BERNARD RUTTER,

Grievant,

v. **DOCKET NO. 95-DOH-O87**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS

Respondent,

D E C I S I O N

Grievant is employed by the West Virginia Division of Highways (hereinafter DOH) as a Transportation Worker III - Mechanic at the District Four headquarters office in Clarksburg. Grievant filed his grievance at hand pursuant to West Virginia Code §§29-6A-1, et seq., on or about February 28, 1994, challenging the fact that he had not received a merit raise for the year 1994. Grievant's complaint was denied at the lower three levels of the grievance procedure and he appealed to level four on February 28, 1994. The case became mature for decision after receipt of the parties' Proposed Findings of Facts and Conclusions of Law on July 10, 1995.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

FINDINGS OF FACT

1. Grievant, Bernard Rutter, is employed by the Division of Highways (DOH) in Clarksburg as a

Transportation Worker III - Mechanic in the Equipment Section.

2. Grievant has worked for the Division of Highways for twenty-three and a half years.

3. By memorandum dated January 12, 1994, Secretary of Transportation, Charles L. Miller, informed all DOT organizations that merit raises were to be given to "a specific number of your most meritorious employees in each of your subordinate organizations whose current annual salary is $20,000.00 or less." Mr. Miller also limited eligibility for merit raises to those employees who had not received a pay increase in the previous twelve months.

4. Grievant's current hourly rate of pay is $9.65 due to an across the board increase for employees. Grievant's hourly rate as of January, 1994 was $9.16. His current annual salary is less than $20,000.00.

5. Merit raises were awarded to several DOH employees during 1994.

6. Grievant did not receive a merit raise in 1994.

7. All of the employees in the shop where Grievant worked who received a merit raise were rated on the WV Department of Transportation Employee Evaluation form as "Meets or Exceeds Expectations" with handwritten comments.

8. Grievant was rated on the WV Department of Transportation Employee Evaluation form as "Meets or Exceeds Expectations" with handwritten comments.

9. There is no written policy requiring mechanics to obtain a Commercial Driver's License. (Transcript, pp. 7, 12). A Commercial Driver's License, (CDL), is currently not required for mechanics at the DOH. Job Description No. 8367, Transportation Worker III (Agency Ex #2), does not cite a CDL as a requirement. The Minimum Qualifications state that a CDL <u>may</u> be required in the areas of Equipment repair, Highway Maintenance, Bridge Maintenance, and Core Drilling at the discretion of the appointing authority.

10. DOH officials prefer that mechanics obtain a CDL.

11. There are twelve (12) mechanics in the District shop and nine (9) of the twelve (12) mechanics have CDLs. (Transcript, pp. 5, 18)

12. Grievant is one of three mechanics in the District shop who do not possess a CDL.

13. Merit raises for 1994 were based on recommendations by the employee's supervisor, employee evaluations and first-hand knowledge of the employees. (Transcript, p. 19)

14. Mr. Harry Carr, District Four Engineer and Agency representative cited that a consideration

by the DOH for not giving the Grievant a merit raise was the fact that Grievant did not obtain a CDL. This deficiency required Grievant's supervisor to adjust schedules. (Transcript, pp. 21, 22).

15. The Plan for Improvement section on Grievant's Employee Evaluation stating "Get CDL"(Commercial Driver's License) was not initially included on the evaluation form but was added after Mr. Carr, directed Mr. Ash, Grievant's supervisor, to do so. (Transcript p. 17).

DISCUSSION

Grievant believes he was "arbitrarily denied a merit raise". Grievant seeks to receive a merit raise and in any other way to be made whole. He contends that he was, at the very least, equally as deserving, if not more deserving of a merit raise as the other employees who received a merit raise in 1994. Grievant also contends that his treatment by DOH constituted discrimination prohibited under W.Va. Code §§29-6A-1, et seq.

Discrimination is defined as "any differences in the treatment of an employee unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W.Va. Code §29-6A-2(d). This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under §29-6A-2(d) must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to the] actual job responsibilities of the griev ant and/or the other employee(s), and were not agreed to by the grievant in writing.

Parsons v. W.Va. Div. of Highways, Docket No. 91-DOH-246 (April 30, 1992).

Applying this prima facie analysis to the facts presented here, Grievant demonstrated that he received a similar employee evaluation as other DOH employees who received merit raises. Grievant demonstrated that he has been treated differently from those other employees to his detriment in that he did not receive a merit raise because he has not earned a Commercial Driver's License (CDL). But

Grievant did not clearly demonstrate that a CDL was unrelated to the actual job responsibilities. Although a CDL is not an actual requirement for the position of Transportation Worker III - Mechanic, under the Job Description No. 8367, TRANSPORTATION WORKER III (Agency Ex # 2), the Minimum Qualifications on page three, under point number (2)states as follows:
"(2) A valid class A or B Commercial Driver's License is required in the area of Equipment Operation, and may [emphasis added] be required in the areas of Equipment repair, Highway Maintenance, Bridge Maintenance, and Core Drilling at the discretion of the appointing authority;"

