STEPHEN RULE,

Grievant,

v. Docket No. 99-HHR-130

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES and

WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Stephen Rule, Grievant, filed this grievance against his employer the West Virginia Department of Health and Human Resources ("HHR"). The West Virginia Division of Personnel ("DOP") was joined as an indispensable party on May 18, 1999, by the undersigned Administrative Law Judge. (See footnote 1) This grievance was denied at all lower levels, and Grievant appealed to Level IV on August 8, 1997. (See footnote 2) Two pre-hearing phone conferences were conducted to clarify issues, and a Level IV hearing was held on July 14, 1999. This case became mature for decision on that date, as the parties did not wish to file proposed findings of fact and conclusions of law.

Procedural History

A procedural history will be helpful in understanding the current status of the case, and the reasons for the delay in its resolution. There have been several Statements of Grievance. The first, or original, Statement of Grievance was filed with HHR on March 17, 1994, and reads:

> The purpose of this grievance is two fold and it is pointing out violation of U.S.Law (sic) under the Federal Hour and Wage, Pension Act. I have been totally disabled for over 4 ½ years and was denied my application for retirement benefits for March 19,1989 thur (sic) to present time, a five (5) years (sic) of benefits.
>
> West Virginia Retirement System will not give me credit for the 71/2 years of Service

as I work[ed] for Goverors' (sic) Emergency Manpower Program.

71/2 years WV Gov. Emergency Employment Program

121/2 years Colin Anderson Center

20 years of total service with the state of West Virginia

Relief Sought:

I wish to be made whole and complete that reflects 20 years toward my retirement.

I want 5 years of Retirement benefits plus interest at U.S. T-bills rate. (See footnote 3)

On March 17, 1994, Grievant's supervisor indicated she was unable to grant the relief sought and was referring his grievance to the next level. At Level II, Grievant was informed that HHR must be guided by DOP on matters involving time lost due to Workers' Compensation, and that the matter at issue was currently under litigation. Apparently this grievance was placed in abeyance while litigation of the issue proceeded. Sometime in March or April of 1996, Grievant, like many other HHR employees, received a settlement agreement and release to resolve the issue of annual increment pay. On April 2, 1996, Grievant signed this settlement agreement with the following notation: " *sign under protest *shortages of years and years of calculation 1989 Partial 1990 and 1991." This settlement agreement was not accepted by the Respondent.

On June 14, 1996, and again on June 18, 1996, Mr. Campbell sent Grievant another settlement agreement indicating they had discussed it the previous day, directing Grievant to read the settlement agreement carefully, and informing Grievant an agreement signed under protest could not be considered a voluntary agreement. Mr. Campbell also notified Grievant he had spoken to the Level III Hearing Examiner and asked her to set the case forhearing as soon as possible, in the event Grievant did not sign the settlement agreement. It appears this settlement agreement was not signed.

On July 18, 1996, the Grievance Board received another grievance form from Grievant dated June 30, 1996, with the following Statement of Grievance :

> Since I am still an employee of DHHR[,] 7 years from 1989 thru 1996 should be considered in 14 years[,] making a total of 21 years[.] [A]ll this should be used to calculate my increment pay. Re: Miller v WVa Dept of Highways[.]

Relief Sought: Pay all increment pay based on 21 years + interest[.]

From the information received, it appeared this grievance was not disciplinary, had not been through a Level III hearing, and was not appropriate for the expedited appeal process. Thus, it was dismissed from the docket of the Grievance Board, and Grievant was instructed to file at Level I.

A Level III hearing was held on August 26, 1996, regarding the March 1994 grievance, and the grievance was denied on July 30, 1997. (See footnote 4) On August 12, 1997, the Grievance Board received a letter from Grievant dated August 8, 1997, stating he did not agree with the Level III Decision and wished to appealto Level IV. Grievant wrote that the "Issue of the grievance" was "71/2 years working for the state of West Virginia funded by Comprehence (sic) Employment Training Act (18 month program) increment pay and tenure to be added to and used to calculate all personel (sic) acts." Little additional information was contained in this letter, and there was no grievance form.

