

**GINA CAVENDER, et al.,**

**Grievants,**

**v.**

**DOCKET NO. 96-BEP-142**

**WEST VIRGINIA BUREAU OF EMPLOYMENT**

**PROGRAMS/DIVISION OF PERSONNEL,**

**Respondents.**

## **D E C I S I O N**

Grievants, Gina Cavender, David Calvert, and Pamela Brown, are employees of West Virginia Bureau of Employment Programs (hereinafter "BEP"). Ms. Cavender is classified as a Secretary I working in the Unemployment Compensation Division's Benefits Section; Mr. Calvert is classified as a Supervisor III, working in the Bureau's Labor and Economic Research Section; Ms. Brown was employed as Employment Programs Interviewer at the Charleston Job Service office, but has since left BEP's employ and now resides out-of-state.

On August 4, 1993, July 30, 1993 and August 1, 1994, respectively, Grievants filed their grievances with BEP in accordance with W. Va. Code §§ 29-6A-1, et seq. as follows: [\(See footnote 1\)](#)

### **Statement of Grievance (David Calvert)**

Equitable proration of annual increment pay by the actual factor of 2 rather than by 20. Continuation of same grievance filed last year (1993) concerning pro-rata of increment due to two-month leave of absence. Increment was pro-rated in 1993 by a factor of 19; in 1994 by a factor of 20. Grievance is based upon Miller v. Division of Highways in which decision was rendered in favor of Miller, subsequently appealed by the Department of Personnel to the Kanawha County Circuit Court, where the appeal was dismissed, and has most recently been appealed to the WV Supreme Court where it awaits review.

**Relief Sought:** Pro-ration by the more conscienable factor of 2 months.

### **Statement of Grievance (Gina Cavender)**

I was reinstated December 1, 1992. My increment pay was subjected to the pro-rata formula in accordance with the Division of Personnel.

**Relief Sought:** Compensation for all years of service, instead of using the pro-rata formula.

### **Statement of Grievance (Pamela Brown)**

I was on a personal leave of absence from 7/92-3/93. I am now being credited with only four years of service toward my 1992-93 increment pay instead of my actual 12 years as of 6/92 due to the "pro-rata" formula used to calculate this years pay. (1992 rate, divided by 12 months, multiplied by the number of months worked in 1993).

**Relief Sought:** Compensation for actual 12 years of service instead of four years used in the pro-rata formula and to be made whole in every way.

Following adverse decisions at the lower levels, Grievants appealed to level four on or about April 4, 1996. [\(See footnote 2\)](#) Hearing was held on June 17, 1996, and this case became mature for decision on July 8, 1996, the deadline for the filing of proposed findings of fact and conclusions of law.

### Discussion

Although stated somewhat differently in each grievance statement, Grievants are essentially challenging the method by which their annual increment payments were calculated for fiscal years 1992-93 and 1993-94. Grievants do not contest the authority of Respondents to prorate their increment pay for the time they were off work, but they assert that the amount prorated should only be the increment they believe they earned in any one particular fiscal year, i.e., \$36.00, rather than the entire amount of the increment. [\(See footnote 3\)](#) Further, Grievants assert they were not credited with carryover months to achieve an additional full year's service in accordance with this Board's decision in Miller v. W. Va. Div. of Highways, Docket No. 93-DOH-011 (June 30, 1993), aff'd Circuit Court of Kanawha County, Civil Action No. 93-AA-201 (Feb. 27, 1994).

The Division of Personnel's (DOP) method of calculating increment pay has been challenged before, and this Board has found it to be in accordance with all applicable rules and statutory

authority. Smith v. W. Va. Div. of Highways, Docket No. 96-DOH-083 (Aug. 2, 1996). The annual increment statute is embodied in W. Va. Code § 5-5-2. It states, in pertinent part:

[E]very eligible employee with three or more years of service [\(See footnote 4\)](#) shall receive an annual salary increase equal to thirty-six dollars times the employees' years of service, not to exceed twenty years of service. In each fiscal year thereafter and on the first day thereof, each such employee shall receive an annual increment increase of thirty-six dollars for such fiscal year . . .

For employees with between three and twenty years of service, the formula for increment pay is \$36.00 times an eligible employee's full years of service. The number of full years of service is assessed on July 1 for each fiscal year.

