BENJAMIN "PETE" BLAKE,

_____Grievant,

v. Docket No. 97-DOH-416

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,

DIVISION OF HIGHWAYS,

Respondent.

DECISION

___ Benjamin "Pete" Blake (Grievant), currently an Equipment Operator III employed by Respondent W. Va. Department of Transportation, Division of Highways, Lewis County (DOH), filed a grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that the decision not to select him as Transportation Crew Chief (Foreman) was arbitrary and capricious. Grievant also believes that he was not selected for the position in retaliation for his past grievances, and that the decision was motivated by favoritism. The grievance was denied at Level I by Lewis County Supervisor William Cayton (Cayton) on March 11, 1997. The grievance was denied at Level II by District Engineer Marvin Murphy (Murphy) on March 25, 1997. A Level III grievance hearing was held on July 10, 1997 before Bob Whipp of District Six, Steve Halley of the Structures Division, and Chief Evaluator Gary Klavuhn. Grievant was represented at this hearing by attorney Basil Legg, Jr., and DOH was represented by attorney Patti Lawson. By correspondence dated September 11, 1997, the grievance was denied at Level III by DOH Acting Commissioner Samuel H. Beverage. A Level IV hearing was held on December 9, 1997, beforeAdministrative Law Judge Jeffrey N. Weatherholt. (See footnote 1) This matter became mature for decision on January 26, 1998.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcripts of the Level III and Level IV hearings, and documentary evidence admitted at Levels I through IV.

FINDINGS OF FACT

1.

Grievant is employed by DOH as an Equipment Operator III. He has been a regular full-time employee of DOH since approximately 1974. He has been an Equipment Operator III for the past eight years.

2.

On August 14, 1996, DOH posted a bid for a Transportation Crew Chief position in the Lewis County Maintenance Office. The qualifications for the Transportation Crew Chief, commonly known as the “Foreman” position, include no formal education, 2 years of full time or equivalent part time experience in highway construction or maintenance or core drilling, oil or gas drilling or surface mining, and a valid West Virginia commercial driver's license (CDL). Under general supervision, the Foreman leads a crew and participates in the maintenance and repair of highways.

3.

Both Grievant and Danny Williams (Williams) met the posted minimum qualifications for the position.

4.

As an Equipment Operator III, Grievant held the highest employment classification of any applicant for the Foreman position. 5.

Both Grievant and Williams submitted appropriate bids for this position, and Williams was selected.

6.

At the time he bid on the Foreman's position, Williams was employed by DOH as an Equipment Operator II. Williams has worked for DOH since October of 1989.

7.

On his employment application, Williams listed previous employment with the Rose-Lee Construction Company from May of 1989 to October of 1989 and with the O.L. Thompson Construction Company in Goose Creek, South Carolina from June of 1988 to May of 1989.

8.

Cayton did not contact any of the previous employers listed by Williams to verify the experience claimed on his application.

9.

The 1995 employee evaluations for both Grievant and Williams were satisfactory. Neither employee was placed on a plan of improvement. Both employees were rated as “satisfactory” or “exceeds expectations” in every category. No previous evaluations were considered by DOH or included in the record.

10.

The interview committee for this position consisted of Cayton and Ed Lough, Assistant Engineer for District Seven of DOH. Cayton was responsible for selecting the successful applicant.

11.

The Transportation Crew Chief position description does not include many of the criteria relied upon by Cayton to select Williams for the position.

12.

Cayton used as a factor in his decision experience Williams claimed in carpentry and electrical work, plumbing, and laying pipe. Cayton relied in part upon his conclusion that Williams had worked in construction for many years. Working in construction is not a criteria on the job description for the Foreman position. 13.

Cayton used as a factor in his decision Williams' alleged superior experience in operating a Leeboy. A Leeboy is a piece of equipment used by DOH to grind and apply hot paving mix. Both Grievant and Williams can operate a Leeboy. This criteria is not on the job description for the Foreman position.

14.

Cayton used as a factor in his decision Williams' alleged superior ability in operating a Grade-all grader. This criteria is not on the job description for the Foreman position.

15.

