JEFF ROBINETT,

Grievant,

v. **DOCKET NO. 02-MHS&T-253**

OFFICE OF MINERS' HEALTH,

SAFETY AND TRAINING,

Respondent.

DECISION

In a grievance filed July 21, 2002, Jeff W. Robinett grieved a “reduction of annual salary from $49,834 to $45,352.” As relief, he seeks to have his annual salary restored to $49,834 “and all increases thereafter.” His grievance was denied at Levels I and II, and by agreement of the parties Level III was waived. A Level IV hearing was held September 24, 2002, at the Grievance Board's Beckley office. Grievant appeared *pro se* and Respondent Office of Miners' Health, Safety and Training (MHST) was represented by Barry L. Koerber, Esq. The parties declined the opportunity to file post-hearing briefs, so the matter became mature for decision at the close of the hearing.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant has been employed by Respondent as an Underground Mine Inspector (UGMI) since May 1, 1991, and was assigned to Region Two, headquartered in Welch. He remained in that region until January, 1998 when he was reassigned to an administrative post in MHST's Charleston office. His salary when hired was $32,580, andhe had received two salary advancements, along with the other UGMI's, in 1994 and 1995 of $1,008 each. In January, 1998 when he was transferred to Charleston, he received a temporary salary upgrade to $36,636.

2. Grievant remained in the administrative post until September, 2002, when he was returned to his former assignment in the Welch office. While working in Charleston, Grievant served as an assistant to the Director, revising examinations, revising and writing State Code and administrative

rules, and serving as a legislative liaison. He retained his title of Underground Mine Inspector the entire time.

3. When he was first transferred to the Charleston office for administrative duties, Grievant was awarded a temporary salary advance of 4.98625% for four months, ending May, 1998. Respondent's Exhibit No. 2. Grievant's assignment to the Charleston office lasted much longer than the four months, however, and his salary was not reduced to its original rate after the four-month period ended.

4. On July 1, 1998, Grievant received a $756 increase, as did all other UGMI's. On September 16, 1998, he and all other UGMI's received a $996 increase. On July 1, 1999, all UGMI's received both a 5% advance and a $756 increase. On January 1, 2000, Grievant was the only UGMI to receive a 5% merit increase. All UGMI's again received $756 raises on July 1, 2000, and Grievant again was the only UGMI to receive a 2.5% merit increase on July 16, 2000. Grievant and all other UGMI's received another $756 raise on October 1, 2001, and there was an across-the-board $804 raise on July 1, 2002. 5. Grievant's salary when he left the Charleston office to return to Welch in 2002 was $49,284. 6. As a result of a Level II Grievance Decision in a matter brought by another employee to protest Grievant's salary, his salary was reduced on June 27, 2002 to $45,352. Respondent's Exhibit No. 5. At that time, most other UGMI's received raises, and one other UGMI also had his salary decreased. As of July 16, 2002, one UGMI made $42,864; 34 UGMI's made $43,320; two UGMI's (including Grievant) made $45,352; and one UGMI made $46,320 (See footnote 1) .

7. The Mine Inspectors' Examining Board did not approve Grievant's salary reduction.

DISCUSSION

Grievant's salary reduction was non-disciplinary. In non-disciplinary matters, Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). He argues that the salaries of UGMI's must be approved by the Mine Inspectors' Examining Board, and that Board did not approve of the decrease in his salary. Respondent argues it is within the discretion of the director to fix salaries and it is entirely proper to do reduce a salary when it is out of line with that employee's peers. It further

argues Grievant's initial salary increase was only temporary, and intended to only last as long as he was in Charleston. Lastly, Respondent argues Grievant's merit increases were based on non-UGMI work he was performing in Charleston, and so should not be applicable to his work in Welch.

Grievant relies on W. Va. Code § 22A-1-12(c), which states:

> Salaries of district inspectors shall not be less than twenty-eight thousand fifty-six dollars per year; assistant inspector-at-large, not less than thirty thousand one hundred eight dollars per year; inspectors-at-large, not less than thirty-one thousand five hundred seventy-two dollars per year, and they shall receive mileage at the rate of not less than twenty cents for each mile actually traveled in the discharge of their official duties in a privately owned vehicle. Within the limits provided by law, the salary of each inspector shall be fixed by the director, subject to the approval of the mine inspectors' examining board. In fixing salaries of mine inspectors, the director shall consider ability, performance of duty and experience.

Both parties acknowledged that the terms UGMI and District Inspector are synonymous. Doug Conaway, Director of MHST, testified that Grievant's downward salary revision was not approved by the Mine Inspectors' Examining Board. Respondent offered no authority that would permit bypassing the statutory requirement of Board approval. As the statute explicitly applies to the salaries of *each* inspector, rather than inspectors as a class, that approval was required in order for the Director to fix Grievant's salary at its lower level.

In addition, that language, when placed in contrast with a very similar section related to oil and gas inspectors, shows an intent by the legislature not to put the decision within the sole discretion of the director. In W. Va. Code § 22C-7-2(c), the salaries of oil and gas inspectors are treated thus:

> Within the limits provided by law, the salary of each inspector and of the supervising inspector shall be fixed by the director, and the oil and gas inspectors' examining board may make recommendations for salary determinations. In fixing salaries of the oil and gas inspectors and of the supervising inspector, the director shall consider ability, performance of duty and experience.

