

Otherwise, performance evaluations for merit increases were discretionary with the supervisor based on performance criteria developed by the supervisor, as were the amounts of increase to be granted.

CONCLUSIONS OF LAW

The parties have raised issues concerning the allocation of the burden of proof and the question of whether or not the denial of the merit increase was an abuse of discretion, as well as whether or not the Department complied with statutory requirements for administering merit pay increases. We conclude that the Department failed to comply with statutory requirements for the administration of merit pay increases. Inasmuch as we would reach this conclusion regardless of the allocation of the burden, we do not reach that question. Because we find that the Department failed to develop criteria for performance evaluation in accordance with statutory requirements we do not feel there is a sufficient basis to determine whether the Department adequately evaluated Appellant's performance for merit increase purposes, and we do not reach this question either.

The legislature has set out rather specific provisions concerning merit increases:

S. 16.086 (5) (a) (1). Increases shall be granted only on the basis of meritorious service and not for longevity, employee need, or for other similar reasons. The Director shall establish rules for assuring that state departments follow procedures which promote this end, including therein the use of employe work planning and progress evaluations and such other measurements as may be required. (Emphasis supplied.)

In response to this explicit directive, the Director has promulgated Wisconsin Administrative Code S. Pers. 5.03 (6):

(a) Policy. The State's policy on merit increases is to establish a system of evaluation through performance standards consistent with good personnel management

practices so that merit increases may be granted solely in recognition of and to encourage meritorious service, and provide justification to the employe for either the award or denial of merit increases.

- (b) Application. Each department shall adopt a plan for the distribution of merit increases to accomplish the legislative intent and the policy expressed in this rule. (Emphasis supplied.)

The "plan" for merit increases utilized by the Department of Revenue had no written criteria for performance evaluation. Because it is so unclear what was actually communicated verbally to the supervisors, it is questionable that the Department's operation even qualified as a "plan" as that term is commonly used, as, for example, something that could be approved by the Director as required by Wisconsin Administrative Code S. Pers. 5.03 (6) (c). In any event, the plan left performance evaluation and determination of the amount of increase to the discretion of the supervisors, and to the standards and criteria developed by each one, and made no attempt to provide justification to the employee for the award or denial of an increase. This is graphically illustrated by the following testimony of the Department Personnel Director, T. Pp. 117-118:

- Q Now, is there any standard other than consistency----Let's say is there any standard at all by which he's to make the determination as to what he will give out and what he won't other than the rule about no more than ten percent can receive two steps?
- A I think there is a basic understanding that probably carries over from our past system, that if an employe is performing in the manner expected and required, that he'll probably get 80 percent of his step. But this is flexible. That is not a hard and fast rule.
- Q First of all none of this is written down. There isn't any rule that says if he's performing at par, that he gets 80 percent?
- A No.

Q And I take it there is no standard which says how to judge whether he's performing adequately?

A Nothing. No. No written directive.

Q What about even orally or in practice.

A, Well, again it would get back to the general motive of operation of supervisors in being able to evaluate employe's performance as to whether or not he felt that employe was performing to standards that he had prescribed for employes in his unit or for specific program functions.

Q Now, how would an employe know what the standard that was prescribed was?

A Well, that would vary.

Q Let's take Mr. Prey's case. You've already told us that the merit evaluation---Strike that. That the management by objectives evaluation and the rest of that has nothing to do with the merit increase, so that the supervisor of Mr. Prey is going to make a judgment as to his performance, whether he's performing up to whatever he's expected to do. How would Mr. Prey know what he was expected to do so that Mr. Prey could then once that judgment is made, have been able to look at what he's expected to do and what he had and say and make his own judgement about whether he agreed or disagreed.

A An employe would be expected to do the work assigned to him, and should he be advised that he did not get a merit increase, it would be up to him to consult with his supervisor as to the reason for it.

Q But the burden is placed upon the employe to find out what the reasons were. Or is there any rule that says the supervisor must give him reasons for turning down his merit increase?

