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DONALD R. ELLIS

v.

Docket No. 91-ENGY-181

WEST VIRGINIA DIVISION OF ENERGY, OIL AND GAS

DECISION

Grievant Donald R. Ellis has been employed by Respondent West Virginia Division of Energy, Oil and Gas¹ since December 16, 1983, when he was hired as an oil and gas inspector. In March 1991, he filed a level one grievance in which he claimed that Respondent engaged in discrimination and retaliation when it denied him merit raises during time periods in which other inspectors whose work performances were equal to or below his were granted such increases. He attributes this treatment of him to his refusal to perform personal chores for his supervisor on work time and because he filed an ethics complaint against the supervisor in 1990. Grievant also claimed that he only recently learned of his supervisor's dislike of him and that this fact has bearing on why he had not previously filed a complaint on the issue of merit raises and other matters.

¹Subsequent to the filing of this grievance, Respondent was renamed the West Virginia Division of Environmental Protection.

I.

There is little dispute about the underlying facts in this matter.² Grievant was initially hired as an inspector to serve several West Virginia counties. His first work assignments were in Marion, Monongalia, Taylor and Preston Counties. During his tenure he also assisted oil and gas inspectors in additional counties in reclamation efforts while maintaining his workload in his assigned counties. At the time he filed this grievance, Grievant had been responsible for monitoring seven counties; he was also approaching retirement age.³

²Facts have been gleaned from the record and the parties' fact/law proposals. The evidentiary record consists of transcripts/exhibits from the level three and four hearings.

³Some delay ensued over processing this grievance and completing the post-hearing response briefing. Although the grievance was received by the undersigned on June 6, 1991, and acknowledged and set for a June 19 level four hearing on June 6, the hearing was later continued for cause shown. A September hearing was likewise continued; the case was finally heard on October 10, 1991. Afterwards, the parties agreed to a responsive briefing schedule, said submissions to be completed by December 10. However, in January 1992, Respondent submitted a "Memorandum To Clarify Certain Facts" along with an affidavit signed on January 17, 1992, by Ted Streit, Director of Oil and Gas. A telephonic conference among counsel and the undersigned was conducted on January 23. Ultimately, the undersigned agreed to furnish the attorneys with a transcript of the level four hearing and they agreed to resubmit their responsive briefs and to cite the transcript for all references to specific testimony. The second set of responsive briefs were received by March 20, 1992. However, in a March 24 letter, Grievant's attorney objected to the contents of Respondent's response brief. The undersigned responded by letter to the parties on April 1, 1992; thereafter, no further concerns were voiced by either of them.

At all times pertinent to the grievance, Grievant's immediate supervisor had been Robert Stewart.⁴ For some period after the inception of Grievant's employment, Grievant, as well as some other workers, acceded to Mr. Stewart's requests to perform personal chores for him during work hours.⁵ Sometime in 1986, Grievant refused to work for Mr. Stewart in that manner any longer. Thereafter, Grievant never received another merit raise. At the same time, from 1986 through 1991, nearly all of Respondent's similarly-situated inspectors, but not Grievant, received merit raises. Grievant apparently broached the subject of merit raises with Respondent's Oil and Gas Section Director Ted Streit in Spring 1990. On April 23, 1990, Mr. Streit responded by memorandum to Grievant. The memo states, in pertinent part:

Under John Johnson's tenure, two raises were given to particular inspectors. One, in the fall of 1986, and the other in the fall of 1988. . . . At that time raises were not requested for all inspectors, but only for those who. . . [were] doing a meritorious service.

⁴Sometime after March 1991 and before October 10, 1991, Mr. Stewart, who testified on Respondent's behalf at the October 10 level four hearing, retired. Prior to ending his thirteen-year tenure as a State employee, Mr. Stewart's title had been "Supervising Inspector, Section of Oil and Gas - Northern Division."

⁵Grievant cited as examples that he had been asked on several occasions to use a State vehicle in conjunction with Mr. Stewart's personal association with a volunteer fire company and that he and another inspector "pulled" a water pump and fixed the water lines of the pump at Mr. Stewart's home. Grievant also testified that other workers frequently discussed the work they performed for Mr. Stewart such as working for him at the firehouse, building him a shop and working on his daughter's house. This testimony was uncontroverted.

