LINDA BUSH,

Grievant,

v.

DOCKET NO. 97-HHR-568

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES and

WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Linda Bush, filed the following grievance on July 31, 1997:

> In 1996 & 1997 I did not receive my full increment pay. This violates WV Code in relation to increment pay.
>
> Relief sought: Reimbursement for the shortage of increment pay plus interest for 1996 & 1997 and any other way be made whole. (See footnote 1)

The grievance was denied at levels one and two on August 4, 1997, and August 19, 1997, respectively, for lack of authority to grant the relief. A level three hearing was held on October 24, 1997, and the grievance was denied by Jennifer T. Plymale, Commissioner, Bureau for Children & Families, on November 16, 1997. Grievant appealed to level four on December 22, 1997, and after several continuances for good cause, the parties agreed to submit the case on the record developed below. The grievance became mature for decision on October 19, 1998, the deadline for the parties' proposed findings of fact andconclusions of law. Grievant was represented by Lynn Belcher, AFSCME Council 77 Representative, and George Surmaitis, Esq., Crandall, Pyles & Haviland, and the Department of Health and Human Resources (“HHR”) and the Division of Personnel (“DOP”) were represented by John Hammer, Regional Director, and Assistant Attorneys General Don Darling

and B. Allen Campbell, Esq.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Case Synopsis of Miller v. W. Va. Div. of Highways/Div. of Personnel, Docket No. 93-DOH-011 (June 30, 1993).

Ex. 2 -

W. Va. Div. of Highways/Div. of Personnel v. Miller, No. 940998 West Virginia Supreme Court of Appeals (Sept. 8, 1994).

Ex. 3 -

Case Synopsis of Smith v. W. Va. Div. of Highways/Div. of Personnel, Docket No. 96-DOH-083 (Aug. 2, 1996).

Ex. 4 -

Copy of Annual Increment Check (July 31, 1997).

Ex. 5 -

Individual Attendance Reports, June 1996 and June 1997.

HHR's Exhibits

Ex. 1 -

W. Va. Div. of Personnel Annual Increment Policy (May 15, 1997).

Ex. 2 -

Reimbursement Calculation for Linda Bush (August 5, 1996).

Ex. 3 -

Reimbursement Calculation for Linda Bush (August 21, 1996).

Ex. 4 -

Copy of repayment checks from Linda Bush.

Testimony

Grievant testified in her own behalf, and HHR presented the testimony of Susan Craft.

FINDINGS OF FACT

The material facts are not in dispute. Grievant is employed by HHR's Bureau for Children & Families, and is currently classified as an Office Assistant II. As of June 30, 1997, Grievant had been employed as a regular, full-time employee of the State of West Virginia for approximately twenty-two (22) years. On August 16, 1996, Grievant sufferedan illness and took an unpaid medical leave of absence until October 9, 1996. For the fiscal year ending June 30, 1997, HHR prorated Grievant's increment pay for the period of time she was on leave without pay, resulting in Grievant receiving approximately ten- twelfths (10/12) of her total increment pay.

DISCUSSION

Grievant alleges that the West Virginia Division of Personnel Annual Increment Policy (May 15, 1997) is in direct violation of W. Va. Code § 5-5-2, and unlawful. HHR contends that, as Grievant was in a “no-pay” status for a period in 1996 due to a personal illness, the Increment Policy was applied correctly by prorating her increment pay for that fiscal year.

From the effective date of Code § 5-5-2, Grievant received her annual increment pay without any problems until 1996. For the increment year of July 1, 1996 to June 30, 1997, Respondents prorated Grievant's annual increment in accordance with Personnel's policy because she did not work the entire fiscal year. Grievant concedes the Policy was applied properly in her case, but argues that the Policy itself is unlawful, and is in violation of two prior Kanawha County Circuit Court decisions. See Miller v. W. Va. Div of Highways and W. Va. Div. of Personnel, Docket No. 93-DOH-011 (June 30, 1993), aff'd, Circuit Court of Kanawha County, Civil Action No. 93-AA-201 (Feb. 27, 1994), cert. denied, W. Va. Supreme Court of Appeals, No. 940998 (Sept. 8, 1994); and Smith v. W. Va. Div. of Highways and W. Va. Div. of Personnel, Docket No. 96-DOH-083 (Aug. 2, 1996), rev'd, Circuit Court of Kanawha County, Civil Action No. 96-AA-127 (Oct. 15, 1997).

