JOHN HOWELL,

Grievant,

v. **Docket No. 98-HHR-014**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/CHILD SUPPORT ENFORCEMENT DIVISION and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, John Howell, filed this grievance on August 11, 1997, and alleges "the annual salary increase mandated by West Virginia Code § 5-5-2 become[s] a part of the Grievant's base salary such that a salary increase received for any one year continues to be received in subsequent years." The relief sought is "$14,355.00 dollars plus interest at the prevailing statutory rates, from July 1, 1986 to the date of settlement." Additionally, he requests his "base salary yearly gross be increased to $19,005.50 effective July 1, 1997."

This grievance was denied at all lower levels, and Grievant then appealed to Level IV. (See footnote 1) A telephonic prehearing conference was conducted on March 3, 1998, to resolve various issues. At that time, Respondent Department of Health and Human Resources's("HHR") Motion to Dismiss was denied. (See footnote 2) Also during the telephone conference, Respondent HHR placed Grievant on notice that it would raise the issue of timeliness both as it related to back pay and to the grievance in its entirety. A Level IV hearing was held on March 10, 1998, and this case became mature for decision on April 10, 1998, the deadline for the

parties' proposed findings of fact and conclusions of law.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact. The major issues in this case are of a legal nature with the exception of when Grievant knew or should have known the contents of W. Va. Code § 5-5-2.

Findings of Fact

1. Grievant has been employed by HHR since April 25, 1975, except for the period from 1993 to 1996, when he attended law school in South Carolina. Grievant returned to employment with the state on October 16, 1996. He began receiving the annual salary increase in 1985, the year after the statute was enacted.

2. Grievant knew he received his annual increment checks in a lump sum payment.

3. Grievant did not file this grievance until he received his first annual increment check after his return to employment. This increment was prorated. Grievant then read W. Va. Code § 5-5-2, believed the statute's mandate had been incorrectly applied, and filed this grievance.

Arguments

Grievant argues the amount of an annual increment should be added to an employee's base salary every year, as W. Va. Code § 5-5-2 calls the payment an "annual salary increase." He contends an employee must also receive an additional lump sum payment as this compensation is mandated by the statute. (See footnote 3) The following calculations submitted post-hearing by Grievant illustrate his theory:

Time Period (See footnote 4)	Years of Service	Lump Sum Payment	Amount Pro- rated for Year	Total Paid Each Year
7/1/84-6/30/85	10	$ 360.00	$ 0.00	$ 360.00

7/1/85-6/30/86	11	$ 396.00	$ 360.00	$ 756.00
7/1/86-6/30/87	12	$ 432.00	$ 756.00	$ 1188.00

To further clarify Grievant's argument the example he discussed at hearing will be recounted. If, in 1996, an employee who had nine years of service, received an annual salary of $19,000.00 a year, on July 1, 1996, he would received a $950.00 lump sum payment, and an additional $950.00 would be added to his yearly salary to make his annual salary amount $19,950.00. The following year, 1997, this same employee would receive a $1,000.00 lump sum payment, and would have $1,000.00 added to his base salary, making his salary for 1997 $20,950.00. Thus, Grievant's disagreement with the current method of calculating increment pay is two-fold. He maintains an employee should have the annual increment added to the base salary each year and should also receive alump sum payment. He avers this payment should, in essence, be compounded by adding the amount of the annual increment each year to the base salary. (See footnote 5)

Respondents argue this interpretation goes against the plain language of the Code Section as well as case law from the West Virginia Supreme Court of Appeals. Additionally, Respondents make two arguments based on timeliness. First, that this grievance was not timely filed, and second, that even if this grievance is found to be timely filed, Grievant's relief must be limited to ten days prior to filing his grievance.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd.

156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33- 88-130 (Aug. 19, 1988).

The timeliness issue is governed by the time lines set out in W. Va. Code § 29-6A- 4(a), which states a grievance must be filed:

> **Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .**

A claim dealing with the payment of annual increment can be seen as an ongoing grievance. As such, this claim can be filed any time, but the relief must be limited to ten days prior to the filing of the grievance. See Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, S.E.2d 399 (1995); Gaskins v. Dept. of Health/Div. of Personnel, Docket No. 90-H-032 (Apr. 12, 1990). Thus, the grievance is timely only for the most recent annual increment.

W. Va. Code § 5-5-2 was initially enacted in 1984 and the first annual increment payments were made in 1985. This Code Section states in its entirety:

> **Effective for the fiscal year beginning the first day of July, one thousand nine hundred ninety-six, every eligible employee with three or more years of service shall receive an annual salary increase equal to fifty dollars times the employees' years of service, not to exceed twenty years of service. In each fiscal year thereafter and on the first day of July, each eligible employee shall receive an annual increment increase of fifty dollars for that fiscal year. Every employee becoming newly eligible as a result of meeting the three years of service minimum requirement on the first day of July in any fiscal year subsequent to one thousand nine hundred ninety-six, is entitled to the annual salary increase equal to fifty dollars times the employees' years of service, where he or she has not in a previous fiscal year received the benefit of an increment computation; and shall receive a single annual increment increase thereafter of fifty dollars for each subsequent fiscal year. These incremental increases shall be in addition to any across-the-board, cost-of-living or percentage salary**