This past year, I asked Bob Stewart to prepare a list of inspectors based on who he felt was doing the best work as an inspector, and who was doing the poorest. After reviewing the list, I then asked the Commissioner how many people in the Division could get raises, and his response was "only those who deserved it." I again reviewed the list and decided that I would recommend the top three on Bob's list for a raise.

I can find no evidence that merit raises have been given to any inspector out of favoritism or any other reason other than the quality of their work.

In May 1990 Grievant also filed an ethics complaint against Mr. Stewart in which he alleged that Mr. Stewart was using employees to perform personal chores for him on work time and also using State vehicles for personal purposes. Grievant again did not receive a merit raise for fiscal year 1990. In addition, he had apparently "grouched" somewhat to some of the clients he served and perhaps to co-workers about the age and, as far as he was concerned, the less than satisfactory condition of his work vehicle and the fact that he had received no salary enhancements for the past several years.

Finally, on or about March 7, 1991, Grievant received his performance evaluation from Mr. Stewart for the 1990 work year; this evaluation reflected a much drastically lower rating than he had been given in any previous year. Although Grievant had been downgraded in four performance areas, Mr. Stewart had merely noted on the evaluation that Grievant needed to improve his attitude toward other departmental employees. The lowered evaluation prompted Grievant, desirous of more favorable pre-retirement wages, to discuss the matter with his supervisor.

During the ensuing March 13 conference,⁶ the subject of the ethics complaint came up and Mr. Stewart remarked, apparently somewhat heatedly, that he had not liked Grievant since 1986. According to Grievant, that revelation prompted him to file the within complaint.

At some point after formally filing his grievance, Grievant also learned that, prior to 1990, Respondent had been subject to a regulation that its inspectors' evaluations be forwarded by Grievant's division director to the Oil and Gas Inspectors Examination Board (IEB)⁷ for review with respect to proposed merit raises; however, Respondent had not complied with the regulation. Instead, the division director bypassed the submission to IEB and tendered merit-raise recommendations, mainly generated by supervisors such as Mr. Stewart, directly to Respondent's Commissioner.⁸ In addition, Grievant discovered that Mr. Stewart had not complied with regulations which require him to note the reasons for downgrading a particular performance area and setting forth a specific plan for improvement if it is determined that improvement is needed. Also, until the release

⁶According to the record, this conference had not been scheduled at any of Respondent's work-sites, but rather a private location, the firehouse in Jane Lew, West Virginia. Mr. Stewart was associated with and highly supportive of Jane Lew's volunteer fire department. T4.78.

⁷The Legislature created the IEB in 1985. In addition to its other tasks, IEB was to conduct qualifying examinations of oil and gas inspector applicants. W.Va. Code §22-13-3.

⁸In October 1990, mandated IEB review of merit recommendations was officially dropped but remained an option.

of the 1990 evaluation (in March 1991), Mr. Stewart had not provided Grievant an evaluation instruction sheet informing the evaluatee of his right to expressly comment in writing, using "specific reasons," if he believed the supervisor's evaluation to be somehow inaccurate.

Some further information is necessary to discuss the merits of the case. Of record is what appears to be a copy of a computer printout which lists "Employee Salary Changes Since 01 July 1988." Although individual names have been blocked out, the list contains information about thirteen employees; the latest entry earmarks the employment of a new employee in August 1991. Ten entries record the salary activity of inspectors whose employment began in 1985 or before. In 1985, any then-employed inspector who was not making \$22,572 had his salary raised to that amount so that all ten inspectors' salaries were equal. On December 1 of that year all received a \$564 across-the-board increase and all were then at the \$23,136 mark.

In July 1986 all but one inspector received what appears to be a \$600 across-the-board increase and salaries remained equal at \$23,736 with the one exception. On December 1, 1986, three employees received a \$1,188 merit increase, one received \$1,191 and six received nothing, including the employee who had not received the \$600 non-merit increase in July 1986. March 1, 1987, brought a "second round" of \$1,188 merit increases. These were awarded to three of the six who had not received the December 1986 increases. In addition, the worker who missed the \$600 across-the-board increase in July 1986 and who also did not

receive the December 1986 merit increase received \$1,788, equalizing his salary with the salaries of the other seven inspectors who received the eleven-hundred-plus-dollar December 1986 or March 1987 increases. Grievant and one other employee had not received a merit increase during the 1986-1987 merit-raise allocations; no other merit raises were processed for the ten inspectors for over eighteen months.

