JOHN C. WAUGH,

Grievant,

v. DOCKET NO. 94-EP-390

DIVISION OF ENVIRONMENTAL PROTECTION/

OFFICE OF WATER RESOURCES AND

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, John Waugh, filed the following grievance on January 18, 1994:

> I was informed in writing that effective December 16, 1993, that I had been approved for a merit increase in salary. The increase has been modified by a salary review Office of the Department of Personnel. During an official training session, Mr. Lowell D. Basford, Assistant Director, Department of Personnel, advised Division of Environmental Protection Management Staff that a maximum salary within a certain range will not limit salary increases. An example given was an employee with a salary rate at 3% less than the maximum of the range would be eligible for the full 10% increase.
>
> The statewide Reclassification Project Pilot Administrative Guidelines approved 11/21/91 have not been updated, as a result of the reclassification of The Department of Commerce, Labor, and Environmental Resources employees on October 16, 1992, and are being inappropriately applied to me as an employee of Commerce, Labor, and Environmental Resources, Division of Environmental Protection.

Relief Sought

> I request that the agency recommended merit increase be granted.

The grievance was denied at the lower levels, and after a hearing and decision at Level III, was

appealed to this Board on August 1, 1994. A hearing was held before the undersigned on November 14, 1994, at which time the matter became mature for decision.

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

Findings of Fact

1. Grievant is an engineering technician with the Office of Water Resources, Division of Environmental Protection (DEP).

2. DEP employees were reclassified under the statewide reclassification project in October 1993.

3. During a training session to explain the reclassification project, Mr. Lowell Basford, Assistant Director of Classification and Compensation, Division of Personnel, advised DEP, that under the Reclassification Project Pilot Administrative Guidelines, employees such as Grievant who were within a few hundred dollars or less of their particular pay grade would be eligible for longevity pay increases above the cap provided they met all of the requirements for longevity pay adjustments.

4. Based upon Mr. Basford's representations, DEP recommended Grievant for a 9% longevity pay increase in December 1993, pursuant to West Virginia Administrative Rule 5.09.

5. Prior to the statewide reclassification project, Grievant's salary was at Paygrade 16, Step 12A. There were only 12 steps in the old pay plan and the maximum longevity increaseGrievant would have been eligible for was 2.5% or one-half step to Step 12B.

6. After reclassification, Grievant's salary was at Paygrade 11 and he fell only .4% from the top of the range.

7. Grievant was within one-half of one percent of the maximum salary for his pay grade, and if the full amount of his increase had been granted, his salary would have increased to $34,944 or $2,760 above the grade 11 salary cap.

8. The full amount was not approved by the Division of Personnel (DOP). Instead, Grievant was limited to the $132.00 difference between his former salary and the cap, on the basis of DOP's interpretation of its regulations to require an employee to be exactly at the maximum in order to be eligible for a longevity increase.

9. There were four employees, including Grievant, within DEP who were high in their range before reclassification, and ended up at the top of their range within a few hundred dollars from the

cap after reclassification.

10. West Virginia Administrative Rule, Section 5.09, currently provides:

> Longevity Increases: An employee with seven years of total state service who has attained the maximum in the range for the class without a salary increase in the immediately preceding twelve months is eligible for a longetivy increase as prescribed in the adoption of a new pay plan.

11. The Statewide Reclassification Project Pilot Administrative Guidelines provide, in pertinent part:

> C. Salary Advancements (Merit)
>
> 1. Salary advancements shall be limited to permanent employees.
>
> 2. No salary advancement shall be approved by the Division of Personnel unless it conforms to the salary range assigned to the class except as allowed in VI D.
>
> Longetivy Increase
>
> 3. All salary advancements shall be based on the quality of performance as recorded on the employee's most recent performance appraisal form.
>
> 4. An employee is eligible for salary advancements up to a maximum of 10% in any twelve month period. . .
>
> 5. Salary advancements shall be discretionary with the appointing authority and based on availability of funds.

D. Longevity Increasses

> An employee with seven years of total state service who has attained the maximum in the range for the class without a salary increase in the immediately preceding twelve months shall be eligible for a longevity increase utilizing the same eligibility criteria.

G Ex. 2, Level III.

12. A "Draft-Pay Plan Implementation" was circulated by DOP consistent with Mr. Basford's representations which included a proposed change to the longevity increase language as follows:

> Longevity increases shall not exceed 10% in any 12-month period. The appointing authority may grant longevity increases to employees whose current salary is below the maximum rate when such pay action causes the salary to exceed the maximum rate but within the 10% limitation in any 12-month period.

G Ex. 1, Level III.

13. This draft language was ultimately deleted by DOP from the final pay implementation plan because the State Personnel Board felt it was in direct conflict with Administrative Rule 5.09.

14. It is undisputed that the policy of the DOP has long been to permit longevity increases to employees only after they have reached the cap for their grade.

Discussion

The statement of grievance raises three issues which will be addressed separately.

I.

> Whether Mr. Basford has the authority to bind DOP with statements made to employees in a public meeting?