The West Virginia Personnel Board has adopted a policy covering the payment of the annual salary increment. This policy provides that the total annual increment must be prorated where the employee works less than the entire fiscal year. (See, Annual Increment Policy, Policy # DOP-P5, effective date: March 1, 1992). Respondent DOP is responsible for the administration of W. Va. Code § 5-5-2. "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, 424 S.E.2d 775 (W. Va. 1992); Syl. Pt. 3, Smith v. Bd. of Educ. of County of Logan, 341 S.E.2d 685 (W. Va. 1985); Syl. Pt. 4, Security Nat'l Bank and Trust Co. v. First W. Va. Bancorp, Inc., 277 S.E.2d 613 (W. Va. 1981).

The reason the current method of calculating increment pay is correct is 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, *supra*. In administering the increment policy correctly, Respondents harmonized W. Va. Code § 5-5-2 with other salary dependent statutes. Respondent's Annual Increment Policy, under Section III entitled "Policy", states:

C. In accordance with the U.S. Department of Labor ruling on August 26, 1985, the increment increase payments shall only be included when computing the determined rate of pay for overtime payment for employees working in excess of 40 hours in any workweek.

D. The experienced-based increment pay shall be included when determining an employee's daily rate to be reported to the Workers' Compensation Fund.

F. The experienced-based increment pay shall be included in an employee's reportable income for Unemployment Compensation benefits.

Furthermore, the 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 a 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 Smith v. W. Va. Div. of Highways, Docket No. 96-DOH-083 (Aug. 2, 1996).

Applying the above analysis to the instant case, the following results are achieved for each Grievant. With respect to Grievant Calvert, the undersigned has searched therecord, but finds no documentation or testimony as to his initial starting date with the state. However, Grievant Calvert testified that in fiscal year 1992-93 he received an increment check reflecting 19 total years of service and in fiscal year 1993-94 his increment check reflected 20 years of total service. He also testified that in fiscal year 1992-93, he had 4 "surplus" months, or carryover months, and that in fiscal year 1993-94, he had 2 "surplus" months. Based on these representations, the undersigned has attempted to recreate Grievant Calvert's employment history to better understand how his increment pay was calculated.

It appears to the undersigned that Grievant Calvert had 18 full years plus 4 months service at the beginning of fiscal year 1992-93. He went on approved leave of absence without pay for approximately 2 months in fiscal year 1992-93. He was obviously credited with 2 months of his "surplus" to give him a total of 19 full years service, but received a prorated annual increment payment calculated on the 10 months actually worked in that fiscal year. Again, in fiscal year 1993-94, Grievant Calvert went on approved leave of absence for 2 months. Again, it appears he was credited with the additional 2 months "surplus" to give him a total of 20 full years service, but his increment payment was calculated based upon 10 months actually worked.

Grievant Calvert asserts that by being credited with the 2 months "surplus" each year, resulting in

a full year's service, his increment checks should not have been prorated at all, in essence, treating those 2 months as credit for time actually worked. This is not the intent of the statute and policy. Because Grievant Calvert did not work for 2 months in each of those fiscal years, he would not be entitled to receive a salary for those months. Thus, prorating his annual increment for 10 months for each of those years, but crediting him with full years' of service due to his "surplus" months, was the correct way to calculate his increment payment.

Grievant Cavender was employed as a permanent employee at BEP from November 7, 1984, through September 9, 1988, for a total of 4 years and 8 months of service. She resigned her employment on September 9, 1988. She testified she had received an increment check in July 1988, before she resigned, which would presumably have been for 4 years total service, leaving her a "surplus" of 8 months. Upon leaving state employment 2 months later, Grievant Cavender testified she was paid all benefits which she was entitled to receive, but did not know whether she was paid for the increment pay to which she was entitled at that time. Joe Smith, Assistant Director, Division of Personnel, testified that employees are paid for all benefits, including any annual increment pay, to which they are entitled upon resignation of employment with the state. Therefore, Grievant Cavender more likely than not was paid for the 8 months increment pay upon her resignation from state employment in September 1988.

Grievant Cavender returned to state employment on December 1, 1992. For fiscal year 1992-93, she received an annual increment payment prorated for 7 months of actual service during that fiscal year, for a total of \$105.00. The increment was calculated counting her prior years of service with the state as follows:  $\$36.00 \times 5$  years of service to equal \$180.00 (the prior 4 years and 8 months + 7 months = 5 years and 3 months), divided by 12 months to equal \$15.00/month, multiplied by seven months, for a total of \$105.00. The undersigned finds no error in this calculation. Grievant Brown was employed by the state from August 1, 1979 to June 29, 1992, for a total of 12 years, 10 months and 29 days service. In fiscal year 1992-93, she went on approved leave of absence without pay from July 1992 to March 1993. She received a prorated annual salary increment for the 4 months during which she performed work for BEP, which was calculated as follows:  $\$36.00 \times 13$  years of service to equal \$468.00 (the prior 12 years, 10 months, 29 days + 4 months = 13 years, 2 months, 29 days), divided by 12 months to equal \$39.00/month, multiplied by four months, for a total of \$156.00. The undersigned finds no error in this calculation.