On August 28, 1997, Ms. Valerie Rist, the Grievance Board's Administrative Assistant, wrote Grievant telling him the brief information provided was insufficient to docket the grievance submitted to Level IV. This letter contained a copy of the Grievance Form, specific directions about what information was required, and additional instructions directing Grievant to call if he had questions. The last sentence stated, "Be advised that no further action will be taken on your grievance until the requested information is received."

The grievance form was not returned. However, Grievant would periodically call this Grievance Board and ask what was happening with his grievance, and when would it be scheduled for hearing. He would indicate his grievance was settled, and would be informed settled grievances did not come to Level IV. Each time he was 1) informed about Ms. Rist's letter, 2) told of the need to complete a grievance form, 3) sent another grievance form, and 4)directed as to what he needed to do. On the last call, he was also told how to get a grievance form from the web site. Grievant would say he had sent the form, and then would indicate he would send the form. (See footnote 5) On April 23, 1999, this Grievance Board received another letter from Grievant. The information received indicated the settlement agreement was "figured wrong". Grievant also sent an E-Mail message on April 27, 1999, stating he was willing to sign off on a new settlement agreement with the proper calculations.

On or about April 26, 1999, the undersigned Administrative Law Judge was assigned this case, and wrote Grievant a letter dated April 28, 1999, directing him that he "MUST" fill out the enclosed

Grievance Form, and send it back before a needed conference call could be scheduled. Grievant was also directed to attach any signed orders from circuit court judges he felt were applicable to his grievance. (See footnote 6) Mr. Campbell was also sent a letter at that time requesting the file and all lower level exhibits.

On May 3, 1999, Grievant returned his Grievance Form. This Statement of Grievance asserted:

> State increment pay [Miller v. West Virginia DOH]
>
> State does not recognize tenure +
>
> Relief Sought: Recalculate settlement based on letter or memorandum of tenure + interest [22 yrs.]

On May 10, 1999, Grievant sent another completed copy of his Grievance Form and several documents he believed applied to his case.

A pre-hearing telephone conference was held on May 14, 1999, for the purpose of clarifying the issue of the grievance. (See footnote 7) At that time the parties agreed the issues to be resolved were how much time Grievant had for annual increment purposes, and whether Grievant's CETA (See footnote 8) time should count towards his annual increment pay. A Level IV hearing was scheduled for July 14, 1999.

On June 17, 1999, Grievant requested the undersigned Administrative Law Judge issue a subpoena for Judge Andrew McQueen. (See footnote 9) A second pre-hearing phone conference was scheduled for July 7, 1999, to discuss this request. After some discussion, clarification, and explanation, Respondents moved to quash this subpoena request, this Motion was granted, and Grievant's objection was noted. Grievant then requested subpoenas for former Governors Arch Moore and Jay Rockefeller. Respondents again moved to quash stating these individuals did not have information necessary to the resolution of this grievance. This Motion was also granted, and Grievant's objection was again noted for the record.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed through the CETA program from March 1972 to August 1978, six years and five months, as a paid employee with theWaverley Volunteer Fire Department, administered by the Wood County Commission. (See footnote 10)

2. CETA was a federal program which has since been replaced by the Job Training Partnership Act Program. The funding for this program flowed from the Federal government through the State of West Virginia Office of Community and Economic Development.

3. The purpose of this program was to subsidize the employment of an employee for 18 months of training, and then the state or community agency was to add the individual as a permanent employee.

4. As a CETA employee, Grievant did not pay into the State Retirement Fund. (See footnote 11)

5. Employees must be employed by the State and pay into the State Retirement Fund in order for this time to be considered for annual increment purposes. Time worked in an "Extra Help position (i.e., CETA, hourly, summer, co-op, internship, temporary, 30-day, 90-day, etc.) [is] not eligible to earn years of service and annual increment . . . ." Respondent DOP Exh. Nos. 3 (Dep't ofFinance and Admin., Annual Increment Guidelines, Attach. 1) & 5 (Increment Guidelines dated July 2, 1990).

6. Grievant began state employment with Colin Anderson Center ("CAC") on July 15, 1981. The annual and sick leave he had accumulated with CETA was transferrable to this agency.