The express inclusion of specific language in the W. Va. Code § 22A-1-12(c) requiring the approval of the Mine Inspector's Examining Board for the director to fix the salaries of district inspectors, when more discretionary language was used for oil and gas inspectors,evidences an intention by the legislature to limit the discretion of the director by making Board approval mandatory.

Respondent made other arguments in its attempts to justify Grievant's salary reduction, but the reason for the reduction is explicitly stated in the letter to Grievant advising him that the action had been taken. His director said, “While temporarily assigned to the Charleston office you received three

merit increases related to your assignment which resulted in your being paid $4952 more than the next highest UGMI. . . . [I]n settlement of a Level II grievance filed by Janice Molineaux, an UGMI, protesting your salary, I am reducing your annual salary to a level more commensurate with the other UGMI's." Respondent's Exhibit No. 5. The details of that grievance and its final decision are not a part of the record, but its effects are shown on Respondent's Exhibit No. 6. At the same time Grievant's and one other UGMI's salaries were reduced, the salaries of 35 other UGMIs were increased. Based on Respondent's stated reasons and by inference from related events, the real reason for Grievant's salary reduction was a general realignment of UGMI salaries across the board.

A non-punitive reduction in salary is not *per se* improper. Respondent lowered the salaries of Grievant and another UGMI, and raised the salaries of others, in an attempt to make the salaries of similarly-classed employees more equitable, as a result of a grievance decision in a case filed by another employee to which Grievant was not a party. In Manning v. W. Va. Div. of Rehab, Services, a similar payscale revision was upheld for an entire group of similarly-situated employees. Docket No. 89-RS-282 (Mar. 29, 1990). In Fiorini v. Div. of Highways, the grievant's reduction in salary was upheld where it wasfound in another employee's grievance that it had been increased through favoritism. Docket No. 98-DOH-001 (Aug. 17, 1998). The affected employees in both cases were in the classified service, whereas the grievant in this case is not. Grievant is classified- exempt, a status found by the Grievance Board to confer considerably less job protection on the employee than is afforded classified employees. However, it is apparent from the statute creating his classification that he has considerably greater protection than an "at- will" employee. *See* W. Va. Code §§ 22A-1-12(e); 22A-1-4(b)(4). Those protections mostly address the reasons for which an UGMI may be terminated, but as far as their salaries are concerned, the legislature decreed only a minimum level and a requirement of Board approval. Therefore, Grievant's salary may be lowered for the stated reasons if Respondent complies with the requirement of Board approval.

It must also be noted that Grievant's initial salary increase when he was transferred to Charleston was temporary, and that apparently it was never reduced from its temporary level after the date the temporary increase was to expire in May, 1998. Although this was one of the after-the-fact reasons Respondent gave for Grievant's salary retreat, no evidence was produced to show the numbers involved were actually related to each other. Nevertheless, this decision should not be read as deciding the merits of whether or not the temporary increase could or could not be rescinded at this

time, but instead should be read as limited to the issue Grievant raised: whether Board approval was required in order to lower his salary.

The following conclusions of law are made in support of this discussion:

CONCLUSIONS OF LAW

1. In non-disciplinary matters Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. Id.

2. The requirements of W. Va. Code § 22A-1-12(c), which states:

> Salaries of district inspectors shall not be less than twenty-eight thousand fifty-six dollars per year; assistant inspector-at-large, not less than thirty thousand one hundred eight dollars per year; inspectors-at-large, not less than thirty-one thousand five hundred seventy-two dollars per year, and they shall receive mileage at the rate of not less than twenty cents for each mile actually traveled in the discharge of their official duties in a privately owned vehicle. Within the limits provided by law, the salary of each inspector shall be fixed by the director, subject to the approval of the mine inspectors' examining board. In fixing salaries of mine inspectors, the director shall consider ability, performance of duty and experience.

are mandatory, and do not permit the Director to fix the salaries of mine inspectors without the approval of the Board.

3. An employee's salary may be reduced for non-punitive reasons such as business necessity or to comply with a ruling in a grievance to which the employee was not a party. *See* Manning v. W. Va. Div. of Rehabilitation Services, Docket No. 89-RS-282 (Mar. 29, 1990); Fiorini v. Div. of Highways, Docket No. 98-DOH-001 (Aug. 17, 1998). 4. It would be permissible to revise the salaries of the UGMI's as a result of a grievance decision in order to obtain salary parity, subject to the approval of the Mine Inspectors' Examining Board.

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is ordered to restore Grievant's salary to its level on July 1, 2002, with back pay from ten days prior to the filing of the grievance. This decision should not be read as limiting the authority of Respondent to reduce

Grievant's salary the same amount in the future for the same reasons, with the approval of the Mine Inspectors' Examining Board.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: October 17, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

This employee, Eugene White, received a 10% raise on July 16, 2002, as did the lowest paid UGMI, Mark Wilfong.