DAVID A. CROWDER, .

.

Grievant, .

.

v. . Docket No. 94-T&R-545

.

WEST VIRGINIA DEPARTMENT OF TAX .

AND REVENUE AND DEPARTMENT OF .

ADMINISTRATION/DIVISION OF .

PERSONNEL, .

.

Respondents. .

D E C I S I O N

David A. Crowder (Grievant) filed this grievance on July 25, 1994, alleging he "[d]id not receive the $1008.00 across the board pay increase effective July 1, [19]94." The grievance was denied at Levels I and II, as Grievant's supervisors did not have authority to adjust his salary. After a Level III hearing on August 19, 1994, the grievance was partially granted by Dale W. Steager, Grievance Evaluator. Grievant submitted a timely appeal to Level IV on September 8, 1994. By Order dated September 30, 1994, the West Virginia Division of Personnel (DOP) was joined as an indispensable party. Thereafter, an evidentiary hearing was held in this Board's office in Charleston, West Virginia, on November 21, 1994. This matter became mature for decision upon receipt of post-hearing submissions on December 13, 1994.

Background

As the facts in this case are not in dispute, the following relevant Findings of Fact are appropriate

to resolution of this grievance.

FINDINGS OF FACT

1. Grievant was employed by the West Virginia Department of Transportation, Division of Motor Vehicles (DMV), as a Customer Service Representative, from November 1992 to June 30, 1994. L III HT at 5, 7.

2. In March or April of 1994 Grievant interviewed for a position as a Revenue Agent with the West Virginia Department of Tax and Revenue (T&R). Sometime around June 8-10, 1994, Grievant was advised that he had been selected for a Revenue Agent I position and would begin working for T&R on July 1, 1994. L III HT at 6-7, 10.

3. Grievant first reported to his new position with T&R on July 1, 1994.

4. As a Customer Service Representative in Pay Grade 6 at DMV, Grievant was receiving $1,172 per month ($14,064 per year) prior to June 30, 1994.

5. Grievant's new salary as a Revenue Agent I in Pay Grade 9 at T&R was ultimately calculated by DOP at $1,445 ($17,340 per year).

6. Between January 4, 1994, and June 30, 1994, at least one employee was transferred upon promotion from one state agency toanother and subsequently received the additional $1,008 annual pay raise on July 1, 1994. Oral stipulation of fact at L IV.

Discussion

In a grievance of this nature, Grievant has the burden of proving each allegation by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). This grievance essentially contends that the policy adopted by the West Virginia Division of Personnel to implement the Legislature's 1994 across-the-board pay raise is contrary to legislative intent and is arbitrary and capricious as applied to Grievant's particular situation.

Upon approving a salary increase of $1,000 for full-time public employees, the Legislature noted: "It is the intent of the legislature that all full-time employees of the state participate in salary increases although it is recognized that the Division of Personnel will fulfill its obligations under general law and construct reasonable guidelines for eligibility which may involve minor restrictions." Digest of the Enrolled Budget Bill, Legislature of West Virginia 1994, at VI. (DOP Ex 1 at L III.) As explained by Mr. Lowell Basford, Assistant Director of Personnel for Classification and Compensation, appropriate guidance on eligibility was issued by Robert L. Stephens, Jr., Director of Personnel, in a memo to all

Cabinet Secretaries and Agency Heads dated April 14, 1994, entitled "Instructions for Across-the-Board Increase." For administrative convenience, the across-the-boardincrease was established at $1,008 per year. Section IV-C of that memo further provides:

> Personnel transactions such as promotions and merit increases which are to be effective July 1, 1994 shall be processed and effective after the across-the-board increase. That is, the across-the-board increase shall be added to the affected employee's salary before calculating any promotional or merit increases.

