KIRK WENSEL,

Grievant,

v. **Docket No. 98-DOH-445**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Kirk Wensel (Grievant) challenges the manner in which his annual increment pay was calculated. Grievant's immediate supervisor was without authority to grant relief at level one. The level two evaluator waived consideration, and forwarded the grievance to level three. A level three hearing was held before Brenda Craig Ellis on September 28, 1998. The grievance was denied in a written level three decision dated October 23, 1998. Grievant appealed to level four on November 5, 1998. A level four hearing was scheduled for February 17, 1999. Grievant represented himself, and Respondent was represented by Timbera Wilcox, Esquire. The day before the scheduled hearing, the parties agreed to submit this grievance for decision based upon the record developed below. The parties were given until March 8, 1999, to submit fact/law proposals, at which time this matter became mature for consideration. Neither party filed a written submission.

The following findings of fact are made from a preponderance of the evidence submitted at level three.

Findings of Fact

1. Grievant is employed by the Division of Highways (DOH). His exact length of service is not reflected in the record. 2. Grievant was off work and receiving Workers' Compensation benefits from May 2 to August 11, 1996, and also from July through September of 1997.

3. Grievant's increment pay for fiscal years 1996-1997 and 1997-1998 was prorated to reflect the time he was off on Workers' Compensation.

Discussion

The record submitted to the undersigned upon which to base this Decision is somewhat scant. Unfortunately, the level three evaluator did not believe it necessary to accept Grievant's pay stubs into evidence, which would have reflected the exact amounts of the increment pay he has received. However, from Grievant's testimony, it can be concluded that he does not object to the fact that his increment pay was prorated for the periods he was off on Workers' Compensation. Rather, he protests the manner in which the prorated increment pay was calculated.

Pursuant to W. Va. Code § 5-5-2 (1996), every eligible state employee with three or more "years of service" shall receive fifty dollars times the employee's number of years of service. No more than twenty "years of service" with the State can be applied toward the calculation of increment pay for eligible employees.

In accordance with W. Va. Code § 5-5-1, the West Virginia Division of Personnel (DOP) developed a policy which covers the payment of annual salary increments. Pursuant to this policy, the total annual increment must be prorated when the employee works less than the entire year. Specifically, the Policy states as follows:

> Full Years of Service [means] [f]ull years of total service **as an employee of the State of West Virginia** (1 year equals 12 months): . . .
>
> . . . This excludes any time during the year that an employee is off the payroll in a no-pay status for unauthorized leave, leave of absence (personal, medical, or parental), Workers' Compensation temporary total disability benefits, or suspension.
>
> * * * *
>
> . . . Effective the fiscal year beginning July 1, 1996, every eligible employee with 3 or more full years of service shall receive an annual salary increase equal to $50 times the employee's years of service, not to exceed 20 years of service. . . .
>
> . . . An eligible employee who is or has been on a leave of absence without pay during a fiscal year shall be paid concurrently with all other eligible State employees a pro rata share for the portion of time for which he/she worked regardless of whether or not the employee has returned to duty at the time the annual increment is paid.

> Example: If an employee had 10 years' service, he would be entitled to an annual increment of $500.00 (10 years x $50.00 increment), as if he were being paid a salary of $500.00 per year. If that employee did not work [i.e. was in a no pay status] for 6 months in one year, he would not be entitled to a full year's salary. Therefore, he would only be entitled to one-half of the $500.00 increment, or $250.00 for 6 months he actually worked. [See Smith v. W. Va. Div. of Highways, Grievance Docket No. 96-DOH-083 (Aug. 2, 1996) and Cavender, et al. v. W. Va. Bureau of Employment Programs and Division of Personnel, Grievance Docket No. 96-BEP-142 (Sept. 9, 1996).]

Although the exact amounts of Grievants' increment checks for the past two fiscal years are unknown, it is clear from his testimony that Grievant believes that only the present year's $50 increment should be prorated because of the time he was off work. Therefore, Grievant argues that for all the prior years he has worked for DOH, he should have received $50 for each year; i.e., if Grievant had worked for DOH for 10 years prior to the 1996-1997 fiscal year, he should have received a minimum of $500 increment pay for the next two years, even though he did not work the entire year. Apparently, DOH followed DOP's policy, and Grievant's entire cumulative amount of increment pay wasprorated, because of his time off. (For example, if he had been an employee for ten years, but was off for six months in 1997-1998, his increment pay would only be $250, as shown in DOP's example above.)

