MICHAEL A. WAUGH, .

Grievant, .

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v. . Docket Number: 94-EP-096

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WEST VIRGINIA BUREAU OF COMMERCE .

/ DIVISION OF NATURAL RESOURCES, .

Respondents. .

D E C I S I O N

Michael A. Waugh (hereinafter Grievant) was hired by the Department of Natural Resources (hereinafter Respondent) as a Conservation Officer to serve in its Law Enforcement Division on or about July 5, 1978. On August 15, 1988, the Department's Divisions of Waste Management and Law Enforcement entered into an agreement whereby various Conservation Officer IIs were to be transferred from the Division of Law Enforcement to the Division of Waste Management. The conservation officers were to investigate and enforce violations of Chapter 20, Articles 5E, 5F and 5G, of the West Virginia Code, as the Division of Waste Management did not employ conservation officers. The Division of Waste Management agreed to be responsible for those employees' salaries who weretransferred to it. This agreement did not contain an ending date for the transfer of the conservation officers. Grievant was one of the conservation officers transferred to the Division of Waste Management. (See footnote 1)

On January 7, 1993, Grievant filed a grievance against the Office of Waste Management,

challenging a decision not to award him a merit raise, after his supervisor had recommended that he receive such. The Grievance proceeded through the lower levels of the grievance procedure and was appealed to level four on March 18, 1994. The parties agreed that the decision could be based upon the record then existing, which consisted entirely of stipulations of fact, along with corresponding exhibits. The Grievance Decision styled Michael A. Waugh v. West Virginia Department of Commerce, Labor and Environmental Resources / Office of Waste Management, (July 20, 1994) (hereinafter Waugh I), named as the Respondent, the Department of Commerce, Labor and Environmental Resources as the Office of Waste Management was a sub-part of the Division of Environmental Protection, and both the Divisions of Environmental Protection and Respondent were under the control of the Department. The Grievance was granted and the following relief was awarded:

> 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 EnvironmentalProtection 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 is returned to the payroll of the Division of Natural Resources. 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.

This decision was not appealed to circuit court within the applicable time period provided by Code §29-6A-7. However, Grievant was not awarded an increased salary, consistent with the July 1994 Decision. Therefore, Grievant filed a Petition for Writ of Mandamus in the Circuit Court of Nicholas County to enforce this Board's decision.

By Order dated March 2, 1995, the Honorable Judge Gary Johnson made Findings of Fact based upon the evidence and argument presented by Respondent, Division of Environmental Protection and Grievant. The following Conclusions of Law were also made by Judge Johnson:

> 1. That the Administrative Law Judge's decision filed on July 20, 1994, should be reformed to reflect that the petitioner's merit pay increase should be effective December 1, 1992, and continue throughout the petitioner's employment by respondent DEP, which terminated on April 30, 1994.

2. Respondent DEP owes unto the petitioner, Michael A. Waugh, the amount of $2,086.75, which is the correct amount for the petitioner's merit pay increase from December 1, 1992, through April 30, 1994.

3. Respondent DEP owes unto Donald K. Bischoff, counsel for the petitioner, attorney's fees and Court costs in the amount of $1,445.00, pursuant to the itemized statement filed with the Court.

4. Respondent DEP should be ordered to pay both such sums forthwith and in the event the said amounts are not paid within thirty (30) days that interest at the legal rate should commence accruing after the 30-day period.

5. That this action should be remanded to the Administrative Law Judge for hearing to determine the following issues after service of notice upon DNR:

(a)

Whether DNR is responsible to the petitioner for the merit pay increase from May 1, 1994, through the date of such remand hearing.

(b)

Whether DNR is responsible for paying the merit pay increase to the petitioner after the date of the remand hearing.

The Undersigned conducted a hearing at this Grievance Board's Charleston, West Virginia office, on April 20, 1995, to comply with the Order issued by Judge Johnson. Present at this hearing were representatives of Respondent, the Division of Environmental Protection and Grievant. (See footnote 2) The Division of Environmental Protection, through counsel, represented that it intended to comply with Judge Johnson's Order. Prior to opening statement, Respondent submitted a written Motion to Dismiss, wherein it argued that the case be dismissed based upon fourteen stated affirmative defenses. This motion was taken under advisement as it was not submitted prior to the hearing pursuant to this Board's administrative rule, 156 CSR 1, Section 4.5.

