MICHAEL A. WAUGH, .

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Grievant, .

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v. . Docket No. 94-EP-096

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WEST VIRGINIA DEPARTMENT OF COMMERCE, .

LABOR AND ENVIRONMENTAL RESOURCES .

/ OFFICE OF WASTE MANAGEMENT, .

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Employer. .

D E C I S I O N

Michael Waugh (hereinafter Grievant) is an employee of the West Virginia Division of Natural Resources but has been working for the Division of Environmental Protection, both divisions of the West Virginia Department of Commerce, Labor and Environmental Resources (hereinafter Respondent). He filed this complaint against the Office of Waste Management, which is within the Division of Environmental Protection, pursuant to the provisions of W.Va. Code §29-6A-1 et seq., on January 7, 1993, challenging the fact that he had not received a merit raise salary increase which had been recommended on his behalf by an administrator at the Office of Waste Management. The level one evaluator ruled thatGrievant's request was beyond his authority to award, thereafter, an appeal was made to level two on January 20, 1993. At that level, the answer provided Grievant was that his request was again beyond the evaluator's authority to grant. As of March 4, 1994, Grievant and Respondent agreed to a written set of stipulations of fact which was to be used for purposes of developing the record for appeal to level four. These stipulations are accompanied by various documents determined to be relevant to the legal issue at hand. By letter dated March 7, 1994,

Grievant informed David C. Callahan, Director of the Division of Environmental Protection, that he wished to proceed with his grievance to level four pursuant to Code §29-6A-3 because level four is the only procedural level vested with the authority to grant the relief he seeks. By letter dated March 15, 1994, Mr. Callahan concurred with Grievant's request to file at level four.

This Grievance Board received Grievant's appeal via letter dated March 18, 1994, wherein he requested that a decision be based upon the record currently existing. This request was honored and both parties were given the ability to file written briefs in support of their legal positions. Respondent, through counsel, filed with the Undersigned its Proposed Findings of Fact and Conclusions of Law on April 18, 1994. Within this brief, Respondent asserts that the West Virginia Division of Environmental Protection is not a proper party to this action, and therefore, Grievant's claim should be dismissed for his failure to state a claim upon which relief may be granted and for failing to pursue aclaim against the proper governmental entity. Respondent's brief will be treated as a Motion to Dismiss.

The stipulations of fact entered into between the parties, and the documents enclosed with those stipulations (exhibits), constitute the only evidence which can be considered for purposes of this Decision; therefore, the stipulations have been adopted by the Undersigned as appropriate findings of fact in this case with additional findings of fact having been deduced from the exhibits presented. The stipulations are set forth below in their entirety.

Parties' Stipulations of Fact

1. On August 15, 1988 DNR Law Enforcement and DNR Waste Management entered into a memorandum of agreement that resulted in Sgt. M. A. Waugh being assigned to investigate violations of the West Virginia Hazardous Waste Management Act.

2. This memorandum of agreement is still in force to date.

3. H. Michael Dorsey, an Assistant Chief for the Office of Waste Management, conducts Sgt. Waugh's annual service rating evaluation, reviews his work, makes his assignments, and approves both sick and annual leave, among other tasks.

4. The Office of Waste Management is the state agency, organization, department or unit of government that utilizes Sgt. Waugh's work product or services.

5. In March 1991, the Office of Waste Management granted Sgt. Waugh a merit salary advancement based on meritorious performance.

6. On or about September 1992, H. Michael Dorsey recommended Sgt. Waugh for a merit salary advancement via a written recommendation prepared by himself.

7. This recommendation for merit salary advancement was based on Sgt. Waugh's meritorious performance.

8. H. Michael Dorsey also recommended two other employees at the same time and in the same manner for merit salary advancement.

9. H. Michael Dorsey also assigned a ranking to each of the three individuals recommended for merit salary advancement based on how meritorious their job performance was.

10. Sgt. Waugh's performance was ranked as the most meritorious.

11. Prior to September 1992, H. Michael Dorsey, G. Maxwell Robertson, and Richard Hall held a meeting.

12. On December 28, 1992 Sgt. Waugh was notified that he would not be receiving the merit salary advancement for which he had been recommended.

13. The other two employees who had been recommended for merit salary advancement at the same time as Sgt. Waugh, but who were ranked below Sgt. Waugh, received their merit salary advancements, based solely on the recommendation made by H. Michael Dorsey.

14. One reason given for Sgt. Waugh not receiving the merit salary advancement for which he had been recommended was that Senate Bill 18/WV 20-7-1c prohibits merit salary advancements for conservation officers.