Cayton used as a factor in his decision Williams' alleged superior ability in operating a backhoe. This criteria is not on the job description for the Foreman position.

16.

Murphy testified that Cayton should not have considered any abilities or qualifications that are not included within the position description.

17.

Grievant can operate a grader, a Leeboy, and a backhoe.

18.

Both Grievant and Williams had experience serving temporarily as Foreman for DOH in Lewis County. Grievant had more experience serving as temporary foreman than Williams.

19.

Cayton stated that both Grievant and Williams performed equally well in their personal presentation and performance during the interview process.

20.

Cayton had tried in the past to get Williams promoted from Equipment Operator II to Equipment Operator III. At that time, Williams was not the most senior Equipment Operator II under Cayton's supervision. This promotion was denied by DOH at the state level.

21.

DOH issued Williams a letter of admonishment for using a state truck to drive his family to a ball game. 22.

Bruce Garrett (Garrett), Bridge Inspector for District Seven, was Lewis County Supervisor for four years and was responsible for hiring Williams. He believed that Williams was somewhat lazy.

23.

Grievant was a good grader operator who could work without day-to-day

supervision.

24.

Cayton testified that Dane Skidmore (Skidmore), Rick Taylor (Taylor), Terry Messenger (Messenger), and Paul Toms (Toms) had stated that they did not want to work with Grievant. Cayton further testified that a similar number of employees did not want to work with Cayton.

25.

Messenger never told Cayton that he did not want to work with Grievant. Messenger, Taylor, Junior Heath (Heath), Garrett, Jack Bleigh (Bleigh), and Roger Gaines (Gaines) had no objection to working with Grievant.

26.

Skidmore and Toms did not testify.

27.

Cayton considered as a factor against Grievant that Grievant listed on his employment application that he was applying for this position as a day shift position. Williams listed his availability as all shifts. Murphy testified that this position was a day shift position, and that Cayton should not have used this criteria.

28.

Cayton considered as a factor against Grievant the fact that he had been convicted of a first offense DUI approximately eleven years earlier. Grievant has had a clean driving record since this incident. Grievant confirms that this arrest occurred.

29.

Cayton considered as a factor against Grievant a belief that Grievant had been involved with marijuana. (See footnote 2) Cayton could not remember when this occurred, or how this alleged involvement had been resolved, although he felt that a court proceeding had occurred.

30.

Cayton considered as a factor against Grievant the fact that he had been

involved in a physical altercation with Taylor. (See footnote 3) Taylor testified that this physical altercation had occurred four or five years earlier and that it involved only a little pushing and shoving. This altercation was not during work time. Taylor also testified that he and Grievant had worked out their disagreement years ago and that they now get along just fine.

31.

Taylor testified that he would have no problems in working with Grievant as the Foreman.

32.

Cayton considered as a factor against Grievant the fact that he had been involved in a physical altercation with Tommy Thompson (Thompson) which occurred in 1994 at Lee-bo's (See footnote 4) Fruit Stand. (See footnote 5)

33.

Thompson testified that the incident which occurred at Lee-bo's Fruit Stand was totally Thompson's fault, that he was intoxicated and belligerent, that he attacked Grievant without any provocation, and that Grievant defended himself appropriately in response to this assault.

34.

Cayton felt these alleged incidents reflected badly on Grievant's character, and that character was a factor in a foreman's supervision of a crew.

35.

Murphy believed that character is a factor to be considered because Foremen handle crews, the public, and the press, and so must be fairly sophisticated.

36.

Cayton never contacted any of the alleged participants in these incidents to determine whether they actually occurred, or occurred as he thought they had. Cayton obtained some of his information from his son-in-law, Burkhardt, (See footnote 6) who was a deputy sheriff in Lewis County.

37.

Cayton and Lough never questioned Grievant about these alleged

incidents during his interview for the position.

38.

Cayton testified that, based upon DOH policy, nothing in Grievant's private life disqualified him from the Foreman position.

39.

Murphy testified that DOH does not normally do an active investigation of the private behavior and character of an applicant for a Foreman's position, and that DOH would only do such an investigation for positions of trust within the DOH.