Grievant relies on the "representations" of Mr. Basford in the training sesstion on the reclassification project that employees in his situation (within 10% of the cap of the range) would be

eligible for full 10% longevity pay increases even if the result would raise their salary above the cap. Mr. Basford testified that it was his interpretation of Section 5.09 of the Pilot Administrative Guidelines that longevity pay increases would be allowed for employees who at or near the salary cap, but that he was only speaking prospectively. Whether Mr. Basford was only referencing an action he believed would occur in the future or whether he was actually making a "promise" is irrelevant, because only the State Personnel Board has the authority to modify or amend DOP's administrative rules.

The State Personnel Board is empowered by W. Va. Code § 29-6-10(2) to promulgate, amend or repeal rules regarding the pay plan for classified state employees. It must do so after consultation with appointing authorities and state fiscal officers, and after a public hearing, in accordance with the provisions of the Administrative Procedures Act, W. Va. Code § 29A-1-1. W. Va. Administrative Rule § 5.02. The Board, in interpreting the Pilot Administrative Guidelines, believed that the language regarding longevity pay increases was in direct conflict with West VirginiaAdministrative Rule 5.09 and declined to adopt the revised language, thus leaving Rule 5.09 intact. Although an employee may have a reasonable basis for understanding terms of his employment, those understandings cannot override state law that defines the terms of employment. Therefore, because the Board and not Mr. Basford has the authority in these matters, Mr. Basford's representations regarding longevity increases are not binding upon DOP. See Martin v. Pugh, 334 S.E.2d 633, 642 (W. Va. 1985); Freeman v. Poling, 338 S.E.2d 415, 420 (W. Va. 1985).

II.

Whether the application of the longevity increase rule to Grievant is discriminatory?

Grievant claims that he is being discriminated against by DOP in being denied a full 10% longevity pay increase. (See footnote 1) Discrimination is defined in W. Va. Code § 29-6A-2(d) as "[A]ny differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to prevail on a claim of discrimination, Grievant must first establish a prima facie case which establishes: (a) that he is similarly situated, in a pertinent way, to one or more other employees; (b) that he has, to his detriment, been treated by his employer in a manner that the other employees have not, in a

significant particular; and (c) that such differences were unrelated to actual job responsibilities of the grievant, and were not agreed to by thegrievant in writing. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

In this case, Grievant has failed to make a prima facie showing of discrimination in that he has failed to establish that he is similary-situated to other employees who have been treated differently than he by Respondents. Grievant has presented no evidence which establishes that other employees who were reclassified at the top of their pay grade, within 10% of the maximum, were given full 10% longevity increases which carried them over the cap. Indeed, there were four DEP employees in the same situation as Grievant who were not eligible for the maximum longevity pay increase. Even before reclassification, there were employees who fell below the 10% maximum of the grade and employees who fell within 10% of the maximum. Indeed, Grievant himself, under the old pay plan, was within 10% of the maximum and would only have been eligible for a 2.5% salary increase to the top of the grade. Grievant does not allege that the practice under the old pay plan was discriminatory. The practice is no different under the new play plan. The only difference is that Grievant now falls even closer to the cap and therefore was only eligible for a .4% salary increase.

III.

> Whether the State Board of Personnel's decision not to modify the longevity increase language in the new pay implementation policy was an arbitrary and capricious act which interfered with Grievant's job performance under W. Va. Code § 29-6A-2?

Grievant alleges that the retention of the longevity increase Rule 5.09, in light of the new pay implementation plan, is anarbitrary and capricious act of DOP which interferes with his job performance.

DOP was concerned that the longevity increase language under the draft pay implementation policy was in direct conflict with Administrative Rule 5.09. Perhaps DOP could have implemented the policy without effecting a change in the Rule, but it was within its discretion to do so, and the decision to propose a formal amendment to the rule is not "arbitrary and capricious."

Grievant has not presented any legal argument to support his contention that the failure of DOP to adopt the draft longevity increase language in the new pay implementation plan was in any way wrong or arbitrary and capricious. Grievant simply argues that by not changing the language, an

absurd result is reached with respect to employees in his situation.

Mr. Basford testified that DOP has proposed an amendment to the longevity pay increase Rule 5.09 which will be addressed in the upcoming Legislative session. However, simply because DOP has recognized that the application of the longevity increase rule under the new pay plan may result in unfairness to certain employees like Grievant, this fact alone does not render DOP's decision to retain Rule 5.09 an arbitrary and capricious act. Consistency between formal rules and agency policies is a desired result which will lead to better understanding of those rules and the avoidance of future conflict in their application, and it is within the purview of the Legislature to adopt DOP's proposal in the next Legislative session in order to ensure such consistency.

Based upon the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. DOP is not bound by the representations of Mr. Basford concerning proposed revisions to the longevity increase pay policy.

2. Grievant has failed to establish a prima facie case of discrimination with respect to the application of the longevity increase, Rule 5.09, West Virginia Administrative Rules.

3. DOP's decision to retain Rule 5.09 pertaining to longevity increases under the new pay implementation plan was not arbitrary and capricious.

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: December 30, 1994

Footnote: 1 *While Grievant did not use the word discrimination in his original pleadings, argument presented in hearing indicates that he indeed is making a claim of discrimination.*