |
| 6. Rick Wheeler   |                       |

After review by Mr. Robson, only three of the eleven, Marion Lane, Rodney Engle and Carl Wilson, received raises.<sup>3</sup>

These grievances share some factual similarities with Terry v. W.Va. Div. of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991). Mr. Terry was also an employee of MCSTD and was bypassed for a merit increase in late 1990. In Terry it was determined that, for the limited purposes of that decision,

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<sup>2</sup>Although the record is unclear, Mr. Campbell's justification was apparently physically written by Mr. Stinnett in the final memorandum submitted to Mr. Robson.

<sup>3</sup>Mr. Robson received a total of forty-nine recommendations, with written justifications, from his staff. He testified that twenty-five individuals actually received merit increases.

the written justifications submitted by the supervisors to Mr. Robson adequately complied with the procedural requirement, found in the DOH policy, to have current performance appraisals on file for each employee recommended for an increase.<sup>4</sup> The undersigned reaches the same conclusion in the instant matter. However, as in Terry, these written justifications are not substantively adequate to make an objective determination of the comparative meritorious performances of the candidates. In Terry, the ranking of merit candidates by their supervisors was looked to as a more objective indication of the comparative merit of Mr. Terry and other employees ranked lower, who received merit increases. In the instant grievance, however, only individuals who were ranked higher than the grievants received merit increases. The grievants assert that this ranking itself was tainted by favoritism.<sup>5</sup>

The grievants presented testimony that they, and not the three drillers who received merit increases, had the skill and experience to operate both a pavement drill and a CME drill. They testified that they had each been assigned to take over a

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<sup>4</sup>There are references in the record to performance appraisals being completed on behalf of Mr. Board and Mr. Wheeler some time before the merit increases were awarded. However, these appraisals were not made a part of the record and apparently were not used in the selection process for merit increases, so it is presumed that they were not considered current.

<sup>5</sup>Although the grievants use the term favoritism, their position appears to be that they performed as meritoriously as those individuals receiving increases. The grievances will be analyzed on this basis.

drilling project after one of the other drillers had been unable to skillfully complete the job. Both grievants presented testimony that they were extremely safety-conscious, as compared to the other drillers, and had made complaints to their supervisor regarding perceived unsafe practices. They also testified that these complaints had not been well received by Mr. Campbell.<sup>6</sup> In summary, the grievants assert that they are experienced, versatile and safe employees who perform as well, if not better, than the three drillers who received a pay increase.<sup>7</sup>

The respondent does not dispute that the grievants are meritorious employees. In fact, the record supports a finding that all five of the drillers were unquestionably competent in their jobs and, furthermore, were each recommended for merit increases. However, knowing it was unlikely that all of the drillers would be granted merit increases due to the limited amount of funds available, the supervisors based their assessment of merit on more than drilling skills and included such things as completing paperwork in a timely fashion, maintaining

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<sup>6</sup>Mr. Board also conjectured that Mr. Campbell did not like him because he had sought the supervisor's position at the time that Mr. Campbell successfully applied for it.

<sup>7</sup>Much of the evidence introduced by the grievants seemed to focus upon the relative inexperience of some of the other drillers. It is noted that an employee can be learning his or her job and perform very meritoriously in that very process. Further, it seems logical that those who have performed a task the longest, such as the grievants, would gain greater competence through that experience.

cleanliness of the vehicles and the drill room and, generally, a willingness to perform tasks when asked.<sup>8</sup>

While the grievants presented some evidence to refute the respondent's assessment that they did not perform these other tasks as well as or as willingly as the successful merit raise candidates, the thrust of their argument appears to be that, inasmuch as they perform so well as drillers, these other aspects of job performance should not be considered. However, an employer has the discretion to weigh all relevant aspects of an employee's performance when assessing merit. It cannot be said that the respondent was unreasonable or arbitrary and capricious in considering factors other than actual drilling skills in rating the merit of its employees.

The grievants also contend that DOH failed to abide by its own guidelines in granting merit increases inasmuch as the grievants are more senior than the drillers who received raises. While DOH does consider such factors as length of service and pay equity when awarding merit raises, the respondent asserts that these factors are not controlling. The three successful candidates were considered by their supervisors to have rendered, overall, the more meritorious performances. Accordingly, the factor of greater seniority cannot, in itself,

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<sup>8</sup>Mr. Board asserted that his work on the pavement drill did not require him to do as much paperwork as the drillers using the CME drill. However, this assertion does not address whether the paperwork that was required was done in a timely manner, nor does it address the other aspects of performance considered by the respondent.

be deemed to require the respondent to award a merit increase to the grievants.