Respondent contends that this case must be dismissed because it was not joined as a party in the original case. It furtherpresents other legal arguments in support of its Motion to Dismiss based upon this assertion. Consistent with the discussion in Waugh I, Grievant substantially complied with the filing requirements of Code §§29-6A-1 et seq., and it was determined that Respondent was afforded all the rights necessary as the Department of Commerce, Labor and Environmental Resources was named as a respondent. In any event, it appears that Judge Johnson has remanded this case to the Undersigned in order to allow Respondent an opportunity to defend its position at the administrative level. Therefore, the case shall not be dismissed on these grounds.

Respondent further argues that the West Virginia Division of Personnel is an indispensable party to this action, and therefore, the case should be dismissed or the record held open for additional evidence. It presented into evidence a copy of an October 16, 1993 memorandum from Division of Personnel Director, Robert L. Stephens, Jr., wherein the following was stated in regard to the salary attached to the classification series of Conservation Officer: "[a]lso, the salary level of the Conservation Officer series is set by statute." Respondent further presented a copy of the Division of Personnel's pay plan to support its position that Personnel would not approve a merit pay raise for conservation officers because their salaries are established aat a specific level by statute.

Even if Respondent is correct in expounding upon Personnel's position on the eligibility of conservation officers to receive salary advancements, this issue was clearly decided in Waugh I andis not at issue in the instant case. Therefore, Personnel is not an indispensable party to this action. Further, pursuant to Code §29-6A-7, Personnel had the statutory authority to appeal the first decision, and it has the authority to appeal any ruling in this decision in order to protect its interests.

Finally, Respondent represents that it relied upon the same defenses in the Nicholas County Circuit Court as it does herein, in contending that the case should be dismissed. Based upon a review of Judge Johnson's order, it is determined that the substantive rulings interpreting Code §20-7-1c in the Waugh I decision were affirmed. Also, there is no evidence of record to support findings that Grievant was guilty of laches, had "unclean hands" or had waived any right to the raise he seeks. Respondent's Motion to Dismiss is hereby **DENIED** and the Undersigned shall attempt to address the issues set forth by the Circuit Court as mandated by its Order.

The arguments of the parties are hard to define. Grievant appears to rely upon the holdings in Waugh I to support his contention that Respondent should be responsible for paying him the same

salary when he returned to work for it that the Division of Environmental Protection had been ordered to pay as a result of the Waugh I decision. Grievant's post-hearing brief contains a finding of fact which reads as follows: "DNR Law Enforcement has not paid Sgt. Waugh the merit salary advancement ordered in the level 4 decision, as of this date." On the merits, Respondent seems to rest its case on the fact that when Grievant returned to duty, heaccepted a vacant position which had been posted for bid; therefore, he should be required to assume the salary which was established for that position and not keep the salary that he had at that time.

The following findings of fact are made in addition to the findings set forth in the Waugh I decision.

1. Grievant was hired by Respondent on or about July 5, 1978 as a conservation officer.

2. On or about August 1988, Grievant was transferred from Respondent's Law Enforcement Section (Office) to its Division (Office) of Waste Management.

3. During the time Grievant worked in conjunction with the Division (Office) of Waste Management, his salary was paid by the Division of Environmental Protection.

4. Grievant returned to duty with Respondent on May 1, 1994, as a Conservation Officer, Sargent, and was transferred/assigned to its Litter Control Program in Fairmont, West Virginia.

5. Grievant was classified as a Conservation Officer, Sargent, concurrent with his transfer to the Division of Environmental Protection.

6. The position that Grievant was assigned upon his return to Respondent was vacant and had been posted for bid.

7. Respondent has awarded Grievant "full credit for Conservation Officer Tenure" for the time he was assigned to the Division of Environmental Protection. Grievant's employment records with Respondent show no break in service.

There is no direct statutory authority supporting either side's position. Further, Personnel's administrative rules, 143 CSR 1, allow agencies to transfer employees within their organization, but there is, likewise, no regulation which can be construed to address the issue presented. Obviously, Grievant has never been fired and his employment with Respondent has not ceased. Further, had there not been a vacant position with Respondent at the time Grievant's transfer ended, it would not have had just cause to terminate his position. Grievant was entitled to an assignment of duties on May 1, 1994.