15. Another reason given for Sgt. Waugh not receiving the merit salary advancement for which he had been recommended was that if Sgt. Waugh's salary was advanced, it would affect the salaries of all people in DNR Law Enforcement (see attached memo dated 12/22/92).

16. No other reason exists for the denial of the merit salary advancement which was recommended for Sgt. Waugh.

17. Neither the reasons cited previously in numbers 15 and 16 were considered for any other employee recommended for a merit salary advancement.

18. Merit salary advancement for Sgt. Waugh or any other employee has no positive or negative effect on any other employee's salary in OWM.

19. G. Maxwell Robertson, Chief of the Office of Waste Management, concurred and approved H. Michael Dorsey's recommendation of Sgt. Waugh's for a merit salary advancement.

20. Except for Sgt. Waugh, no recommendation for merit salary advancement by H. Michael Dorsey has ever failed to be placed into effect.

21. Sgt. Waugh's salary has directly reflected the denial of this merit salary advancement to the present date.

22. This most recent recommendation for merit salary advancement is based on Sgt. Waugh's continuing meritorious performance.

23. On or about January 7, 1993 Sgt. Waugh filed a level 1 grievance over the misapplication of state statute and nonmeritfactors considered in acting upon his recommendation for merit salary advancement.

24. On or about January 14, 1993 H. Michael Dorsey responded to the level 1 grievance.

25. On or about January 20, 1993 Sgt. Waugh appealed H. Michael Dorsey's level 1 decision to level 2.

26. On or about January 27, 1993 DEP advised DNR that the conservation officers assigned to DEP were to be removed from the DEP payroll and transferred to the DNR payroll effective February 15, 1993.

27. On or about February 1, 1993 by mutual agreement between Sgt. Waugh and G. Maxwell Robertson, this level 2 grievance meeting has been continued to the date undersigned.

28. On or about January 4, 1994 Sgt. Waugh requested that the level 2 grievance meeting take place.

29. On or about January 10, 1994 DEP decided to take steps to transfer the conservation officers on the DEP payroll (see attached minutes of meeting).

Additional Findings of Fact

30. Colonel Richard M. Hall, Administrator of DNR's Law Enforcement section disapproved the recommendation that Grievant be given a merit raise.

31. Grievant' salary at all times pertinent hereto was $23,604. The amount of the merit raise recommended for Grievant was $2,124.00.

Discussion

First, Respondent's Motion to Dismiss shall be addressed. W.Va. Code §29-6A-2(i) defines the

term "grievance," in pertinent part, as

> any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violations, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; . . . (emphasis added).

"Employer" is defined in subsection (g) as "that state department, board, commission or agency utilizing the services of the employee covered under this article." For purposes of the grievance procedure statute, Grievant can be considered an employee of the Division of Environmental Protection because this is the state agency which utilized his services during the time period in question. Further, Grievant has always been an employee of the Department of Commerce, Labor and Environmental Resources during his tenure both within the Division of Natural Resources and the Division of Environmental Protection as those Divisions are within said Department.

The grievance procedure was not intended to be a technical and legalistic "nightmare" whereby employees are precluded from having their complaints addressed and disputes resolved on the basis of technicalities. See e.g., The Fayette County Bd. of Educ. v. Lilly, 403 S.E.2d 431 (W.Va. 1991). Although Code §29-6A-4 does contain various procedural time frames and filing requirements, itdoes not establish narrow pleading requirements governing against whom grievances may be filed. According to Code §29-6a-4(a), a grievant must file a written grievance with his/her immediate supervisor within ten days of the occurrence of the event upon which the grievance is based. However, at level two, the grievant may file his/her claim with "the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board commission or agency." (Emphasis added).

In this case, Grievant filed his grievance at level one and appealed through level four, naming as a party the state division utilizing his services, an "appropriate subdivision of the [D]epartment" of Commerce, Labor and Environmental Resources. It is determined that Grievant, at the very least, has substantially complied with the requirements of Code §29-6A-1 et seq., in prosecuting his grievance through the lower levels. See generally, Duruttya v. Bd. of Educ. of Mingo, 382 S.E.2d 40 (W.Va. 1989). Respondent's Motion to Dismiss is **DENIED** and the merits of Grievant's claim may now be discussed.