Despite some initial confusion between T&R and DOP regarding Grievant's salary, (See footnote 1) his pay was eventually established in accordance with the foregoing DOP guidance at $17,340 per year. This was done by awarding Grievant the $1,008 pay increase on June 30, 1994, his last day at DMV, and then adding the 15 per cent pay increase to which he was entitled because of his promotion to a position in Pay Grade 9, giving Grievant a new annual compensation rate of $17,340. (See footnote 2)

Grievant contends that his salary should have been calculated by adding the $1,008 across-the-board raise to the base salary for an employee in Pay Grade 9, $17,256 per year, giving him an annualsalary of $18,264. (See footnote 3) As Grievant correctly notes, had he left DMV a day or more sooner and commenced working at T&R on June 30, 1994, or earlier, his calculations would apply. However, notwithstanding the existence of this anomaly, Grievant has failed to demonstrate that he was the victim of any form of discrimination since all employees who changed agencies in the same time frame would be treated in the same manner. See Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Moreover, DOP has broad discretion to perform its administrative functions so long as it does not exercise this discretion in an arbitrary or capricious manner. See Smith v. W. Va. Div. of Corrections, Docket No. 94-CORR-624 (Feb. 27, 1995). The rules promulgated by DOP pursuant to its delegated authority are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. See Callaghan v. W. Va. Civil Serv. Comm'n, 273 S.E.2d 72 (W. Va. 1980). Moreover, a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 328 S.E.2d 164 (W. Va. 1985). See W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681 (W. Va. 1993). As aptly noted by the Grievance Evaluator at Level III, "just because

application of a differentrule would result in a large salary increase for Grievant does not render DOP's rule unreasonable or the position advocated by Grievant less arbitrary." L III Decision at 8.

In addition to the foregoing, the following conclusions of law are made in this matter.

CONCLUSIONS OF LAW

1. In order to prevail in a grievance alleging impropriety in the calculation of his salary, Grievant must prove the allegations in his complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. The West Virginia Division of Personnel has broad discretion to perform its administrative functions, so long as it does not exercise this discretion in an arbitrary or capricious manner. See Smith v. W. Va. Div. of Corrections, Docket No. 94-CORR-624 (Feb. 27, 1995).

3. Grievant failed to demonstrate by a preponderance of the evidence that either the Department of Tax and Revenue or the Division of Personnel improperly applied or failed to comply with any applicable laws, rules, policies or regulations in regard to calculating his new annual salary as a Revenue Agent I commencing on July 1, 1994.

4. Grievant failed to demonstrate by a preponderance of the evidence that the West Virginia Division of Personnel's instructions, policies, rules or regulations applicable to determiningGrievant's proper annual salary as of July 1, 1994, are arbitrary and capricious as written or applied or that they do not comply with the authorizing legislation. See Callaghan v. W. Va. Civil Serv. Comm'n, 273 S.E.2d 72 (W. Va. 1980); Smith, supra; Miller v. W. Va. Div. of Highways, Docket No. 93-DOH-011 (June 30, 1993), aff'd, Civil Action No. 93-AA-201 (Kanawha County Cir. Ct. Feb. 7, 1994).

Accordingly, this grievance is **DENIED**.

Any party 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.

LEWIS G. BREWER

Administrative Law Judge

Dated: February 28, 1995

Footnote: 1*It is evident that various Personnel Action Forms (WV-11) were incorrectly generated and variously altered before Grievant's current annual salary of $ 17,340 was established. Cf. G Ex 1 & 2 and R Ex 1 at L III. The Level III hearing examiner granted partial relief, making this $17,340 salary retroactive to July 1, 1994. L III decision at 8-9.*

Footnote: 2*This transaction may be summarized mathematically as follows:*

$14,064.00 - Salary at DMV

+ 1,008.00 - Across-the-board raise

$15,072.00 - Adjusted base salary

+ 2,268.00 - 15% promotion increase

$17,340.00 - New annual salary at T&R

Footnote: 3*Grievant's calculations may be summarized mathematically as follows:*

$14,064.00 - Salary at DMV

+ 3,192.00 - Promotion increment

$17,256.00 - Base salary for Pay Grade 9

+ 1,008.00 - Across-the-board pay raise

$18,264.00 - New annual salary at T&R