The printout data indicates that from January 1989 through February 1991, only four additional merit raises were granted, two to the same employee and one to an inspector hired in November 1988 and not among the aforementioned ten employees. On January 20, 1989, the employee who received \$1,788 in March 1987 received an additional \$626.18 merit raise. Later that year, on December 1, 1989, the employee who received \$1,191 in December 1986 received a \$623 merit raise. On April 1, 1990, the inspector hired in late 1988 received a \$780 merit increase. Finally, the last merit raise recorded, a \$1,392 increase, occurred on February 15, 1991, and was granted to the same recipient of the December 1989, \$623 award.⁹

In summary, from 1986 through 1991, nearly every worker except Grievant received at least one merit raise, and one received two raises while another received three. A "picture" of the 1986-91 merit raise activity for the several employees would look like this:

⁹It is also noted that two across-the-board non-merit increases occurred in January and August 1990 in the amounts of \$1,200-1,281, and \$1,008, respectively.

#1:	12/1/86	-	\$1,188	#5:	3/1/87	-	\$1,188
#2:	12/1/86	-	\$1,188	#6:	3/1/87	-	\$1,188
#3:	12/1/86	-	\$1,188	#7:	3/1/87	-	\$1,188
#4:	12/1/86	-	\$1,191	#8:	3/1/87	-	\$1,788
	12/1/89	-	\$623		1/20/89	-	\$626.18
	2/15/91	-	\$1,392	#9:	4/1/90	-	\$780

Also of record is Respondent's Exhibit 5 from the April 26, 1991, level three hearing entitled "Comparison of Ratings on Oil and Gas Inspectors." According to that document, Grievant and his named inspector peers, identified herein by letters only, have received the following evaluation ratings over the past five years:¹⁰

<u>Empl.</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>
A.	6.0	6.0	6.4	---	6.8
B.	6.0	6.0	6.0	5.6	7.1
C.	6.0	---	6.0	6.2	6.6
D.	6.0	6.0	6.5	6.4	8.0
E.	6.0	6.0	6.6	6.6	7.8
F.	7.8	7.6	6.0	6.0	7.3
G.	6.0	6.0	6.9	6.6	8.0
H.	6.0	6.0	6.8	6.4	8.0
I.	6.0	6.0	7.6	5.1	7.8
J.	6.0	6.0	6.2	6.6	7.8
Grievant	6.0	6.0	6.8	6.4	5.8

Another exhibit is a graph which seemingly compares Grievant's evaluations from 1986 through 1990 with that of an "Inspector Average" or the collective of "All Oil/Gas Inspectors." The data is somewhat misleading. For example, the graph shows Grievant's score of 6.0 for both 1986 and 1987 to be below

¹⁰The rankings of two employees who were hired in 1988 or later have been omitted.

the "6.16" average of his peers for those years. In reality, according to Respondent's Exhibit No. 5, Grievant's score was exactly the same as that of nine of his peers. Only one employee, "F," scored "high," that is, well over seven and one-half points for the two consecutive years in question; F's score skewed the averages for 1986 and 1987. On the other hand, the graph shows that Grievant's scores of 6.8 and 6.4 are above the averages of 6.53 and 6.17 in 1988 and 1989, respectively. He actually tied with one other inspector for third-place ranking in 1988 and tied with two others for second-place ranking in 1989. In 1990, Grievant's score of 5.8 is the lowest of all the rankings for long-term employees, almost one point lower than any other worker's score, and substantially below the 7.52 average of the other listed workers. It is also noted that Respondent furnished no documentary evidence or other information as to how the merit increases for the unnamed workers relates to the evaluation scores and ranks of the named workers.

Finally, Respondent's Exhibit No. 5 (from the level four hearing) is six separate graphs, for the 1985 through 1990 work years, which seemingly monitors each named inspector's "Activity" for the year. The relevance of the charts and the meaning of the data therein is not entirely clear. For example, it would appear that some inspectors reached a substantially higher numerical value than others. However, there appears to be no correlation between those numbers and the evaluation scores of the various workers over the years. Also, if the activity log signifies some sort of individual accomplishment, without

further information about each worker's overall caseload, number of counties or areas to be covered, proximity from work base to work site and travel time, task impediments such as work vehicle problems and/or breakdowns, complexity of individual assignments and the overall quality of the finished assignments, the data is meaningless.