Grievant contends that the recommendation made by Mr. Dorsey was improperly denied by Colonel Hall for the following reasons: (1) Said denial was based upon a misinterpretation of W.Va. Code §20-7-1; (2) Said denial was not based upon merit factors; (3) The denial amounted to an act of discrimination as the other employees who were recommended by Mr. Dorsey to receive a merit raise did receive such a raise in salary; (4) Colonel Hall's action was inviolation of the agreement entered into between the Division of Waste Management and the Division of Law Enforcement. (See footnote 1) At no time has Respondent articulated a defense to Grievant's legal claims.

W.Va. Code §20-7-1c (1991) establishes minimum salaries (base pay) for the various ranks of both supervisory and nonsupervisory employees within the law-enforcement section of the Division of Natural Resources. In addition to these minimum salaries, subsection (d) states "Nothing in this section shall prohibit other pay increases as provided for under section two [§ 5-5-2], article five, chapter five of this code." Code §5-5-2 is the statutory provision which provides for state employee incremental salary increases based upon years of state service. In Code §5-5-2, the following language is found: "This article shall not be construed to prohibit other pay increases based upon merit, seniority, promotion or other reason, if funds are available for such other pay increases . . .. " Upon reading Code §§ 20-7-1c and 5-5-2 in pari materia, it is concluded that Code §20-7-1c specifically allows for merit raises to be given to supervisory and nonsupervisory conservation officers. Respondent's reliance upon Code §20-7-1c for the proposition that conservation offices are noteligible for merit raises is in no way supported by the language of this section which simply establishes minimum but not maximum salary levels. The denial of the recommendation that Grievant be awarded a merit raise on the basis that this statutory provision prohibits such is based upon a misinterpretation of the statute and is legal error.

The second reason given for the administrative decision at issue herein is that Grievant's receipt of a merit raise would adversely affect the salaries of all of the other conservation officers holding the same rank as Grievant. Again, this argument is not supported by a reading of the applicable statutory language as it does not mandate that each officer within each rank must make the same salary for his/her tenure within that rank. Code §20-7-1c establishes minimum hiring salaries and not maximum salaries.

The major concept behind the awarding of merit raises is that hard-working, conscientious and productive employees can be rewarded for their service. Respondent's assertion that a merit raise

award to one employee would negatively affect the other employees is not consistent with the purpose behind the issuance of merit pay raises. The common thought is that if merit raises are available, then all employees will strive to work efficiently and effectively in order to qualify for such raise. This concept should not create a negative atmosphere within a working environment. This third offered reason as to why Grievant's merit raise recommendation was not approved is also unreasonable and not supported by any reference to law or basis in fact.

The foregoing discussion of the facts of the case and of the law applicable to those facts is hereby supplemented by the following appropriate conclusions of law.

Conclusions of Law

1. W.Va. Code §20-7-1c (1991) establishes minimum salaries (base pay) for the various ranks of both supervisory and nonsupervisory employees within the law-enforcement section of the Division of Natural Resources.

2. Code §5-5-2 provides for state employee incremental salary increases based upon years of state service. Upon reading Code §§ 20-7-1c and 5-5-2 in pari materia, it is concluded that Code §20-7-1c specifically allows for merit raises to be given to supervisory and nonsupervisory conservation officers.

3. Respondent's offered reasons as to why the recommendation made for Grievant to receive a merit raise was denied are determined to be legal error and arbitrary and capricious.

Therefore, this grievance is hereby **GRANTED** . Respondent (Department of Commerce, Labor and Environmental Resources) is hereby **ORDERED** to accept Mr. Dorsey's 1991 recommendation that Grievant be awarded a merit raise. Based upon the fact that Grievant's services were utilized by the Office of Waste Management, it appears equitable that the Division of Environmental Protection should bear the burden of funding Grievant's raise in the amount corresponding to the sum it would have been responsible for had the recommendation been approved, until the time when Grievant was returned to the payroll of the Division of NaturalResources. At that point, the Division of Natural Resources would be responsible for continuing to pay Grievant a salary inclusive of the merit raise. Of course, the Department of Commerce, Labor and Environmental Resources could legally bear the burden of paying Grievant what amounts to the full backpay award so that there is less confusion among its Divisions as to budgetary accountability.

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

July 20, 1994

Footnote: 1 This agreement was executed in 1988 between the parties previously listed. Both divisions were statutorily placed within the Department of Natural Resources. Currently, the Division of Law Enforcement is contained within the Department of Commerce, Labor and Environmental Resources, while the Division of Waste Management is currently an Office within the Division of Environmental Protection which is also a sub-part of the aforementioned Department. For purposes of this Decision, this reorganization is of no legal importance with regard to the appropriate conclusions of law which must be made herein.