The undersigned finds that the grievants did not prove by a preponderance of the evidence that they were as entitled to a merit increase as any other successful candidate or that the respondent engaged in favoritism, acted unreasonably or was arbitrary and capricious in its granting of merit increases.

Mr. Wheeler also asserts that the respondent has engaged in favoritism in its disbursement of overtime opportunities. A prima facie test to establish favoritism was enunciated by this Grievance Board in Prince v. Wayne Co. Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).<sup>9</sup> This test requires a grievant to establish:

(a) that he is similarly situated, in a pertinent way, to one or more other employees(s);

(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him;

and,

(c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Once a prima facie showing has been established, the respondent can offer a legitimate reason for its actions. The grievant

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<sup>9</sup>W.Va. Code §29-6A-2(i) defines favoritism, stating it is "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." This definition is the same as that found at W.Va. Code §18-29-2(o), for education employees, and used in Prince.

then has the opportunity to show that this legitimate reason is pretextual.

In the instant case, Mr. Wheeler, as well as Mr. Board, has made a prima facie showing of favoritism in regard to overtime distribution, inasmuch as the respondents' own exhibit shows that each received less overtime than the other drillers.<sup>10</sup>

The respondent contends, however, that no overtime work was available for the pavement drill, the equipment Mr. Board elected to operate. Mr. Board does not dispute this. Mr. Campbell also stated, in regard to Mr. Wheeler's claim, that overtime was assigned to the crews who happened to be working in the area where it was needed and to that extent overtime was somewhat happenstance.<sup>11</sup> He further testified that it was not always possible to determine at the outset of a job whether overtime would be required. Mr. Campbell also noted that Mr. Wheeler at times requested advance notice of overtime work, and such notice was not always possible. And, finally, Mr. Wheeler was medically required to perform only light duty for part of the time period in which favoritism was alleged. This light duty meant he could work no overtime. Mr. Wheeler did not show

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<sup>10</sup>Although Mr. Board did not grieve this issue, the respondent addressed it for both grievants.

<sup>11</sup>The five drillers work jobs all over the state. Mr. Campbell also testified that Mr. Board could receive overtime work on another drill, so long as there was room on the rig. However, since the five drillers are generally working in different parts of the state, it would appear that such opportunity would not arise with great frequency.

by a preponderance of the evidence that these reasons proffered by the respondent were pretextual and so the claim that overtime distribution was the product of favoritism must fail.

In addition to the factual and legal determinations contained in the foregoing discussion and analysis, the following formal findings of fact and conclusions of law are appropriate.

#### FINDINGS OF FACT

1. Dencil Board is a driller employed by the Material Control, Soil and Testing Division of the respondent, Division of Highways.
2. Richard Wheeler is a driller employed by the Material Control, Soil and Testing Division of the respondent, Division of Highways.
3. In late 1990 the Division of Highways received limited funds for the awarding of merit increases.
4. The grievants, as well as the three other drillers with whom they worked, were recommended by their immediate and next level supervisors for merit increases.
5. All five drillers were ranked by the supervisors to show the order in which they preferred merit increases to be granted.
6. Both grievants were ranked lower than the remaining three drillers.
7. Merit increases were awarded to the three drillers ranked one, two and three.

8. The grievants did not receive merit increases.

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. W.Va. Div. of Rehab. Serv., Docket No. 89-RD-051 (May 16, 1989).
2. In a non-disciplinary matter, the grievant must prove the allegations constituting the grievance by a preponderance of the evidence. Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989), and cases cited therein.
3. A prima facie test to establish favoritism requires a grievant to establish:
  - (a) that he is similarly situated, in a pertinent way, to one or more other employees(s);
  - (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him;and,
  - (c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.Once a prima facie showing has been established, the respondent can offer a legitimate reason for its actions. The grievant than has the opportunity to show that this legitimate reason is pretextual.
4. The grievants did not prove by a preponderance of the evidence that the respondent's decision on merit increases

was unreasonable, arbitrary and capricious or contrary to law or properly established policies or directives.

5. The grievants did not prove by a preponderance of the evidence that they were more entitled to a merit pay increase than another employee granted such increase. See Byrd v. W.Va. Div. of Highways, Docket No. 91-DOH-128 (Oct. 8, 1991).
6. The grievants failed to prove by a preponderance of the evidence that the respondents engaged in favoritism in the disbursement of overtime.

Accordingly, these grievances are **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.

  
CATHY RIDER CULHANE  
ADMINISTRATIVE LAW JUDGE

February 28, 1992