II.

Grievant contends that he "has been the focus of improper discrimination in employment since 1986" and has been denied due process of law.¹¹ He supports this notion with the following arguments:

- Respondent admitted it has used an improper procedure for annual review of inspector performance and for merit raise recommendations;
- Grievant's supervisor failed to follow the instructions and incorrectly completed the performance evaluation forms;
- Grievant. . .was not recommended for merit raises because he stopped doing personal jobs for his supervisor on state time and because he filed a complaint with the West Virginia Ethics Commission[.]

Grievant further urges that had Respondent submitted his evaluations to the IEB for review as was required, he would have been protected from discriminatory treatment at the hands of his supervisor. Had his supervisor conducted the evaluations properly, Grievant argues, performance deficiencies and

¹¹According to Grievant, he was denied due process because his supervisor failed to afford him a meaningful level one hearing. Respondent counters that Grievant's meeting with Mr. Stewart in March 1991 was not a grievance conference; Grievant had scheduled a meeting to discuss his performance evaluation.

recommendations for improvement would have been listed and defined. Grievant states that because his supervisor did not critically cite his work or recommend ways for him to improve his performance, he came to believe his work was "satisfactory" and that Respondent's failure to grant him a merit raise had been because his "turn" for a merit award had not yet occurred. Grievant seeks redress in the form of "a one-step merit raise for the years 1988 and/or 1989 together with interest on unpaid sums. . . and such other relief as appears appropriate."¹²

Respondent raises a timeliness issue and argues that Grievant's complaint must be denied on the basis of untimely filing. Respondent also contends that Grievant's real purpose in this action is to secure enhanced retirement benefits and that such a grievance is not permitted under the grievance statute.¹³ Further, Respondent denies that Grievant had been denied due process with respect to his evaluations. Finally, Respondent argues that notwithstanding the particular facts of this case with respect to Grievant's supervisor and problems with

¹²Grievant also asked for "his attorney fees and costs expended in processing his grievance." Generally, under Code §§29-6A-1 et seq., the parties are responsible for their own grievance-related costs at the lower levels. In addition, the statute does not provide the Grievance Board with the authority to award attorney fees at level four.

¹³The absurdity of this argument is apparent and does not deserve further comment. Needless to say, any time an employee seeks a wage adjustment and prevails, his or her retirement benefits will be affected. Surely, Respondent is not suggesting that State employees are not permitted to file wage-related claims when they are close to retirement and/or that the Grievance Board is without authority to rule favorably on such claims.

evaluations and merit recommendations, Grievant has not demonstrated the exceptional service required for the awarding of a merit raise and that the grievance must be denied on that basis.

In response to Respondent's claim that he had not timely filed a grievance with respect to past merit raises, Grievant argues that, under the circumstances, he should benefit by the "discovery rule exception to the time limits for instituting a grievance" discussed in Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W.Va. 1990), and also applicable to his situation under Code §29-6A-4. Grievant asserts that he has filed his complaint about merit increases within ten days "of the day of which the event became known to. . .[him]." The incident which prompted Grievant to initially file a complaint was his drastically-reduced 1990 performance evaluation rendered by Mr. Stewart. According to Grievant, the "fact" which led him to believe that he had been subject to possible disparate treatment with regard to merit raises and possibly other aspects of his employment was Mr. Stewart's revelation at the level one hearing that he had disliked Grievant since 1986. Grievant urges that he is therefore justified in adding to his claim that Respondent wrongfully failed to provide him with merit raises based upon Mr. Stewart's long-standing ill-will towards him and based on the fact that he only learned of this after he filed a grievance and/or contested his 1990 evaluation.

III.

For reasons more fully set forth below, the undersigned must conclude that Grievant had been wrongfully denied merit

increases and that his 1990 evaluation had been lowered without cause, said actions apparently motivated by retaliation. Moreover, Respondent's defense that Grievant untimely filed a grievance over the matter of merit raises is rejected; therefore, Grievant is entitled to some form of relief.