40.

Murphy testified that DOH, as part of any such investigation, would only use third party information that came from persons in positions of authority. Murphy testified that the Division does not rely upon gossip or rumors in these investigations.

41.

At some point before the Foreman position was posted, DOH held focus sessions at its Lewis County facility to get feedback from workers regarding job problems. The workers were divided into four focus groups. Three of the groups complained that favoritism occurred at the facility. 42.

Cayton had a history of showing favoritism to Williams.

43.

Grievant's satisfactory performance as an Equipment Operator was verified by numerous witnesses.

44.

The parties stipulated at Level III that Grievant could produce a number of additional witnesses who would testify: 1) that the Grievant is a good Equipment Operator and, 2) that during periods of time when he was an acting foreman or temporary foreman, Grievant was a good foreman.

45.

As part of the focus sessions DOH held at its Lewis County facility, three of the four focus groups complained that retaliation occurred at the facility.

46.

Grievant has filed some twenty grievances in the past two years, three of which he has pursued to Level III.

47.

Cayton was admonished by DOH for calling Grievant a “cry baby” and making imitation crying sounds towards him in the maintenance garage.

48.

Cayton made the “cry baby” remark and the crying sounds in response to Grievant's filing of grievances, and Cayton acknowledged this to be true.

49.

Donald Day (Day) testified that Cayton didn't like grievances, that he didn't think they should be filed, that every employee who filed a grievance got a poorer performance evaluation as a result although their work was unchanged in quality, which resulted in more grievances.

50.

Cayton's wife and Williams' wife are first cousins.

DISCUSSION

___In a non-disciplinary grievance, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & StateEmployees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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).

___Grievant contends that the decision not to select him as Transportation Crew Chief (Foreman) was arbitrary and capricious. Grievant also believes that he was not selected for the position in retaliation for his past grievances, and that the decision was motivated by favoritism.

___In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra at 286, Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96- 20-362 (Jan. 30, 1997). Furthermore, in matters of non-selection, the grievance process is not that of a “super-interview,” but rather serves as a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

Nevertheless, from the record in this grievance, it is clear that the selection of Williams to be Transportation Crew Chief (Foreman), instead of Grievant, was arbitrary and capricious. Although both candidates were qualified for the position, and both candidates performed equally well in the interview for the position, Grievant had approximately 15 years greater seniority than Williams.

> When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit. W. Va. Code § 29-6-10(4).

Of course, seniority is merely a factor to be considered, and is not determinative. An employer certainly retains the discretion to select a less-senior applicant with greater qualifications. Lewis v. W. Va. Dept. of Administration, Docket No. 96-DOA-027 (June 7, 1996). In this case, however, Grievant is more qualified than Williams. He is classified as an Equipment Operator III, the highest classification held by any applicant for the Foreman position. while Williams is classified as an Equipment Operator II.

___The record also shows that, although both Grievant and Williams have acted as foremen or supervisors in the past, Grievant had done so for a longer period, and Grievant's performance in this capacity was viewed favorably by his co-workers. Indeed, DOH stipulated that his performance as temporary foreman was competent. The record does not contain any favorable reports of Williams'

work as a supervisor. It is significant that Garrett, who was Lewis County Supervisor for four years and was responsible for hiring Williams, testified that Williams was somewhat lazy and not a self-starter, that he needed to be pushed, and that many times Garrett would visit a job to find Williams doing nothing. These are not the attributes of a good foreman. Garrett also testified that Grievant was capable of doing his day-to-day work without supervision. Williams has also been admonished for using a state truck for private purposes. The undersigned finds thatrelevant factors were not considered, and irrelevant factors were considered by DOH in selecting Williams for the Foreman position. Grievant was both the most senior and the most qualified person for the position of Foreman, and DOH's decision to not select him for the job was arbitrary and capricious.

Grievant has also established by a preponderance of the evidence that he was the victim of favoritism. As noted above, DOH held focus group sessions at its Lewis County facility to get feedback from workers regarding job problems. The workers were divided into four focus groups. Three of the groups complained that favoritism occurred at the facility.