7. Grievant began paying into the State Retirement Fund when he began his employment with CAC.

8. On May 15, 1985, Betty Baron, Personnel Officer at CAC, wrote Grievant informing him he had ten years of service as of March 31, 1985. The letter also informed Grievant, "[p]lease keep in mind that the above calculation possibly includes only tenure which is countable for leave purposes." Grievant signed this letter on June 6, 1985. (See footnote 12)

9. Grievant sustained a work related injury on May 21, 1989, and was granted a medical leave of absence without pay. Grievant returned to work briefly from December 15, 1993, to January 24, 1994, for a total of 39 days. Grievant again returned to work on February 19, 1994, to March 10, 1994, for 18 days. 10. Grievant's last day of work was March 5, 1994, and his last day on the payroll was March 10, 1994.

11. Grievant was granted a medical leave of absence without pay from March 10, 1994, to April 1, 1994. There is no further clear evidence about what happened after that time.

12. Grievant was laid off on March 5, 1994. (See footnote 13)

13. At some point in time, Grievant received a RIF letter, and the date of this action is unclear. Records indicate Grievant was still on a leave of absence as of March 4, 1997, but do not indicate whether this leave was related to Workers' Compensation or due to the other medical problems Grievant experiences. (See footnote 14)

14. Grievant was no longer considered an employee of HHR, after he was laid off on March 5, 1994, and received his final check .

15. Grievant learned in February 1994 that his annual increment pay for 1993-1994 would be prorated and was based only on his full years of service when he paid into the State Retirement Fund. This was when Grievantfirst understood that his CETA time would not be applied toward his annual increment pay.

16. Although Grievant initially testified he was still on Workers' Compensation, this testimony was later clarified. He is currently seeking to reopen his Workers' Compensation claim.

17. Grievant presented no testimony or evidence about the dates he had received Temporary Total Disability or Benefits ("TTD's").

18. Grievant was off for approximately four years and seven months after the May 1989 injury. Pursuant to W. Va. Code § 23-4-6, a Workers' Compensation claimant is only allowed to receive TTD's for 208 weeks, or four years for an injury; thus, is unclear how much of the time between May 1989 and April 1994 Grievant received TTD's.

Issues and Arguments

Although somewhat confusingly presented by Grievant, there are two key issues in this grievance. The first is whether Grievant's CETA time should be counted for annual increment purposes, or put another way, how long has Grievant been a state employee for the purpose of computing his annualincrement pay. (See footnote 15) Grievant argues he was an employee of West Virginia during his CETA years, and as such, these years must be applied to his annual increment pay. Grievant believes HHR's failure to include his CETA time in this calculation violates his civil and constitutional rights.

Grievant also wants all the time he alleges he has been off on Workers' Compensation to be counted for annual increment purposes. He argues this time runs from May 21, 1989, to the date of

the hearing on July 14, 1999. (See footnote 16) Grievant avers the case of Miller v. Division of Highways/Division of Personnel, (See footnote 17) supports his case and requires him to be paid his annual increment from March 1972 to present.

Respondents argue the statutes, policies, and rules are clear, and, if an employee does not pay into the State Retirement Fund, he is not eligible to count those years toward his annual increment pay. Respondents also aver the issue of annual increment and Grievant's Workers' Compensation time isnot before this Grievance Board and is not relevant to these proceedings. Respondents also indicated they were unsure whether Miller, supra, was still considered by this Grievance Board to be good law, and whether it should or could be applied to this case. Respondent HHR acknowledges Grievant is owed some annual increment pay and asks that his time be determined by the Grievance Board.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

The two issues, although related, will be discussed separately.

I. Whether Grievant's CETA time should be counted toward his annual increment pay?

The first issue to examine is whether Grievant, while he was employed by CETA, was an eligible employee, such that his time with CETA should be counted toward his annual increment .

W. Va. Code §§ 5-5-1 & 2 relate to the rules for payment of the annual increment

and state:

5-5-1. Definitions.

For the purposes of this article: (1) "Eligible employee" means any regular full-time employee of the state or 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 . . .; (2) "years of service" means full years of totaled service as

an employee of the state of West Virginia; (3) "spending unit" means any state office, department, agency, board, commission, institution, bureau or other designated body authorized to hire employees.

5-5-2. Granting incremental salary increases based on years of service.