Under the circumstances of this case, Grievant is entitled to the benefit of the discovery rule discussed in Spahr as a basis for tolling his time to file a grievance about not receiving a merit raise from 1988 until the date he did file a claim in March 1991. Obviously, while Grievant knew that he had not received a merit increase for a number of years and probably suspected that other inspectors had, he had no specific information about when and to whom such increases had been granted. The arguments that Respondent makes about this matter, for example, that such information is a matter of public record and that, in any event, Grievant did not ask for a merit raise for himself until recently is not persuasive.

First, administrative notice can be taken that it is not common practice for State employees to request merit increases. Certainly no formal procedure has been established for these workers to petition their employers and to justify their belief that they are entitled to such salary increases of which the undersigned is aware. Moreover, most employees would not know when such raises are available or how to obtain information about their peers' salaries or recently-granted merit increases. Again, the undersigned is not aware of any State-disseminated information about this topic. In any event, Grievant did seek

information about merit increases. Seemingly, when he inquired in 1990 about the issue of merit raises, he received misleading information from Mr. Streit. When the information provided in Mr. Streit's 1990 memo about merit increases is compared to the printout data supplied by Respondent in 1991, it is obvious that merit raises had been granted in far more instances than those about which Streit reported to Grievant.

Furthermore, based on the third paragraph of the 1990 memo, it is easy to see why Grievant could have been misled into believing that nothing was amiss with respect to merit awards. In fact, Grievant would have had no basis or reason to file a claim until after he knew of Mr. Stewart's intense dislike for him. As for Mr. Stewart's disclosure to Grievant in 1991 that he had disliked him (Grievant) since 1986, it is true that that information cannot be construed as the grievable event. However, such a revelation could certainly give rise to suspicions on Grievant's part that he had been the subject of some type of disparate treatment with respect to merit increases due to retaliatory motivations.¹⁴ Another problem in this case is that Grievant had had no means to gather the necessary and confidential personnel information upon which to file a claim until after the claim had been filed. Thus, it cannot be said that Grievant possessed all of the operative facts of his claim or

¹⁴At the level four hearing, Mr. Stewart did not deny that he had also threatened Grievant at the March 1991 meeting in the firehouse because of the ethics complaint Grievant had filed in 1990, although Stewart did say he had uttered the remark "when everybody was mad." T4.90.

was in any position to possess all of the facts until after the claim had been actually filed and Respondent had been compelled to provide him with specific and exact information about past merit increases.

The merits of the case can now be discussed. While Respondent would have the undersigned ignore its violations of rules and regulations controlling the employee evaluation and merit-raise processes, it is well settled that an administrative body such as Respondent must follow any procedures it properly establishes to conduct its management affairs. See Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977). In addition, "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'n of Rehab. Ser., Docket No. 89-RS-051 (May 16, 1989).

Grievant herein has established that Respondent failed to follow the mandated procedure for IEB review of employee performance and merit raise recommendations. He has additionally shown that Respondent also wrongfully excluded him from receiving a salary hike during the late 1986 and early 1987 merit-raise allocations and in at least one year beyond. The record confirms that at one time or another during the entire 1986-1991 time period, Grievant was equally or more entitled to a merit pay increase than other employees granted such increases. Respondent acted arbitrarily in not granting Grievant a merit pay increase over the years when others were granted such

raises. See Terry v. W. Va. Div'n of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991).¹⁵

Among other things, Grievant had been slighted in the 1986-1987 merit increases for no apparent good reason. While Respondent asserted that all merit raise recommendations and awards had been based upon meritorious service, the evidence indicates otherwise. As was shown on Respondent's charts and graphs, Grievant's evaluation score and rank for 1985 and 1986 were the same as all but one of the other inspectors' scores. One must conclude that the inspectors were given raises in 1986-87 in two installments; the members of one group had to await their "turn" for the next "round" of awards several months later. Additionally, Grievant's evaluations for 1988 and 1989 were above the average scores of his peers, but he was not granted a merit raise following either of those years. Further, Respondent presented no evidence from Grievant's peers which would tend to support Mr. Stewart's directive on the 1990

¹⁵The factual situation in Terry is somewhat similar to that presented herein. For example, the grievant in Terry alleged, among other things, that although others had been recipients of available merit increases since 1986, the respondent had not granted him a merit increase during that time; that he had been the victim of unfair and discriminatory treatment; that others less worthy than him had gotten raises; and that the respondent had not followed its own policy with regard to merit increases. It is also noted that the administrative law judge who decided that case declined to address the distinctions between favoritism and discrimination; in fact, those two charges were not specifically addressed at all. The undersigned has also determined that, for the purposes of this decision, it is unnecessary to address the similar charges found in the present case.

evaluation that Grievant must improve his working relations with his co-workers.