Based on the documentation, testimony, and the foregoing discussion, the undersigned makes the following findings of fact and conclusions of law.

### Findings of Fact

1. Grievants were, at all times pertinent herein, employees of BEP. Grievant Brown resigned from state employment effective January 29, 1996.

2. BEP is a classified state agency established by W. Va. Code § 5F-1-2, and as such, is subject to the West Virginia Division of Personnel's Administrative Rules as well as its lawfully promulgated policies.

3. Grievant Calvert had approximately 18 years, 4 months service at the beginning of fiscal year 1992-93. He took two 2-month leaves of absence without pay in fiscal years 1992-93 and 1993-94. In 1992-93 he was credited with 2 months of "surplus" to give him a total of 19 full years of service. In 1993-94 he was credited with the remaining 2 months of "surplus" to give him a total of 20 full years of service. He received annual increment increases calculated on his full years of service, divided by 12 months, and then multiplied by the 10 months actually worked in both fiscal years 1992-93 and 1993-94.

4. Grievant Cavender had 4 years and 8 months prior service with the state. She was reinstated to state service and had been on BEP's payroll for 7 months at the end of fiscal year 1992-93. She received a pro-rated increment payment which was based on 5 years total full years of state service, divided by 12 months, then multiplied by the 7 months she actually worked in fiscal year 1992-93.

6. Grievant Brown had 12 years, 10 months, 29 days service, when she went on approved leave of absence without pay from July 1992 to March 1993. In fiscal years 1992-93, she received a pro-rated increment payment for 13 years total service, divided by 12 months, then multiplied by the 4 months of fiscal year 1992-93 during which she actually performed work for BEP.

### Conclusions of Law

1. In non-disciplinary matters, Grievants must prove all of the allegations constituting the grievance by a preponderance of the evidence. Ward v. W. Va. Reg. Jail and Corr. Facility, Docket

No. 95-RJA-410 (Feb. 20, 1996).

2. Every eligible employee of the State of West Virginia with three or more "years of service" shall receive annual increment pay equal to thirty-six dollars times the employee's number of years of service. No more than twenty "years of service" with the State can be applied toward calculating increment pay for eligible employees. W. Va. Code § 5-5-2.

3. "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, 424 S.E.2d 775 (W. Va. 1992); Syl. Pt. 3, Smith v. Bd. of Educ. of County of Logan, 341 S.E.2d 685 (W. Va. 1985); Syl. Pt. 4, Security Nat'l Bank and Trust Co. v. First W. Va. Bancorp, Inc., 277 S.E.2d 613 (W. Va. 1981).

4. "'Annual 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 10, 1993), aff'd, Circuit Court of Kanawha County, Civil Action No. 93-AA-201 (Feb. 7, 1994).

5. Because W. Va. Code § 5-5-2 states the annual increment is an "annual salary increase," one can only receive the annual increment for time actually worked during the fiscal year.

6. Grievants' annual increments were correctly calculated based on the Division of Personnel's Policy DOP-P5. Therefore, Respondents did not violate W. Va. Code § 5-5-2 in calculating Grievants' annual increment for fiscal years 1992-93 and 1993-94.

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.

---

**MARY JO SWARTZ**

**Administrative Law Judge**

**Dated: September 9, 1996**

---

[Footnote: 1](#)

*West Virginia Code §§ 29-6A-1, et seq., are the Grievance Procedure for State Employees.*

---

[Footnote: 2](#)

*The grievances were consolidated at the lower levels, and were held in abeyance pending the appeal of a prior increment case, Miller v. Division of Highways, Docket No. 93-DOH-011 (June 30, 1993), aff'd Circuit Court of Kanawha County, Civil Action No. 93-AA-201 (Feb. 7, 1994).*

---

[Footnote: 3](#)

*The annual increment pay has been amended to \$50.00 per year, effective July 1996.*

---

[Footnote: 4](#)

*"'Years of service' means full years of totaled service as an employee of the state of West Virginia." W. Va. Code § 5-5-1.*