Mr. Ash, (Grievant's supervisor), testified that in comparison to all the employees he supervises, Grievant would rate "good overall." Mr. Ash further testified that Grievant, in comparison to other employees who received a merit raise, was just about equal...though the mechanics are supposed to be able to maintain, test and evaluate equipment. (Transcript pp. 13-14). Mr. Carr stated that the Grievant was a good employee and that when theoverall evaluations are reviewed, everybody else's evaluation that received merit raises were still as good as the Grievant's. (Transcript, p. 53). Moreover, Mr. Ash testified that he could not document or measure any resulting problem at the DOH in regard to Grievant's lack of a CDL. (Transcript p. 17). In fact, Mr. Ash was unable to cite how many times over the last year that work had to be stopped because the Grievant did not possess a CDL. (Transcript, pp. 15-16). Moreover, Mr. Ash could not specifically cite one time when work had to be stopped because the Grievant did not possess a CDL. Mr. Ash further testified that usually two (2) mechanics are sent out to repair equipment on the road. (Transcript, p. 6).

Randy Burrows, an employee at DOH for ten (10) years and currently classified as a Mechanic III, testified that when he has been required to work on a piece of equipment, the equipment operator has been present. (Transcript, p. 29). He testified that ninety-five percent (95%) of the time there is normally an operator at the site of the equipment. (Transcript, p. 28). Mr. Burrows, who also does not have a CDL, additionally testified that in the past DOH sent him intimidating letters stating that he would be reclassified as a Mechanic II, receive a pay rate cut and be transferred if he did not obtain his CDL. (Transcript, p. 30).

Mr. Gary Lynch, classified as a Mechanic III, has been employed at the DOH for eleven (11) years. Mr. Lynch testified that when a mechanic is sent out to repair equipment that hasbroken down on the road, normally, the operator is waiting with the equipment and that if the mechanic has to travel, he does so in a pickup. (Transcript, p. 37).

An employer may rebut a grievant's prima facie showing of discrimination by showing that a legitimate, non-discriminatory reason was the controlling motivation to sustain its actions. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W.Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (December 23, 1991). However, should the respondent succeed in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination. See Burdine, supra at 253; Shepherdstown Vol. Fire Dept. v. W.Va. Human Rights Comm'n, 309 S.E. 2d 342, 352 (W.Va. 1983).

Mr. Carr instructed Grievant's supervisor, Mr. Ash, to change Grievant's Employee Evaluation. (Transcript, p. 7), and stated that it is desirable for Grievant to obtain a CDL (Transcript, p. 20). Mr. Carr explained that the need for a CDL was necessary for an efficient working shop. (Transcript, p. 53). Grievant testified that he had been previously told that not having a CDL would affect merit raises but that he felt that he had been more or less threatened. (Transcript, p. 40). In addition, the two witnesses who testified for Grievant, both classified as mechanics, also did not receive a merit raise. (Interestingly, no evidence was presented in regard to these witness' evaluations). It appearsthat the decision not to award a merit raise to Grievant was based upon a "recognition of the quality of [his] job performance" for the performance rating period; meaning that Grievant's lack of obtaining a CDL, which is not a requirement of the job, but may be required, [emphasis added], reflected in some way on his job performance. Accordingly, a prima facie case of discrimination was not established and the employer presented a legitimate, non-discriminatory reason as the controlling motivation to sustain its action, that is, Grievant's failure to obtain a CDL.

It is therefore determined that Grievant is not entitled to the remedy he seeks based upon a violation of W.Va. Code §§29-6A-1, et seq.

The above discussion is supplemented by the following conclusions of law.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving his claim by a preponderance of the evidence. W. Va. Code §§29-6A-1, et seq.

2. "An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious or contrary to law or properly established policies or

directives." Terry v. W.Va. Div. of Highways, Docket No. 91-DOH- 185 (Dec. 30, 1991).

3. In order to make a prima facie showing of discrimination under W. Va. Code §29-6A-2(d) a grievant must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to the] actual job responsibilities of the griev ant and/or the other employee(s), and were not agreed to by the grievant in writing.

Parsons v. W.Va. Div. of Highways, Docket No. 91-DOH-246 (April 30, 1992).

4. An employer may rebut a grievant's prima facie showing of discrimination by showing that a legitimate, non-discriminatory reason was the controlling motivation to sustain its actions. Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W.Va. Parkways Economic Dev. & Tourism Auth., Docket no. 91-PEDTA-225 (December 23, 1991).

5. Should the respondent succeed in rebutting the presumpt ion of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination. See Burdine, supra at 253; Shepherdstown Vol. Fire Dept. v. W.Va. Human Rights Comm'n, 309 S.E. 2d 342, 352 (W.Va. 1983).

6. Merit raises were to be based on merit as reflected by performance evaluations and other recorded measures of performance.

Accordingly, this grievance is **DENIED**.

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MARY BETH ANGOTTI-HARE

Administrative Law Judge

Dated : December 28, 1995

Any party may appeal this 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 §18-29-7. 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.