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**WEST VIRGINIA EDUCATION AND
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ARLAND PAYNE

v.

DOCKET NO. ENGY-88-015

WEST VIRGINIA DEPARTMENT OF ENERGY

DECISION

Grievant Arland Payne is an Underground (or Deep) Mine Inspector, employed by respondent West Virginia Department of Energy (DOE) in Region IV of its operations.¹ On March 1, 1988, grievant was ordered to assume responsibility for a new inspection area within the Region, necessitating that he travel farther from his home than he did in his previous assignment. He alleges favoritism, as defined in W.Va. Code §29-6A-2(h), claiming that other Inspectors are the

¹ DOE has divided West Virginia into six Regions, and into districts within those Regions, for purposes of its operations. It is without contention in this matter that Inspectors are required by DOE to live within their Region of employment, as opposed to their district of employment.

recipients of preferred treatment. Grievant's complaint, seeking reinstatement to his original assignment, was denied at Levels I, II and III² and was the subject of a Level IV hearing on October 18, 1988. The parties declined to submit proposed findings of fact and conclusions of law, and this matter is therefore mature for disposition.

Grievant was first hired as a Deep Mine Inspector by the West Virginia Department of Mines (DOM), respondent's forerunner, approximately 11 years ago.³ At that time, grievant's residence was at Raysal, McDowell County, within Region IV; the vacancy for which he was hired was in and around Oak Hill, within Region III. DOM's Director told grievant that he must move to that general geographical area if he wanted the job and accordingly, grievant relocated to Beckley. Seventeen months later, when he was offered an Inspector's job in the Welch area (Region IV), he returned to his home in Raysal.

In early 1988, Region IV lost one Deep Mine Inspector to Region V. This necessitated a reshuffling of assignments within Region IV, to cover the workload. Grievant, whose home was closest to the area previously worked by the Inspector moved to Region V, and three other Inspectors were

² The extensive Level III transcript is a part of the record herein.

³ In 1985, DOE was created through a merger of DOM and the Reclamation Division of the West Virginia Department of Natural Resources.

affected; grievant was reassigned to the lost Inspector's mines.

Both parties agree that W.Va. Code §22A-1A-7 controls this situation. In pertinent part:

The director [of DOE] ... shall designate the places of abode of inspectors at points convenient to the mines of their respective districts

Grievant contends that some Inspectors within Region IV have not been required to live within the districts they cover, and complains that the "policy" of Code §22A-1A-7 has thus been inconsistently applied. He argues that, just as he was required to move into his inspection district when he was first hired by DOM, other Inspectors should have to do the same.⁴ He further asserts that some Inspectors live in areas where there are no or few active mines and therefore, that one of them should be moved to the area vacated by the lost Inspector.⁵

DOE interprets the statute not to mandate that Inspectors' residences be within the district of their employment,

⁴ Grievant admitted at the Level IV hearing that he had known for some time that certain Inspectors did not live within their districts, but that it "didn't bother him" until his reassignment.

⁵ Grievant expressed concern that DOE was wasting money by not requiring a Region IV Inspector living in a relatively inactive district to move into the district left vacant by the lost Inspector. Because of the constant need to reassess Inspectors' assignments, see n. 7, infra, it appears impossible to say with any certainty whether such is the case or not.

but to afford its Director of Mines and Minerals latitude in ensuring that those residences be in locales convenient to assigned mines. The agency further contends that it has never been DOE policy to require any Inspector to live within his/her assigned district and no written policy to that effect was presented by grievant.⁶

It is undisputed that grievant is travelling more than he did in his previous assignment. However, DOE presented unrefuted statistical evidence that certain Inspectors within Region IV travel more and others travel less than does grievant. Further, grievant does not challenge DOE's contention that he was reassigned solely because of the proximity of his home to the newly-vacated area.⁷

⁶ One witness testified that written policy to this effect did exist in the "state mine law book" at the time he was hired. No such "book" was presented into evidence or otherwise identified.

⁷ DOE presented convincing evidence, via testimony at Level IV, of the fluid nature of its mine inspection operations. Since new mines open and established ones close with some frequency in West Virginia, DOE Inspectors' assigned areas are in a rather constant state of flux. The loss of one inspector to Region V in the instant scenario was a result of a decrease in mining activity within Region IV; however, DOE stated at Level IV if current trends continue, it will need another Inspector in Region IV shortly and grievant will likely be returned to his original assignment.

FINDINGS OF FACT

1. Grievant was first employed as an Underground (Deep) Mine Inspector by the West Virginia Department of Mines (DOM), the forerunner of the respondent, approximately 11 years ago. He currently works as an Inspector for the West Virginia Department of Energy (DOE) in its Region IV.

2. When grievant was employed, he was required to relocate to the Oak Hill area, within the DOM Region (III) of his work site. After seventeen months, a vacancy occurred within Region IV, and grievant returned to his home in Raysal, McDowell County, West Virginia.

3. In early 1988, Region IV lost one Deep Mine Inspector to Region V.

4. Grievant was the Inspector whose residence was closest to the district previously covered by the Inspector lost to Region V. Because of the location of his home, and for no other reason, he, grievant, was reassigned to cover that area.

5. The assignments of three other Region IV Inspectors were affected by this shuffling.

6. As a result of the reassignment, grievant must travel farther to complete his work.

7. Certain Region IV Inspectors must travel farther, and others less, than grievant to complete their work.

8. Certain Region IV Inspectors do not live within the districts of their employment, although all live within the Region.

9. DOE has never had a policy that its Deep Mine Inspectors must live within their districts of employment. DOM may have had such a policy; if so, it was changed at or before the time DOM became a part of DOE.

CONCLUSIONS OF LAW

1. W.Va. Code §22A-1A-7 does not require Deep Mine Inspectors employed by DOE to live within their districts of employment; rather, it grants DOE's Director of Mines and Minerals the authority to dictate the locale of each Inspector's residence, to ensure that it is convenient to assigned mines.

2. Favoritism is "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Code § 29-6A-2(h).

3. To prevail upon his complaint, a grievant must prove the allegations thereof by a preponderance of the evidence.

Smith v. W.Va. School of Osteopathic Medicine, Docket No. BOR88-051-4 (Sept. 29, 1988).

4. Grievant has failed to demonstrate any favoritism toward other Inspectors by DOE, or any unfair treatment whatsoever.

Accordingly, this grievance is DENIED.

This decision may be appealed to ~~either~~ the Circuit Court of ~~Kanawha~~ or McDowell County, but only within thirty (30) days of its receipt. W.Va. Code § 29-6A-7. Neither The West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. The Grievance Board must be advised of any intent to appeal so that the record of this case can be prepared and transmitted to the appropriate Court.



M. DREW CRISLIP
HEARING EXAMINER

Dated: 11/2/88