Effective for the fiscal year beginning the first day of July, one thousand nine hundred ninety-six, every eligible employee with three or more years of service shall receive an annual salary increase equal to fifty dollars times the employees' years of service, not to exceed twenty years of service. (See footnote 18) In each fiscal year thereafter and on the first day of July, each eligible employee shall receive an annual increment increase of fifty dollars for that fiscal year. Every employee becoming newly eligible as a result of meeting the three years of service minimum requirement on the first day of July in any fiscal year subsequent to one thousand ninehundred ninety-six, is entitled to the annual salary increase equal to fifty dollars times the employees' years of service, where he or she has not in a previous fiscal year received the benefit of an increment computation; and shall receive a single annual increment increase thereafter of fifty dollars for each subsequent fiscal year.

These Code Sections mandate that to be an Eligible Employee for annual increment pay, the employee must be employed by the state and must pay into the State Retirement System.

DOP's policy follows this Code Section, and DOP's POLICY NUMBER: DOP-P5 identifies the rules governing the annual increment pay and gives the following information:

I. PURPOSE: The purpose of this policy is to ensure uniform adherence to the established procedures for compensating eligible employees of the State and its spending units for the annual increment payment provided for in West Virginia Code § 5-5-2.

II. DEFINITIONS

A. Eligible Employee: means any regular full-time employee of the State or any spending unit thereof who is eligible for membership in any State retirement system of the State of West Virginia or any other retirement plan authorized by the State . . . .

B. Years of Service: means full years of totaled service as an employee of the State of West Virginia. Employees who work less than half-time (0.5 FTE) shall not receive years of service credit for such employment. Years of service excludes any period in which an employee is in a no-pay status for unauthorized leave, leave of absence (personal, medical or parental) or suspension: Provided, however, that, effective March 11, 1999, employees of the State ofWest Virginia continue to accrue tenure for the calculation of annual increment pay while receiving temporary total disability (TTD) benefits during absences from work due to a work-related compensable injury. (See

W. Va. Code § 23-5A-4, infra.)

C. Spending Unit: means any State office, department, agency, board, commission, institution, bureau, or other designated body authorized to hire employees.

III. POLICY

A. Effective for the fiscal year beginning July 1, 1996, every eligible employee with three or more years of service shall receive an annual salary increase equal to fifty dollars ($50) times the employee's years of service, not to exceed 20 years of service. In each fiscal year thereafter and on the first day of July, each eligible employee shall receive an annual increment increase of fifty dollars for that fiscal year. Every employee becoming newly eligible as a result of meeting the three years of service minimum requirement on the first day of July in any fiscal year subsequent to 1996, is entitled to the annual salary increase equal to fifty dollars times the employees' years of service, where he or she has not in a previous fiscal year received the benefit of an increment computation; and shall receive a single annual increment increase thereafter of fifty dollars for each subsequent fiscal year . . . .

Example: An individual was employed by the State Police and retired with 20 years of service. This person was subsequently employed by the Bureau of Employment Programs, effective September 1, and was eligible for an increment payment of $833.33 on July 1 of the next fiscal year. Calculation as follows:

Total Full Years of State Service (20) x $50 Per Year = Annual Increment Entitlement.

Annual Increment Entitlement ($1000)) 12 = Monthly Rate of Entitlement ($83.333).
Monthly Rate of Entitlement ($83.333) x Months Worked in Fiscal Year (10) = Gross Increment Payment ($833.33).

2. During the month of July, the Auditor's Office shall make such payment for the salary supplement in a lump sum payment. Eligible employees on leave of absence without pay at the time payment is made shall receive their annual increment payment concurrently with all other employees.

. . .

4. An eligible employee who has been in no-pay status (for reasons other than leave without pay while receiving Workers' Compensation temporary total disability benefits) during the fiscal year for which payment is being made shall receive a pro-

rated payment, based on the percentage of time in paid status during that fiscal year.

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 Cavender, et al. v. W. Va. Bureau of Employment Programs and Division of Personnel, Grievance Docket No. 96-BEP-142 (Sept. 9, 1996).]

. . .

B. The annual increment shall be paid on a pro rata basis for the portion of service rendered by the employee during the current fiscal year of employment.

1. Such service period shall include tenure value of any terminal annual leave, regardless of the method elected for payment of the leave (i.e., lump sum or remaining on payroll).