> **increases which may be granted in any fiscal year by the Legislature. This article shall not be construed to prohibit other pay increases based on merit, seniority, promotion or other reason, if funds are available for the other pay increases: Provided, That the executive head of each spending unit shall first grant the mandated increase in compensation in this section to all eligible employees prior to the consideration of any increases based on merit, seniority, promotion or other reason.**

Although as a state employee with ten years of service the undersigned Administrative Law Judge would love to adopt Grievant's argument, it is impossible to do so. In Lawson v. County Commission of Mercer County, 199 W. Va. 79, 483 S.E.2d 77 (1996), a case dealing with deputy sheriff's annual increment, the West Virginia SupremeCourt of Appeals cited favorably the unpublished order of State ex. rel. Erwin v. Gainer, No. 16791 (W. Va. Aug.2, 1985) which addressed W. Va. Code § 5-5-2. In Erwin, the Court found the state employees incremental salary increases could be paid in lump sum payment "because it was designed to supplement the regular pay of eligible State employees . . . ." Erwin at 2 (emphasis added); See Lawson at 83. The Lawson Court compared and contrasted the deputy sheriff's statute, W. Va. Code § 7-14-7 with W. Va. Code § 5-5-2, harmonized the two, and found the annual increment was "not an integral part of the base salary . . . ." Id. at 83. Thus, the annual increment is not to be added to the base salary and is to be paid only in a lump sum payment.

The next issue is whether the annual increment for subsequent years should be calculated by using a compounding or cumulative approach. This question was asked of the Lawson Court. (See footnote 6) **The Court found W. Va. Code § 7-14-7 was titled "salary increment", and the Court was required to give plain meaning to the term increment. W. Va. Code § 5-5-2 is titled, "Granting incremental salary increases based on years of service." (Emphasis added).**

The Lawson Court defined increment and held:

> **An increment is "a series of regular consecutive additions." Webster's Ninth New Collegiate Dictionary 611 (1984). Any formula that would result in compounding the annual salary increase within W. Va. 7-14-17c (1985) which is not a series of regular, consecutive additions, but instead, is an exponential or graduated increase, growing beyond what would be contemplated within the meaning of incremental increase as clearly expressed within the statute would be improper. "It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court todisregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity." Syllabus Point 2, Click v. Click, 98 W.Va. 419, 127 S.E. 194 (1925); accord Syllabus Point 2, Pristavec v. Westfield Ins. Co., 184 W.Va. 331, 400 S.E.2d 575 (1990).**

Lawson at 83-84.

This logic and reasoning is directly applicable to W. Va. Code § 5-5-2, and the Lawson Court's holding that the annual increment should not be compounded, must be applied to W. Va. Code § 5-5-2. Additionally, it is noted that to apply Grievant's compounding formula would result in basically doubling the amount of increment received by the employee. For example, a ten year employee who would currently receive a $500.00 annual increment would receive $950.00 under Grievant's calculations. (See footnote 7) **This result, per Lawson, is not what the Legislature intended.**

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources,

Docket No. 89-DHS- 72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. ofEduc., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Grievant's claim is time-barred except for the payment of the most recent annual increment.

3. The yearly annual increment mandated by W. Va. Code § 5-5-2 is to be paid in a lump sum payment only, and does not become a part of an employee's base pay. State ex. rel. Erwin v. Gainer, No. 16791 (W. Va. Aug.2, 1985) (unpublished order); See, Lawson v. County Commission of Mercer County, 199 W. Va. 79, 483 S.E.2d 77 (1996). 4. The yearly annual increment mandated by W. Va. Code § 5-5-2, is not compounded, but is to be calculated using a cumulative approach. See Lawson, supra.

5. Grievant has not met his burden of proof and demonstrated that the current method of paying and calculating the annual increment is incorrect or violates any Code Section, rule, or regulation.

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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: May 27, 1998

Footnote: 1

At the Level IV hearing, Grievant, who has a law degree, represented himself, the Department of Health and Human Resources was represented by attorney Michelle Mensore, and the Division of Personnel was represented by Joe Smith.

Footnote: 2

The basis for this Motion was, in essence, one for summary judgement as HHR pointed to the strong legal precedent both in statutory and case law which was contrary to Grievant's position. This Grievance Board does not grant summary judgements. See Little v. Kanawha County Bd. of Educ., Docket No. 96-30-352 (Apr. 30, 1997).

Footnote: 3

Although there have been several cases filed before the Grievance Board about annual increments, none of them address the issues raised by Grievant.

Footnote: 4

The amount of the yearly compensation increased from $36.00 a year to $50.00 a year in 1996.

Footnote: 5

Grievant also made other arguments to support his theory, but due to the outcome of this Decision on the key issues, it is not necessary to address these minor points.

Footnote: 6

Although the answer was in response to a question about the deputy's statute, the holding is valid for W. Va. Code § 5-5-2 as well.

Footnote: 7

"A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Lawson (citing State v. Snyder, Syl. Pt. 5, 64 W. Va. 659, 63 S.E. 385 (1908)).