The Grievance Board held in Miller, supra, that an employee was entitled to be credited with carryover months from one fiscal year to another in order to achieve anadditional full year's service. In Smith, the Grievance Board held that the Division of Personnel's method or calculating increment pay, including prorating for partial years of service, was in accordance with all applicable rules and statutory authority. The Circuit Court reversed that decision, holding that the Respondents' action of prorating increment pay was “clearly wrong and contrary to law.” However, the Circuit Court's Order did not identify specifically what statutory provision(s) or rules were actually violated, and failed to provide any analysis to support its conclusion.

Pursuant to W. Va. Code § 5-5-2 (1996), every eligible employee of the State of West Virginia with three or more “years of service” shall receive fifty dollars times the employee's number of years of service. No more than twenty “years of service” with the State can be applied toward the calculation of increment pay for eligible employees. (See footnote 2)

In accordance with W. Va. Code § 5-5-1, the West Virginia Division of Personnel (“DOP”) developed a policy which covers the payment of annual salary increments. Pursuant to this policy, the total annual increment must be prorated when the employee works less than the entire year. Specifically, the Policy states as follows:

II. DEFINITIONS

. . .

B.

Full Years of Service: Full years of total service **as an employee of the State of West Virginia** (1 year equals 12 months): . . .

3.

This excludes any time during the year that an employee is off the payroll in a no-pay status for unauthorized leave, leave of absence (personal, medical, or parental), Workers' Compensation temporary total disability benefits, or suspension.

III. POLICY

. . .

A.

Effective the fiscal year beginning July 1, 1996, every eligible employee with 3 or more full years of service shall receive an annual salary increase equal to $50 times the employee's years of service, not to exceed 20 years of service. . . .

7.

An eligible employee who is or has been on a leave of absence without pay during a fiscal year shall be paid concurrently with all other eligible State employees a pro rata share for the portion of time for which he/she worked regardless of whether or not the employee has returned to duty at the time the annual increment is paid.

Example: If an employee had 10 years' service, he would be entitled to an annual increment of $500.00 (10 years x $50.00 increment), as if he were being paid a salary of $500.00 per year. If that employee did not work [i.e. was in a no pay status] 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 $500.00 increment, or $250.00 for 6 months he actually worked. [See Smith v. W. Va. Div. of Highways, Grievance Docket No. 96-DOH-083 (Aug. 2, 1996) and Cavender, et al. v. W. Va. Bureau of Employment Programs and Division of Personnel, Grievance Docket No. 96-BEP-142 (Sept. 9, 1996).]

HHR Ex. 1 (emphasis in original).

The Annual Increment Policy provides that the total annual increment must be prorated where the employee works less than the entire fiscal year. "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:

D. 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.

E. The increment pay shall be included when determining an employee's daily rate to be reported to the Bureau of Employment Programs, Workers' Compensation Division.

F. The 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 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 Cavender, supra; Smith, supra. In conclusion, to award Grievant an increment check based on a full year or twelve months of service when she only worked approximately 10 months that fiscal year would clearly violate the statute, as well as contradict the prior rulings of the West Virginia Supreme Court of Appeals.

CONCLUSIONS OF LAW

1. Every eligible employee of the State of West Virginia with three or more “years of service” shall receive annual increment pay equal to fifty 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.

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).

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. Grievant's annual increment was 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 Grievant's annual increment for fiscal year 1996-1997.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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: November 13, 1998

Footnote: 1

Grievant withdrew that portion of her grievance dealing with increment pay for 1996 at level three.

Footnote: 2

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