2. The prorated portion an employee receives upon separation prior to June 30, shall be based on his totaled full years of service, and shall be computed based on the months of service rendered in the fiscal year in which the employee terminates.

Example: An employee has 19 years and 6 months of qualifying State service as of June 30 and receives an increment in the gross amount of $950. This employee later resigns, effective December 31. At the time of his resignation, he is eligible to receive a pro rated increment for the 6 months he worked in the current fiscal year. Although the employee's totaled eligible State service now equals 20 years, he worked for only 6 months of the current fiscal year and is eligible to receive an increment in the gross amount of $500.

Total Full Years of State Service (20) x $50 Per Year = Annual Increment Entitlement ($1000).

Annual Increment Entitlement ($1000)) 12 = Monthly Rate of Entitlement ($83.333).

Monthly Rate of Entitlement ($83.333) x Months Worked in the Fiscal Year (6 mos.) = Annual Increment Payment ($500).

. . .

C. The employee is responsible for obtaining verification of qualifying service and

such service must be verified from each former State employer. The verification shall specify if the service was full-time or a portion thereof.

. . .

IV. REFERENCES

A. Department of Finance and Administration ANNUAL INCREMENT GUIDELINES: for West Virginia Code, § 5-5-1.

B. West Virginia Code, § 5-5-2 as amended (originally effective July 1, 1985).

C. State ex rel Erwin v. Gainer, No. 16791 (Aug. 2, 1985) (Unpublished Order); Courtney v. Dep't of Health, 182 W.Va. 465, 388 S.E. 2d 491 (1989). D. U.S. Department of Labor Opinion Letter, dated August 26, 1985.

E. Op. Att'y Gen., Aug. 17, 1988, No. 3.

F. Op. Att'y Gen., June 28, 1985, No. 11.

G. Op. Att'y Gen., June 27, 1990, No. 37.

H. Miller v. W. Va. Division of Highways, Grievance Docket No. 93-DOH-011 (June 30, 1993), aff'd Circuit Court of Kanawha County, Civil Action No. 93-AA-201 (Feb. 27, 1994).

I. Cavender, et al. v. W. Va. Bureau of Employment Programs and Division of Personnel, Grievance Docket No. 96-BEP-142, (Sept. 9, 1996).

V. EFFECTIVE DATE: March 1, 1992.

VI. REVISIONS

A. Previous Revisions: July 1, 1993; October 19, 1996; May 15, 1997; April 20, 1999

B. Latest Revision: June 17 , 1999.

It is clear Grievant's CETA time was "Extra Help" work, and should not and cannot be counted for annual increment purposes. See Finding of Fact 5 and DOP's Exh. Nos. 3 & 5. Grievant was not an Eligible Employee, did not pay into the State Retirement System, and his CETA time cannot be considered when calculating Grievant's annual increment.

II. Whether, or what, portion of Grievant's Workers' Compensation time should be considered for annual increment purposes?

As stated by Respondents in this case, the Grievance Board's position on Miller supra, is uncertain given the rulings made since that time. A brief history of the policy as well as a recounting of the Grievance Board's cases and their subsequent history should prove useful. The Grievance Board in Miller granted the grievance, and held Grievant's annual increment pay should be based on the employee's entire years of service, and in certain incidences should not be prorated. Grievant Miller had 17 years and 5 months of service before he was off on Workers' Compensation. He was then absent for approximately 4 months for the year he grieved his annual increment; thus, he worked 8 months of that year. His employer had prorated his annual increment, and he received 8/12 of the amount.

Miller held the period of total service was to be calculated by adding all of the employee's time together to see if, even with a leave of absence, the employee had enough time to attain another year of service. Thus, Miller directed Respondents to add the grievant's surplus time, or the 8 months grievant worked to the prior 17 years and 5 months, and if this number added another year of service, Respondent was required to pay Grievant Miller for his full years of service, or eighteen years, and the annual increment could not and should not be prorated. Miller also stated that if the total years of service had been fewer than 18 years, then prorating the entire annual increment would have been proper. DOP appealed this case to the Kanawha County Circuit Court, and on February 7, 1994, this Level IV decision was affirmed. The Circuit Court spoke only to the holding of the case, and indicated since the employee had been employed for a total of 18 full years he should receive increment pay for 18 full years. DOP's petition for appeal to the West Virginia Supreme Court of Appeals was refused.