Favoritism, as defined by W. Va. Code § 29-6A-2(h), means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees. A prima facie showing of favoritism consists of a grievant showing: 1) that he is similarly situated, in a pertinent way, to one or more other employee(s); 2) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and, 3) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference. If a grievant establishes a prima facie case, a presumption of favoritism exists, which a respondent may rebut by articulating a legitimate reason for its action. However, a grievant can still prevail if he can demonstrate that the reason proffered by respondent was mere pretext. See W. Va. Inst. of Technology v. WVHRC and Zavareei, 383 S.E.2d 490 (W.Va. 1989); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

In this case, Grievant and Williams were similarly situated in that they were bothqualified applicants for the Foreman position. However, Williams was given advantage and treated with preference. Day testified that he had seen Williams violate rules with Cayton's knowledge and not be punished, that Williams was assigned overtime when no work needed to be done, that Cayton treated Grievant more strictly than Williams, and that Cayton and Williams appear to be great friends who talk privately at length. Murphy testified that Williams' letter of admonishment for using a state truck to

drive his family to a ball game was a lower penalty than that given any other employee for improper use of a state vehicle. Gaines testified that Cayton showed a much better attitude towards Williams than to the rest of the employees, that Williams could refuse to operate equipment without being written up by Cayton the way anyone else would be, and that Williams takes breaks from work and fails to finish his shift without Cayton reprimanding him or saying anything. Grievant testified that Williams got to start work much later than other employees, and that Cayton and Williams spent a lot of time sitting in the office and talking. Heath testified that Cayton praised Williams for things that were just normal parts of the job. Robert Heater testified that Cayton had been unfairly critical of Grievant, that Cayton and Williams were “awful good friends,” and that Williams got better jobs from Cayton. This consistent testimony, by numerous employees who work with Cayton, Williams and Grievant every day, is deemed credible. It is also noted that DOH produced no witnesses to say that favoritism did not exist. This preferential treatment afforded Williams caused a substantial inequity to Grievant because Williams was selected for the Foreman position. Grievant has established a prima facie case of favoritism.

DOH has attempted to rebut the presumption of favoritism created by Grievant's prima facie case by arguing that its foremen are sophisticated employees who are oftencalled upon to deal with the general public and the press, that foremen hold a position of trust within DOH, and that Grievant's character thus becomes a selection factor. This argument fails for several reasons. First, the job description states that a foreman leads a crew and participates in the maintenance and repair of highways. The job description contains nothing about dealing with the public, press, or holding a position of trust within DOH. Indeed, the position is a classified one and requires no formal education whatsoever. It is disingenuous and pretextual of DOH to attempt to justify its one-sided “character” investigation by elevating the position of Foreman above and beyond its actual description. Second, it is Williams, and not Grievant, who has failed to represent DOH in a positive way to the public. Williams was admonished for driving his family to a ball game in a state truck. The record is devoid of any failure by Grievant to represent DOH in a positive way to the public. Favoritism is shown again by Cayton's failure to objectively evaluate the two applicants in this regard. Third, the record is devoid of any examples of a foreman dealing with the press, the public, or holding a position of trust within DOH.

For these reasons, DOH has failed to offer a legitimate business reason to rebut the presumption

of favoritism created by Grievant's prima facie case. Its proffered reasoning is deemed pretextual. Thus, Grievant has proven that favoritism was a factor in his not being selected for the Foreman position.

___That the decision to select Williams over Grievant was arbitrary and capricious, and the product of favoritism, is most clearly shown by the decision making process itself. Cayton relied upon the worst sort of unsubstantiated gossip and rumor in his evaluation of Grievant, all the while claiming he never considered such information, or that he onlyconsidered such information when it came from official sources. (See footnote 7) Again and again, Cayton testified that he couldn't remember when these events happened, that he couldn't remember who told him, that he couldn't remember who was involved or how it was resolved, that he didn't call anywhere to check, or couldn't say for sure that any particular incident happened at all. Cayton's reliance upon such rumors was arbitrary and capricious, particularly given his admission that, based upon DOH policy, nothing in Grievant's private life disqualified him from the Foreman position.