Q No, there is no requirement that he communicate that reason to him, but he should be able to discuss it with him if the employe requests.

(Emphasis supplied.)

Not surprisingly, and to illustrate the lack of a uniform understanding by management of the administration of the merit increases,

the record reveals a diversity of opinion about various facets of Appellant's evaluation process. For example, the Appellant's immediate supervisor testified as follows:

Vice-Chairman Julian: Was - Did you regard this denial of that merit increase as a penalty for failing to obey your orders to come up with some recommendations and to change the present system that they then had for evaluating the airlines?

Witness: I didn't count it as a penalty, but since I considered it part of the supervisor of the unit's job to be looking for better ways, I had anticipated some suggested improvements and received none. So I was disappointed in his performance. I didn't look upon it as a penalty. T. P. 59.

The witness later testified on the same subject:

. . . looking at the time the merit increase question came up, I analyzed his work in the past year and determined initially that perhaps a small \$10 was due. But in discussions with Mr. McCanna, he and I did then agree that since he was a supervisor at a range 18 and had the responsibility of developing the procedures and techniques used, he had failed in the face of repeated attempts by both he and I to make Merle aware of what we wanted, that he should get no merit increase. T. P. 128.

Mr. McCanna, Mr. Holmes' supervisor, testified concerning this matter as follows:

Oh well, as head of the unit, I consider an assessment of the functions and compliance with the functions in the manner directed as to be absolutely essential to my assessment constitutes adequate performance of the duties of the office. And he was not complying with that so he was not adequately performing the duties of his office. T. P. 154.

Because of the explicit legislative directions found in s. 16.086 (5) (a) (1), expanded on by the Director in Wisconsin Administrative Code S. Pers. 5.03 (6) (b), the question presented

on this record cannot be reduced to whether or not the Appellant was doing a "good or bad" job during the time in question. The legislature directed that merit increases be administered pursuant to administrative rules that will "assure" that agencies follow procedures that promote the end of awarding merit increases on the basis of meritorious service. The Director's rules require a plan of evaluation through performance standards to accomplish the same end and also to provide justification to the employee for the grant or denial of the increase. The Appellant is entitled to a determination of his merit increase in a manner that conforms with these requirements. Ad hoc determinations by supervisors applying self-developed standards do not conform to these requirements. This is so regardless of whether or not the performance evaluation is correct in an absolute sense. Compare Morton v. Ruiz, 415 U.S. 199, 94 S. Ct. 1055, 1072-1073, 39 L. Ed. 2d 270 (1974):

The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress . . . This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation . . . but also to employ procedures that conform to the law . . . No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of the funds. (Emphasis supplied.)

An ad hoc determination followed by a flat notice of denial also falls far short of a "plan" which serves to "provide justification to the employee for either the award or denial of merit increases," and the basic deficiency in this approach to the matter is certainly not cured by the fact that an employee can request the supervisor to explain as best he or she can the reason or reasons for the denial.

We conclude that the Respondent's position on this grievance must be rejected and that the Appellant is entitled to have his merit increase for the period covered in his grievance determined in accordance with S. 16.086 (5) (a) (1), Wis. Stats., and Wisconsin Administrative Code S. Pers. 5.03 (6) and other legal requirements. If Respondent does not make this determination then Appellant is entitled to the relief sought in his grievance.

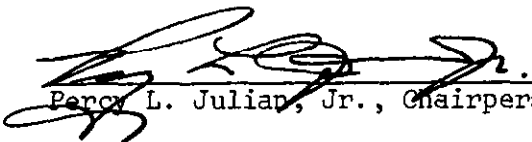
ORDER

IT IS ORDERED that Respondent's position on this grievance is hereby rejected and the matter is remanded for further proceedings not inconsistent with this opinion.

IT IS FURTHER ORDERED that Respondent report to the Board within fourteen days of the date of this Order what steps have been taken to comply with the Order.

Dated August 29, 1975.

STATE PERSONNEL BOARD


Percy L. Julian, Jr., Chairperson