The next case in this series, Smith, (See footnote 19) which cited favorably to Miller, (See footnote 20) and then gave no indication that the directions in Miller were followed as to adding the "full years of total service" to see if Grievant's annual increment should be prorated. The administrative law judge found that since the annual increment was not a bonus, and was a part of an employee's salary, an employee must be in pay status to receive the annual increment. Grievant Smith's annual increment could be prorated because he only worked, or was in pay status for, a portion of the fiscal year. (See footnote 21) Additionally, the administrative law judge held thatsince Grievant Smith did not work at all during several years, he was not in pay status, and should not receive any annual increment for those years.

Upon appeal, the circuit court reversed Smith, and held the partial year was not to be prorated, the grievant was to be paid for his "full years of service," and the grievant was to receive his annual increment in the same amount for all the years he was on Workers' Compensation. In other words, Respondent was required to pay the grievant his full amount for all the years he was off work, but the amount of years the grievant had could not increase.

The next case in the series was Cavender, et al. v. West Virginia Bureau of Employment Programs/Division of Personnel, Docket No. 96-BEP-142 (September 9, 1996). Three grievances were filed separately, but consolidated at Level IV. Grievant Calvert requested that Miller be followed, and if this had been done, he would have received his full annual increment without proration. Cavender indicates Grievant Calvert had 18 full years of service, plus four additional months at the beginning of fiscal year 1992 - 1993. During this fiscal year, Grievant Calvert worked 10 months, and he received a prorated annual increment, 10 months of his total annual increment. He was also credited with having 19 full years of service. The exact same thing happened the followingfiscal year, 1993 - 1994, when he again missed two months of work. He was credited with 20 full years of service, had no remaining surplus, and he received a prorated annual increment check, based on the 10 months he actually worked. The administrative law judge in Cavender denied Grievant Calvert's request to utilize his surplus time to prevent proration, and stated, "[t]his is not the intent of the statute and policy."

Although Miller was cited favorably in the Cavender decision, Miller was not referred to in the section of the decision denying Grievant Calvert's request, Miller was not overruled, and the proration of Grievant Calvert's annual increment for each of these two years was found to be correct. Similar rulings were made with the other two grievants in Cavender. This case was not appealed. One month after Cavender was issued, DOP rewrote its policy citing Cavender. This rewritten policy did not cite Miller, nor did it address the adding of surplus years to obtain full years of service. (See footnote 22)

The next grievance in this series is Bush v. West Virginia Department of Health and Human Resources/Division of Personnel, Docket No. 97-HHR-568 (November 13, 1998). In Bush, proration was found to be correct. Miller was cited in this case for support of the surplus issue, but it was not addressedfurther, Grievant's surplus was not utilized, Miller was not overruled, and proration was deemed correct.

This review of the Grievance Board's case law and these cases' subsequent histories reveal why

the parties in this grievance question whether Miller is still good law, and why they indicated the undersigned Administrative Law Judge should decide the amount of Grievant's annual increment. DOP has interpreted the statute, through its policy, as mandating proration of the annual increment if an employee is not in pay status for a portion of the year. DOP has also interpreted the statute, through its policy, as preventing payment of the annual increment for the entire year if an employee is not in pay status.

It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985). See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Security Nat'l Bank v. W. Va. Bancorp, 166 W. Va. 775, 277 S.E.2d 613 (1981). Additionally, where the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own policies. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). Where the language in a policyis either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth., Docket No. 97-PEDTA-420 (May 7, 1998). See generally Blankenship, supra; Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD- 351 (Feb. 19, 1993). Thus, DOP's interpretation of its policy is entitled to deference by this Grievance Board, unless it is contrary to the plain meaning of the language, is inherently unreasonable, or is arbitrary and capricious. Dyer, supra. In these circumstances, the undersigned administrative law judge must defer to DOP's interpretation of its policy, as Grievant has not demonstrated that such interpretation is clearly wrong. See Blankenship, supra. Accordingly, the portion of Miller which differs with DOP's interpretation is overruled. Grievant's surplus months may be added to his time to achieve additional years of service, but during the years he did not work the full year, or was not in pay status, his annual increment must be prorated. Cavender, supra; Bush, supra. Additionally, Grievant may not receive any annual increment pay for the full years he did not work. Smith, supra. It should also be noted that the recent enactment of W. Va. Code § 23- 5A-4 (March 1999), plays a part in this rationale. This Code Section is titled "State employees to accrue increment pay during absence due to work-related

injuries; legislative rules" and states:

> (a) All employees of the state of West Virginia shall continue to accrue increment pay during absences from work due to a work related injury.
>
> (b) The director of the division of personnel shall propose rules for legislative approval to implement the provisions of this section.