Cayton relied upon allegations that Grievant had been involved in drugs and had been involved in fights without ever asking any of the alleged participants in these incidents to determine whether they actually occurred, or occurred as he thought they had. Cayton did not ask Grievant for his side of these stories at the interview. Incredibly, DOH did not produce a single piece of written documentation of any of these events, at any level, although it should have been relatively simple to obtain documentation of any such event that required action by a court. Favoritism is further demonstrated by the fact that no such gossip investigation was performed upon Williams, as well as by the fact that Cayton did not verify Williams' claimed work experience. The decision making process was further flawed by Cayton's consideration of factors unrelated to the job description.

The undersigned finds that the only reliable piece of negative information concerningGrievant was his eleven year old DUI conviction, which the Grievant acknowledged. The W. Va. Supreme Court of Appeals and this Board have held that a respondent seeking to dismiss or discipline an employee for criminal activity that occurred away from the workplace must demonstrate a rational nexus between the conduct performed outside the job and the duties the employee is to perform. Bledsoe v. Wyoming County Bd. of Educ., 394 S.E.2d 885 (W.Va. 1990), John C. v. Dept. of Public Safety, Docket No. 95-DPS-497 (Jan. 31, 1996).

This conviction alone is not a sufficient reason to deny Grievant the position. Cayton's argument

that Grievant might lose his license again in the future is unsupported by the record and thus is nothing more than speculation. The record shows that Grievant has had a clean driving record since his conviction. The record is also devoid of proof that Grievant's conviction affects his current job performance in any way. Grievant's conviction is sufficiently removed in time and unrelated to his job duties for the required rational nexus to be found.

Grievant has also established by a preponderance of the evidence that he was the victim of retaliation or reprisal. “Reprisal” means the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it. W. Va. Code § 29-6A-2(p).

To establish a prima facie case of retaliation, the burden is upon a grievant to prove by a preponderance of the evidence 1) that grievant engaged in protected activity, 2) that grievant's employer was aware of the protected activities, 3) that grievant was subsequently treated in an adverse manner by the employer and (absent other evidencetending to establish a retaliatory motivation), 4) that complainant's adverse treatment followed his or her protected activities within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. Human Rights Comm., 365 S.E.2d 251 (W.Va. 1986), Ruby v. Insurance Comm. of W. Va., Docket No. 90-INS-399 (Dec. 1992).

As noted above, DOH held focus group sessions at its Lewis County facility to get feedback from workers regarding job problems. The workers were divided into four focus groups. Three of the groups complained that retaliation occurred at the facility. Grievant testified that he has filed some twenty grievances in the past two years, three of which he has pursued to Level III. Cayton was admonished by DOH for calling Grievant a “cry baby” and making imitation crying sounds towards him in the maintenance garage. Grievant testified that Cayton made the “cry baby” remark and the crying sounds in response to Grievant's filing of grievances, and that Cayton acknowledged this to be true. Grievant also testified that Cayton said Grievant was like John Leaberry, who Cayton said had stabbed Arch Moore in the back, and that Cayton had harassed him and given him bad evaluations because of his grievances. Day testified that Cayton doesn't like grievances, that he doesn't think they should be filed, that every employee who filed a grievance got a poorer performance evaluation as a result although their work was unchanged in quality, which resulted in more grievances. Murphy testified that the “cry baby” incident related to Grievant filing a grievance. Only one witness,

Messenger, testified that he filed a grievance and retaliation did not occur. The undersigned finds that the testimony of record regarding retaliation is consistent and credible. It is clear that Grievant filed grievances, and that DOH and its agent, Cayton, knew about them. The record reflects, by a preponderance of the evidence, that Grievant was subsequently treated in an adversemanner by DOH and Cayton, and that this adverse treatment was motivated by DOH and Cayton's desire to retaliate against Grievant for filing his grievances. Grievant has established a prima facie case of retaliation. As DOH has failed to offer any theory to rebut this prima facie case, the undersigned holds that Grievant has proven by a preponderance of the evidence that he was the victim of retaliation or reprisal. ___

CONCLUSIONS OF LAW

1.