The Undersigned believes that the West Virginia Supreme Court of Appeal's discussion and holdings in Snider v. W. Va. Dept. of Commerce, 441 S.E.2d 363 (W. Va. 1994), are helpful in analyzing this case. Effective July 1, 1989, the Legislature transferred the classified-exempt employees of the Blennerhassett Historical Park into the classified service, and placed those employees under the control of the Department of Commerce. The statutory provision which accomplished this act stated that the employees were not to be removed, severed or terminated from their positions by virtue of the transfer. See, W. Va. Code §29-8-2 [1990]. In accepting Mr. Snider into the classified service, the Department of Commerce lowered his yearly salary from $24,816.00 to $17,316.00, based upon what it believed was a comparable salary to that paid its other employees who performed similar work at that time.

Mr. Snider challenged his salary decrease, on numerous grounds, by filing a grievance which was eventually heard anddenied by this Grievance Board. Mr. Snider appealed this Board's decision to the Wood County Circuit Court, and the decision was reversed. The Department of Commerce appealed that decision to the Supreme Court which affirmed the lower court. The Court found that the Department of Commerce, in lowering Mr. Snider's salary by approximately 30%, had constructively discharged him from his position and then hired him back at a lower salary, in violation of Code §29-8-2. The Court stated as follows:

> In this case, Mr. Snider was transferred but his salary was decreased by 30% without a corresponding 30% job reduction. We find that Mr. Snider's reduction in pay was so great that it constitutes a termination of his employment, which is prohibited by W. Va. Code 29-8-2 [1990]. Although in this case, we find a 30% decrease in salary to be a constructive firing, in other cases, a smaller salary deduction in order to align the transferee's salary with an existing salary schedule may be considered **de minimis**, especially considering the greater job security, employment opportunities and other benefits offered by classified service.

Id. at p. 367. Implicit in the holding in Snider, is the recognition that Mr. Snider had a legitimate property interest in his salary, conferred upon him by the Legislature, and that the Department of Commerce's lowering of that salary was tantamount to a firing without good cause.

In this case, Grievant's yearly salary should have been increased by approximately six percent, effective December 1, 1992. It is further accepted that Grievant should have received a salary, inclusive of the merit raise, until he transferred back to Respondent on May 1, 1994. Respondent now contends that Grievant's salary should be lowered by approximately six percent, even though it

admits that he has had no break in employment. It alsocontinues to justify this decrease in salary by relying upon an obvious, and already established misinterpretation of the clear language of W. Va. Code §20-7-1c. (See footnote 3)

It is accepted that Grievant's employment with Respondent has never been severed. Therefore, it is determined that a six percent decrease in his salary would amount to a constructive discharge, and an impermissible severance of his employment absent a showing of just cause. A six percent salary decrease is not determined to be **de minimis** as that term is normally defined. Therefore, Respondent is required to assure that Grievant's salary as a Conservation Officer, Sargent, within its employ, is inclusive of the merit raise in issue.

Respondent's factual argument that Grievant's salary should not reflect the salary inclusive of the merit raise because he accepted a **new position** upon his return to its service is wholly unpersuasive. First, this position is inconsistent with the testimony of Colonel Richard Hall who testified that Grievant, technically, was always an employee of Respondent. Second, Grievant did not resign a position with Respondent and then bid upon and receive another. As noted, Respondent was required at the end of Grievant's service with the Division of Environmental Protection, to reassign him duties consistent with his classification upon his return. Grievant simply accepted a lateraltransfer to the position of Litter Control Sargent in Fairmont, and Personnel's regulations require that upon a lateral transfer, the employee's salary must remain the same. 143 CSR 1, Section 5.07.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusion of law.

Conclusion of Law

Respondent is responsible to Grievant for the merit pay increase from May 1, 1994, through his employment tenure with Respondent while Grievant remains in the classification of Conservation Officer, Sargent.

Respondent's Motion to Dismiss is **DENIED**. Respondent is hereby **ORDERED** to comply with the holding in this case, made pursuant to the remand of two issues from the Circuit Court of Nicholas County in the case of Waugh v. Department of Commerce, (July 20, 1994).

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

August 14, 1995

Footnote: 1By executive order of August 1992, the Division of Waste Management became the Office of Waste Management under the purview of the Division of Environmental Protection.

Footnote: 2Pursuant to West Virginia Code §5F-2-1, effective July 1, 1994, the Department of Commerce, Labor and Environmental Resources was abolished and the Division of Natural Resources was placed under the purview of the newly-created Bureau of Commerce, while the Division of Environmental Protection was placed under the control of the newly-created Bureau of Environment.

Footnote: 3Perhaps those individuals who participated in drafting the language of this Code section intended for there to be only one established salary for each grade of Conservation Officer, however, the clear use of the term "minimum" in this provision cannot be interpreted to support this position.