This statute did not become effective until long after Grievant filed this grievance, and it has been ruled to be a substantive change in the law and cannot be applied retrospectively. Bowery v. Div. of Corrections, Docket No. 99-CORR-145 (July 30, 1999); Hatton v. Div. of Corrections, Docket No. 99-CORR-145 (July 30, 1999). This change also indicates Grievant did not have the right to receive the annual increment "during absences from work due to a work related injury" prior to this recent change.

III. Amount to be paid to Grievant

In applying the above discussion and decisions to assess what Grievant should receive, the Grievance Board finds Grievant is not entitled to count any of his CETA time toward his annual increment pay. Additionally, Grievant is entitled to a prorated portion of his annual increment pay for fiscal years 1989 -1990, 1993 - 1994 and 1994 - 1995 as he worked a portion of these years. (See footnote 23) After the 1994 - 1995 fiscal year, Grievant was no longer an employee of the State.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Grievant's CETA time cannot not be used for annual increment purposes as he was not an eligible employee, did not pay into the State Retirement System, and was employed in an "Extra Help" position. 3. A government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency,

174 W. Va. 558, 328 S.E.2d 164 (1985). See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Security Nat'l Bank v. W. Va. Bancorp, 166 W. Va. 775, 277 S.E.2d 613 (1981).

4. DOP's interpretation of its policy is entitled to substantial weight.

5. The holding in Miller is reversed as it relates to the adding of years to prevent proration. The ruling that surplus time can be added to give the employee a full year of service is upheld. Miller v. Div. of Highways/Div. of Personnel, Docket No. 93-DOH-011 (June 30, 1993), aff'd Kanawha County Circuit Ct., Civil Action No. 93-AA-201 (Feb. 7, 1993), ref'd W. Va. Supreme Ct. of Appeals, No. 940998 (Sept. 8, 1994).

6. Grievant is entitled to prorated annual increment pay for fiscal years 1989 - 1990, 1993 - 1994, and 1994 - 1995, for six, seven, and eight full years of service, respectively. He is not entitled to annual increment for the years of 1990 - 1991, 1991 - 1992, and 1992 - 1993, and thereafter, because he was not in pay status. Smith v. W. Va. Div. of Highways/W. Va. Div. of Personnel, Docket No. 96-DOH-083 (Aug. 2, 1996), rev'd Kanawha County Circuit Ct.,Civil Action No. 96-AA-127 (Oct. 14, 1997), ref'd W. Va. Supreme Ct. of Appeals, No. ____ (May 14, 1998).

7. Grievant is no longer an employee of the state, and has not been since the time of his lay off in 1994. (See footnote 24)

Accordingly, this grievance is **GRANTED, in part, and DENIED, in part**. Respondent HHR is directed to pay Grievant his annual increment, plus interest, in accordance with his decision.

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 withinthirty (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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so

that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 25, 1999

Footnote: 1

Grievant was pro se, HHR was represented by Assistant Attorney General B. Allen Campbell, and DOP was represented by Steve Forsythe, Senior Personnel Specialist in Employee Relations.

Footnote: 2

See pages 4 &5, infra.

Footnote: 3

On June 18, 1996, Grievant filed a grievance with this Grievance Board indicating his "retirement records should reflect 21 years of experience and as long as I was on Workers['] Compensation my time should go on[.]" Grievant's claim was dismissed on July 25, 1996, informing Grievant that the Grievance Board did not have jurisdiction to rule on issues of retirement pursuant to W. Va. Code § 29-6A-2(i). Rule v. Dep't of Health and Human Resources, Docket No. 96-PERS-305 (July 25, 1996). Grievant had previously filed this same grievance with HHR, and it had been dismissed at Level III on the same grounds as the Grievance Board's dismissal.