In a non-disciplinary grievance, the 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); 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.

In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra at 286. Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). In matters of non-selection, the grievance process is not that of a “super-interview,” but rather serves as review of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). “An agency's decision as to who is the most qualified applicant will be upheld unless shown by the Grievant to be arbitrary and capricious or clearly wrong.” Thibault,supra.

3.

When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit. W. Va. Code § 29-6-10(4).

4.

Seniority is a factor to be considered and is not determinative. An employer retains the discretion to select a less-senior applicant with greater qualifications. Lewis v. W. Va. Dept. of Admin., Docket No. 96-DOA-027.

5.

Grievant was, by a preponderance of the evidence, both the most senior and the most qualified person for the job, and DOH's decision not to select him for the Foreman position was arbitrary and capricious.

6.

Favoritism, as defined by W. Va. Code § 29-6A-2(h), means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

7.

A prima facie showing of favoritism consists of a Grievant showing: 1) that he is similarly situated, in a pertinent way, to one or more other employee(s); 2) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and, 3) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification forthis difference. If a grievant establishes a prima facie case, a presumption of favoritism exists, which a respondent may rebut by articulating a legitimate reason for its action. However, a grievant can still prevail if he can demonstrate that the reason proffered by respondent was mere pretext. See W. Va. Inst. of Technology v. WVHRC and

Zavareei, 383 S.E.2d 490 (W.Va. 1989); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

8.

Grievant has established a prima facie case of favoritism.

9.

DOH has failed to offer a legitimate reason to rebut the presumption of favoritism created by Grievant's prima facie case. Its proffered reasoning is pretextual.

10.

Grievant has established, by a preponderance of the evidence, that he was the victim of favoritism.

11.

"Reprisal" means the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it. W.Va. Code § 29-6A-2(p).

12.

To establish a prima facie case of retaliation, the burden is upon a grievant to prove by a preponderance of the evidence 1) that grievant engaged in protected activity, 2) that grievant's employer was aware of the protected activities, 3) that grievant was subsequently treated in an adverse manner by the employer and (absent other evidence tending to establish a retaliatory motivation), 4) that grievant's adverse treatment followed his or her protected activities within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. Human Rights Comm., 365 S.E.2d 251 (W.Va. 1986), Ruby v. Insurance Comm. of W. Va., Docket No. 90-INS-399 (July 28, 1992). 13.

Grievant has established a prima facie case of retaliation.

14.

DOH has failed to offer a legitimate reason to rebut the presumption of retaliation created by Grievant's prima facie case.

15.

Grievant has established, by a preponderance of the evidence, that he was the victim of retaliation and/or reprisal.

Accordingly, the grievance is GRANTED, and Respondent DOH is Ordered to instate Grievant Benjamin “Pete” Blake to the Transportation Crew Chief position, effective the date Williams was awarded the position; and award him all back pay and benefits, including interest, to which would have been entitled as Transportation Crew Chief.

Any party may appeal this decision to the circuit court of Lewis County, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29- 6A-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.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated May 1, 1998

Footnote: 1 *For administrative reasons, this grievance was reassigned to the undersigned administrative law judge on March 18, 1998.*

Footnote: 2 *There is no documentary evidence of this in the record, and this allegation is uncorroborated by any other witness.*

Footnote: 3 *There is no documentary evidence of this in the record.*

Footnote: 4 *Phonetic spelling*

Footnote: 5 *There is no documentary evidence of this in the record.*

Footnote: 6 *Phonetic spelling*

Footnote: 7 *At the Level IV hearing, DOH presented the testimony of Donald L. Beeson (Beeson), who accused*

Grievant of child abuse. Beeson claimed that Grievant pleaded guilty to this crime and paid a fine. However, Beeson also admitted that he had filed a false claim of child abuse against Grievant with Deputy Sheriff Burkhardt, Cayton's son-in-law, because Grievant was living with his ex-girlfriend. Once again, no documentary evidence was introduced to substantiate this allegation. Beeson's testimony is deemed self-contradictory and unreliable.