In fact, Respondent could not articulate any credible reasons why Grievant's performance assessment had been lowered in four areas for 1990. Respondent, in effect, accused Grievant of wasting work time when he groused to others about his dissatisfaction with his aged and less-than-reliable work vehicle and that others had received new ones. In an effort to justify the downgraded 1990 evaluation, Respondent urged in its brief that Grievant had "used official time to discuss his personal efforts for personal benefits." The only evidence of record establishes that Grievant's performance had not declined during the time in question.

Olin Shockey, a private sector businessman who ran a "well service" in the "oil patch," testified that, until a recent personnel change, Grievant had regularly inspected his well sites. He spoke highly of Grievant's work performance during the time periods at issue herein. He also stated that he did recall a meeting with Mr. Stewart and the inspector who was to replace Grievant. When asked by Grievant's counsel if Mr. Stewart had invited him at that time to file a complaint against Grievant, Mr. Shockey replied that he "stopped the situation before it really started" because he had "nothing bad to say about [Grievant]." See T4.69-75.

Mr. Shockey appeared to be a credible and unbiased witness although he seemed somewhat ill at ease at being placed in a position in which he had to "choose sides" in this controversy.

However, Respondent instead relied heavily upon Mr. Stewart's perceptions about Grievant's allegedly poor use of work time. In short, Mr. Stewart's testimony was not persuasive. Indeed, it was Mr. Stewart who indisputably used publicly-paid employees' work time and State equipment for his own personal benefit. Mr. Stewart's declaration that others were doing what he was doing and that he ceased his questionable practices after West Virginia passed an ethics law does little to salvage his credibility on the issue of whether he allowed his personal dislike for Grievant to distort his professional judgment about Grievant's work and Grievant's right to be fairly evaluated and considered for merit increases.

The appropriate remedy in this case is another matter. Grievant concedes that W.Va. Code §29-6A-11 precludes him from raising a claim which involves employer wrongdoing prior to the effective date of the State employees grievance procedure.¹⁶ Thus, Respondent's wrongful failure to grant Grievant a merit raise when his "turn" should have come up during either the first and second "rounds" in December 1986 or March 1987 cannot be used as a basis to grant Grievant relief in the form of a retroactive merit increase. However, the evidence of this treatment is material because it establishes the roots of what was to become an ongoing pattern of Respondent's refusal to

¹⁶According to Code §18-29A-11, Article 29-A applies "to all grievances arising on or after the effective date of this article," July 1, 1988, and also to cases pending in the "civil service grievance system on the effective date of this article."

properly consider Grievant for merit increases. That is, Grievant has established a continuing practice of disparate treatment on Respondent's part with regard to merit increase awards.

While Grievant may not recover for losses incurred prior to July 1988, it is determined that he is entitled to a retroactive merit raise as relates to the January 20, 1989, merit raise awards. Presumably central to the consideration for merit raises at that time was Grievant's 1988 performance evaluation.¹⁷ Grievant's score for that year was above average. In addition, he tied for third-place ranking along with one other employee. Therefore, Respondent must grant the retroactive merit increase, adjust Grievant's present salary and provide him with back wages and interest.

Grievant also tied for second ranking along with two other workers in the 1989 evaluations. Therefore, he is entitled to a fresh consideration of his eligibility for a merit increase given in the April 1, 1990, allocation.

¹⁷While Respondent presented evidence which established that there had been several "freezes" on merit raise awards at various times from 1986 through 1988, it provided no details surrounding those occasions when it did grant merit increases over the years in question. The only information provided was that, on one occasion, Mr. Stewart was asked by Mr. Streit to submit the names of all of his workers and to rank them from best to worst. Stewart apparently submitted a list which contained only five names, those persons to be considered for a merit increase. Thereafter, according to Mr. Streit, he heeded Respondent's Commissioner to recommended only the "best" workers, and for whatever reason, Streit submitted the names of only the top three persons on the list.

