

ROBERT W. SMITH,

Grievant,

v. DOCKET NO. 96-DOH-083

WEST VIRGINIA DIVISION OF HIGHWAYS, and

WEST VIRGINIA DIVISION OF PERSONNEL,

Respondent.

DECISION

Mr. Robert W. Smith (Grievant) filed a grievance against the West Virginia Division of Highways, and the West Virginia Division of Personnel (Respondent) on August 16, 1993. Grievant alleges:

There is a discrepancy in the number of increment[] checks I have received since my injury on the job (2-8- 91) and my return to work (6-1-93). Also there is a discrepancy in the starting date of employment, which would add tenure to my increments and also on my annual leave.

As relief, Grievant requests that "[t]he starting date of employment to be corrected, also the remaining increments due me." Grievant was denied relief at Levels I and II on September 17, 1993, and March 31, 1994, respectively. On November 2, 1995, [\(See footnote 1\)](#) a hearing was held at Level III, and the grievance was denied by a three member panel. On February 13, 1996, Grievant appealed to Level IV. At Level IV, the parties agreed to submit the case on the record developed at the lower levels of the grievance procedure, with the right to file proposed findings of fact and conclusions of law. The case became mature for decision on June 4, 1996, with the receipt of the parties' proposed findings of fact and conclusions of law.

The following Findings of Fact were derived from the record.

FINDINGS OF FACT

1. Grievant became a regular full-time employee of Respondent on April 1, 1979.

2. Grievant was on a leave of absence from February 8, 1991, to June 1, 1993, and received Workers' Compensation. He received no salary during this period.

3. For the increment year of July 1, 1990, to June 30, 1991, Respondent prorated Grievant's annual increment. He had eleven "years of service."

4. For the increment year of July 1, 1991, to June 30, 1992, Respondent did not issue Grievant an increment check because he was not in "pay status" during any part of the year. He remained at eleven "years of service."

DISCUSSION

This grievance presents two issues. The first issue to be decided is Grievant's permanent hire date.

Grievant testified he was temporarily hired by Respondent in March, 1978, and became a "full time" employee on January 1, 1979. Respondent asserts that Grievant did not become a regular employee until April 1, 1979. Mr. James E. Anders, Respondent's payroll supervisor, testified:

We have support in this by printout from the Consolidated Public Employees Retirement Board that will support his first contribution as being made the 1st of April 1979 or the month of April 1979 and carrying forward through his employment history. I have original cards, I don't know that they're original, they may be carbons but they look to be original to me. They go back into his January employment and periods prior to that, going back into September 1978 when he came on board temporary and then he came on board temporary and then he came on board temporary again. Regarding this sheet from our payroll system, it shows that his date of employment is, in fact, 1-8-79.

At the close of the Level III hearing, Grievant's request to leave the record "open" for ten days was granted. However, Grievant was unable to produce any documentation on this issue. Therefore, based on the record developed below, the Undersigned finds that Grievant became a regular full-time employee of Respondent on April 1, 1979.

The second issue is whether it is appropriate to prorate Grievant's increment pay for the 1990-91 increment year. He worked approximately five months of the increment year, and was on a leave of absence for the remainder of the increment year. Grievant received five twelfths of his total annual increment for this increment year in accordance with the applicable policy.

The annual increment statute is embodied in W.Va. Code §5-5-2. It states, in pertinent part:

[E]very eligible employee [\(See footnote 2\)](#) with three or more years of service [\(See](#)

[footnote 3\)](#) 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 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: Mar. 1, 1992).

Respondent 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, ___ W.Va. ___, 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 (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 (1981).

The annual increment is not a bonus. 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. Division of Highways, Docket No. 93-DOH-011 (June 30, 1993). In administering the increment policy correctly, Respondent 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 of 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, ___ W.Va. ___, 388 S.E.2d 491 (1989); State ex rel. Erwin v. Gainer, No. 16791 (August 2, 1985) (per curiam). [\(See footnote 4\)](#) Therefore, Respondent did not violate W.Va. Code §5-5-2 when it prorated Grievant's 1990-91 annual increment.

Grievant also alleges that Respondent violated W.Va. Code §5- 5-2 by not issuing him an increment check for increment year 1991- 92. Respondent asserts that Grievant is not entitled to an increment check because he was not in "pay status," and did not add a year of service. If Grievant was not receiving a "salary" during the period in question, then W.Va. Code §5-5-2 was not applicable, and he was not eligible for increment pay. [\(See footnote 5\)](#)

In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In nondisciplinary matters, Grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Ward v. W.Va. Regional Jail and Correctional Facility Auth., 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, ___ W.Va. ___, 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 (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 (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 30, 1993).

5. Because W.Va. Code §5-5-2 states the annual increment is an "annual salary increase," one must be in "pay status" to receive the annual increment.

6. Respondent did not violate W.Va. Code §5-5-2 when it prorated Grievant's 1990-91 annual

increment.

Accordingly, the 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.

DATED: August 2, 1996 _____

JEFFREY N. WEATHERHOLT
ADMINISTRATIVE LAW JUDGE

[Footnote: 1](#)

The parties did not explain the reason for the substantial time gaps between the levels in the grievance process.

[Footnote: 2](#)

W. Va. Code § 5-5-1 defines "eligible employee" as "any regular full-time employee of the state of any spending unit thereof who is eligible for membership in any state retirement system of the state of West Virginia or other retirement plan authorized by the state . . .".

It further defines "spending unit" as "any state office, department, agency, board, commission, institution, bureau or other designated body authorized to hire employees."

[Footnote: 3](#)

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

[Footnote: 4](#)

Because increment pay is treated as a salary, an employee cannot receive 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.

[Footnote: 5](#)

Grievant does not contest payment for increment years 1992- 93, and 1993-94.