HAROLD R. CRINER,

Grievant,

v. **DOCKET NO. 04-DOH-444**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant Harold R. Criner filed this grievance against his employer, the Division of Highways (DOH) on March 25, 2004, stating: “When employed by [the] State of WV, I was told retirement would be taken out of [my] check, and I had no say so. WV failed to hold retirement out of my checks for 21 months, while I was working. Dates are from 2000-2001- 2002 (June 12, 2000 through February 28, 2002.)” Grievant stated the relief sought as: “To put back my retirement, plus any or all interest I lost during this time, plus put their part in my retirement.”

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on March 22, 2005. Mr. Criner was unrepresented, and DOH was represented by Barbara Baxter, Esq. This matter became mature for decision at the close of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

Findings of Fact

1. Since 1990, Mr. Criner has worked for DOH in District Seven, Braxton County, and he is currently classified as a Transportation Worker 2 / Equipment Operator. 2. Until June 2000, DOH had, as is required by W. Va. Code Chapter 5, Article 10, deducted Mr. Criner's public employees' retirement contribution. DOH also paid its share of Mr. Criner's retirement pension

contribution.

3. Due to an error made by someone in DOH's payroll department, a wrong computer code was entered and retirement contributions were no longer deducted from Grievant's (and sixteen other employees') paychecks.

4. Grievant did not notice the deduction was no longer being taken out, but eventually discovered the error. DOH corrected it beginning in March 2002.

5. The Retirement Board will not allow Grievant to pay back the missing employee's contributions in other than a lump-sum form, and will not allow DOH to pay its portion of the amounts unless Grievant also pays his contribution at the same time.

6. Grievant can not afford to pay the lump-sum amount.

Discussion

In non-disciplinary matters, a grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. (See footnote 1) In this case, however, there is no factual dispute. DOH admits its mistake in failing to take out Grievant's retirement contribution, but contends its hands are tied in correcting the error by the Retirement Board's rules. Although it has attempted to fix the situation and will continue to assist Grievant in finding a solution, DOH correctly points out that the Grievance Board has no jurisdiction to decide how it should be done.

"Any pension matter or other issue relating to public employees insurance in accordance with [W. Va. Code §§ 5-16-1 *et seq*.], retirement, or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article." (See footnote 2) This proscription is broad, and explicitlyremoves retirement issues from the jurisdiction of the Grievance Board. Unfortunately, the undersigned has no authority to grant this grievance.

The following conclusions of law support this decision.

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).

2. The Grievance Board has no jurisdiction to issue a decision in a grievance relating to "[a]ny pension matter or other issue relating to public employees insurance, retirement, or any other matter in which authority to act is not vested with the employer." W. Va. Code § 29-6A-2(i).

For the foregoing reasons, this grievance is hereby **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, and 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

March 24, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

Footnote: 2

W. Va. Code § 29-6A-2(i).