Footnote: 4

After receiving a call from Grievant on May 20, 1997, Mr. Campbell discovered a Level III Decision had not been issued. Mr. Campbell wrote Grievant on May 22, 1997, and informed him that the Hearing Examiner believed the case had been settled, and did not know there was a need to issue a decision. Mr. Campbell apologized for the delay and indicated a Level III Decision would be issued soon.

Footnote: 5

This information is contained in a note to file dated April 19, 1999, written by the Grievance Board's secretary, Ms. Cricket Powell.

Footnote: 6

Although Grievant is convinced these orders pertain to this grievance, they do not, as they dealt with retirement issues.

Footnote: 7

Grievant also requested mediation, and HHR chose not to participate in this activity. When faced with this

unwillingness, Grievant became insistent about mediation, and continued to ask repeatedly for this Grievance Board to make HHR participate in mediation and to force a settlement agreement. It must be noted that although the parties did not engage in mediation, HHR did make a settlement offer which was rejected by Grievant. This information is included only to explain Grievant's frequent requests for mediation included in the record.

Footnote: 8

This acronym stands for Comprehensive Employment Training Act.

Footnote: 9

Grievant identified the purpose for this subpoena as:

> *The Testimony he will give in this case will establish all rights and previledges (sic) directed to a (sic)honorable settlement of this grievance based on his decission (sic) in the case of Miller v West Virginia Department of Highways[.] WHEREAS: either his personal appearance or written brief should be added to the record to July 14, 1999[.] APPEALS HEARING and records as of this todate (sic) be sent to Judge Mcqueen (sic) so as his brief will reflect a (sic) accurate accounting of the facts: This should include all offers and counter offers along with notes and tapes and transcripts of all hearings and appeals dealing with: DOCKET NO. 99-HHR-130[.]*

Footnote: 10

Grievant argues this time was seven and one half years, but he is incorrect.

Footnote: 11

Apparently some of the supervisors of this program were actual state employees, and did pay into the State Retirement System.

Footnote: 12

Respondent HHR has not indicated that it was seeking any annual increment overages it might have paid to Grievant.

Footnote: 13

Grievant contends he was laid off in March of 1998, with the closing of CAC.

Footnote: 14

According to documents submitted by Grievant and his testimony, he has been attempting to obtain retirement from the State, without success.

Footnote: 15

At times throughout this grievance, Grievant has discussed his Workers' Compensation claim, multiple retirement issues, his desire to return to work with the state, and the state's failure to employ him as a social worker. Grievant also identified multiple health problems. These issues are not before the undersigned Administrative Law Judge, and Grievant was so informed.

Footnote: 16

Grievant believes he is still an employee of State of West Virginia.

Footnote: 17

Docket No. 93-DOH-011 (June 30, 1993), aff'd Kanawha County Circuit Court, Civil Action No. 93-AA-201 (Feb. 7, 1993), ref'd West Virginia Supreme Court of Appeals, No. 940998 (Sept. 8, 1994).

Footnote: 18

Beginning fiscal year 1996, the amount of yearly annual increment was changed from $36.00 to $50.00.

Footnote: 19

Smith v. West Virginia Division of Highways/West Virginia Division of Personnel, Docket No. 96-DOH-083 (August 2, 1996), rev'd Kanawha County Circuit Court, Civil Action No. 96-AA-127 (Oct. 14, 1997), ref'd West Virginia Supreme Court of Appeals, No. ____ (May 14, 1998).

Footnote: 20

It should be noted that although the exact statement was quoted incorrectly, the meaning of this statement was the same.

Footnote: 21

Adding Grievant Smith's surplus time would not have resulted in an additional year of service.

Footnote: 22

DOP's later policy did cite Miller.

Footnote: 23

It is unclear from the record whether Grievant received any annual increment pay for the 1989 - 1990 year. If he did not, this should be paid.

Footnote: 24

The West Virginia DOP Administrative Rules define a "lay off" as "[a] reduction in the number of employees caused by a reduced work load, curtailment of funds or reorganization." An employee may appeal his lay off through the grievance procedure; Grievant did not do so.