It has been previously held by this Grievance Board that this practice is appropriate, because the annual increment is not a bonus, but is a salary increase. The "'[a]nnual salary increase,' referred to in W. Va. Code § 5-5-2, means increment pay is part of the employee's salary." Miller v. W. Va. Div. of Highways, Docket No. 93-DOH-011 (June 30, 1993). In upholding DOP's method of prorating increment pay, the administrative law judge in Bush v. Dept. of Health & Human Resources, Docket No. 97-HHR-568 (Nov. 13, 1998) stated:

> [T]he Supreme Court of Appeals of West Virginia in analyzing W. Va. Code § 5-5-2 has twice held that the annual increment represents an adjustment in salary. See Courtney v. State Dep't of Health, 388 S.E.2d 491 (W. Va. 1989). Because increment pay is part of the employee's salary, an employee cannot receive increment payment for services not rendered. For example, if an employee had 10 years' service, he would be entitled to an annual increment of $360.00 (10 years x $36.00 increment), as if he were being paid a salary of $360.00 per year. If that employee did not work for 6 months in one year, he would not be entitled to a full year's salary. Therefore, he would only be entitled to one-half of the $360.00 increment, or $180.00 for the six months he actually worked. See [Cavender v. W. Va. Bureau of Employment Programs, Docket No. 96-BEP-142 (Sept. 9, 1996)]; Smith, supra.

DOP's Annual Increment Policy provides that the total annual increment must be prorated where the employee works less than the entire fiscal year. (See footnote 1) "Interpretations ofstatutes by bodies charged with their administration are given great weight unless clearly erroneous." Syl. Pt. 7, Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (W. Va. 1992); Syl. Pt. 3, Smith v. Bd. of Educ. of County of Logan, 176 W. Va. 65, 341 S.E.2d 685 (W. Va. 1985); Syl. Pt. 4, Security Nat'l Bank and Trust Co. v. First W. Va. Bancorp, Inc., 166 W. Va. 775, 277 S.E.2d 613 (W. Va. 1981). The method of calculating increment pay advocated by Grievant would violate the statute.

Grievant introduced at level three a copy of this Grievance Board's decision in Miller, supra, arguing that it supports his contentions. However, the situation in that case is different from the one presented here. In that case, DOH had failed to consider four months at the beginning of the grievant's employment, for which he had never received increment pay. When those four months were added to the eight months he actually worked during the year he was off on Workers' Compensation, this gave him an additional full year of service. Accordingly, the administrative law judge found that proration was not necessary. However, he noted that, if “grievant's total service as of June 30, 1992, [had] been less than a full eighteen years of service, then prorating the entire annual increment [in a manner similar to that presently used by DOP] would not have been improper.”

Consistent with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. Every eligible state employee with three or more "years of service" shall receive fifty dollars times the employee's number of years of service. No more than twenty "years of service" with the State can be applied toward the calculation of increment payfor eligible employees. W. Va. Code § 5-5-2.

2. "Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." Syl. Pt. 7, Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (W. Va. 1992); Syl. Pt. 3, Smith v. Bd. of Educ. of County of Logan, 176 W. Va. 65, 341 S.E.2d 685 (W. Va. 1985); Syl. Pt. 4, Security Nat'l Bank and Trust Co. v. First W. Va. Bancorp, Inc., 166 W. Va. 775, 277 S.E.2d 613 (W. Va. 1981).

3. The "'[a]nnual salary increase,' referred to in W. Va. Code § 5-5-2, means increment pay is part of the employee's salary." Miller v. W. Va. Div. of Highways, Docket No. 93-DOH-011 (June 30,

1993).

4. Grievant's increment pay was correctly calculated, based upon DOP's Policy and the provisions of W. Va. Code § 5-5-2.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (1998). 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealingparty must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: March 26, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Senate Bill 351, which became effective March 11, 1999, amends Chapter 23 of the West Virginia Code, by adding a section which states that state employees shall continue to accrue increment pay while off work on Workers' Compensation. However, the statute is not retroactive, so it cannot be applied in this case.