Finally, Grievant is also entitled to a re-evaluation for the 1990 work year by an impartial party. It is not only apparent that Grievant's rock-bottom 1990 evaluation score has not been justified by Respondent, it is also evident that Grievant's low score is unrealistically out-of-line with the heightened scores of other workers for no apparent reason. While Mr. Streit testified that performance evaluations for all inspectors declined for the 1990 year, the evidence does not bear that out. In fact, in 1990 nearly all employees gained rating points and the gains surpassed all of those shown for four prior years. Averages had never climbed higher than 6.5 in those four past years; in 1990 the average escalated to over 7 points while Grievant's score plummeted to the bottom of the ratings. Therefore, Respondent must reassess the 1990 evaluation and then determine whether Grievant's recalculated score would entitle him to a merit raise for the February 15, 1991, allotment.

Should Respondent determine that Grievant was entitled to a merit raise for either 1990 or 1991, it must award such raises retroactively and adjust Grievant's salary accordingly and pay the proper back wages with interest. If Grievant has, indeed, retired by this time, Respondent must also adjust Grievant's retirement wages to the proper amount.

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 made.

Findings of Fact

1. For some period prior to 1986, Grievant's supervisor, Robert Stewart, had asked Grievant and some other workers to perform personal chores for him during work hours. Grievant complied until 1986; he then refused to work any longer for Mr. Stewart in that manner. Mr. Stewart claimed that he ceased the practice of using workers for personal gain after the State passed an ethics law.

2. From 1986 through 1990, almost all of Respondent's long-term oil and gas inspectors, but not Grievant, received merit raises. Moreover, Respondent offered no credible explanation with respect to a 1988 hiree being granted a merit increase after two years' service.

3. Grievant filed an ethics complaint against Mr. Stewart in 1990. When Grievant received his 1990 evaluation in 1991, he found that Mr. Stewart had substantially down-graded his performance evaluation.

4. Respondent provided no credible evidence to support a down-grade in Grievant's evaluation from 6.4 points in 1989 to 5.8 points in 1990 while raising the levels of nearly all other long-term workers to a never-before overall high of over 7.1.

5. Prior to 1990, Respondent was subject to a regulation that its employees' evaluations be forwarded to the Oil and Gas Inspectors Examination Board (IEB) for review with respect to proposed merit raises. Respondent did not comply with the regulation; Respondent's Director instead bypassed the

submission to IEB and submitted merit-raise recommendations directly to Respondent's Commissioner.

6. Mr. Stewart also failed to follow regulations when he conducted Grievant's performance evaluations in that he did not cite reasons for downgrading performance areas or list recommendations for improving performance. Prior to 1991, the year the 1990 evaluations took place, Mr. Stewart also failed to give Grievant an evaluation instruction sheet which outlines the ways and means to contest the evaluation.

7. Grievant had no way of knowing precisely when merit raises had been granted or to whom during the 1986 - 1991 time span and prior to filing this grievance in 1991. When Grievant inquired of the matter in 1990, he was given misleading and inaccurate information about past merit increases.

8. During an evaluation conference between Grievant and Mr. Stewart, Mr. Stewart revealed that he had disliked Grievant since 1986.

9. Grievant filed a grievance with respect to his 1990 evaluation; he raised the additional issue of being bypassed for merit raises after Mr. Stewart revealed his long-standing dislike for him and could not justify the downgraded evaluation.

Conclusions of Law

1. "An administrative body must abide by the . . . procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

2. 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'n of Rehab. Ser., Docket No. 89-RS-051 (May 16, 1989).


3. Respondent did not abide by all of its regulations and directives which serve to ensure that all workers are properly evaluated for work performance and considered for merit raise awards.

4. Respondent acted arbitrarily in not granting Grievant a merit pay increase over the years when other similarly-situated workers with equal evaluations were granted such raises. See Terry v. W. Va. Div'n of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991).

5. The reasoning in Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W.Va. 1990), and the discovery rule exception contained in W.Va. Code §29-6A-4(a) are applicable because Grievant had had no basis prior to March 1991 to conclude that he was the object of his supervisor's ongoing rancor and disparate treatment; moreover, he had been without means to obtain the necessary and correct information about when and to whom Respondent had granted merit increases from 1986 through 1991.

Accordingly, the grievance is **GRANTED**, and Respondent is Ordered to provide Grievant with a one-step merit increase retroactive to January 20, 1989, and other relief consistent with the directives herein.

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. And 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.


NEDRA KOVAL
Administrative Law Judge

Date: January 13, 1993