DAVID KEADLE,

_____Grievant,

v.

Docket No. 97-DOH-306

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, and
WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

DECISION

David Keadle (Grievant), a Maintenance Management Analyst/NICET III employed by Respondent W. Va. Department of Transportation, Division of Highways (DOH), filed this grievance on December 14, 1995, pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that he was the victim of favoritism in the granting of merit pay increases by DOH. This grievance was denied at Level I, on January 5, 1996, by Assistant District Engineer Robert C. Ware (Ware), and at Level II, on January 25, 1996, by District Engineer J. D. Brackenrich. A Level III grievance hearing was held on August 27, 1997, before Chief Evaluator Bill Feazelle. Grievant represented himself at this hearing, and DOH was represented by Julie Meeks, Esq. By correspondence dated November 7, 1997, thegrievance was denied at Level III by DOH Commissioner Samuel H. Beverage. Grievant appealed to Level IV on December 10, 1997.

On January 29, 1999, Grievant, through counsel Jennifer Keadle, Esq., filed a Motion to Compel requesting sanctions for DOH's alleged extreme bad faith in discovery at Level IV. On May 10, 2000, the undersigned Administrative Law Judge issued a Show Cause Order, requiring DOH to show cause why it should not be sanctioned. A hearing on this Show Cause Order was held on August 9, 2000, at the Grievance Board's Beckley office. At this hearing, Grievant was represented by Jennifer

Keadle, Esq., and DOH was represented by William Rice, Esq. (Attorney Rice), and Robert Paul, Esq. (See footnote 1) The parties were given until October 2, 2000, to submit proposed findings of fact and conclusions of law, and both Grievant and DOH did so.

By Order of January 12, 2001, the undersigned sanctioned DOH for extreme bad faith and ordered it to pay all of Grievant's costs and fees, other than attorney fees, for the period of time from June 8, 1999, until November 27, 2000, including, but not necessarily limited to, copying, postage, stationery, long-distance telephone costs, witness fees, attorney travel costs, the filing fee for Grievant's Mandamus action in Kanawha County Circuit Court and all other costs and fees associated with that action. Grievant was directed to submit a statement of such costs, which DOH was invited to dispute, to theundersigned for approval. (See footnote 2) The undersigned's Order of January 12, 2001, is hereby incorporated in this Decision by reference.

A Level IV hearing on the merits of this grievance was held on November 27 and 28, 2000, at the Grievance Board's Beckley office. (See footnote 3) At this hearing, Grievant was again represented by Jennifer Keadle, Esq., and DOH was represented by Krista L. Duncan, Esq., and Jennifer Francis, Esq. The parties were given until February 15, 2001, to submit proposed findings of fact and conclusions of law, Grievant did so, and this grievance became mature for decision on that date.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is a Maintenance Management Analyst/NICET III employed by DOH, within its Organization 0980, at its District 9 office in Lewisburg.

2. This grievance was filed on December 14, 1995, alleging favoritism in DOH's granting of merit pay increases. Specifically, Grievant alleged that his supervisor, Ware, improperly gave several such increases to a subordinate with whom he was having an intimate relationship, Naomi Lewis (Lewis). (See footnote 4)

3. Each time merit pay increase money becomes available, DOH formulates a policy governing how that money is to be distributed, and each district is given a “control amount,” which is the limited amount of merit increase money available to be distributed in that district.

4. In late 1992 or early 1993, Ware began an intimate relationship with Lewis, a Secretary II at District 9. At that time, Ware was Lewis's supervisor, who evaluated her and recommended her for

merit pay increases.

5. Previously, Ware had an intimate relationship with another subordinate, Jolene Kidd.

6 In 1993, DOH had a merit pay increase plan. DOH did not submit its 1993 control amount for District 9.

7. In 1994, DOH had three merit pay increase plans; one for employees earning under $20,000.00 per year, for which DOH did not submit a control amount for District 9; one for employees earning more than $20,000.00 per year, for which DOH did not submita control amount for District 9; and a merit increase plan for all employees, with a control amount of $5,169.00 for District 9.

8. In 1995, DOH's merit pay increase plan included a control amount of $6,966.00 for District 9.

9. Between 1993 and 1995, Ware also supervised, evaluated, and recommended merit pay increases for Grievant and other District 9 employees Carl Burns (Burns), Mary Swepston (Swepston), Eugene Tuckwiller (Tuckwiller), Robert Wardrep (Wardrep), and Dennis White (White). (See footnote 5)

10. Grievant's working title, Maintenance Management Analyst, and classification, NICET III, are different from those of Lewis, Burns, Swepston, Tuckwiller, Wardrep, and White.

11. Between 1993 and 1995, Grievant was compared, for merit pay increase purposes, with other employees in District 9, including Lewis, Burns, Swepston, Tuckwiller, Wardrep, and White.

12. Between 1992 and 1995, Grievant, Lewis, Burns, Swepston, Tuckwiller, Wardrep, and White, had performance evaluations of “meets or exceeds requirements.” (See footnote 6)

13. Between 1993 and 1995, Grievant and Lewis were employees of approximately equal merit. 14. Between 1993 and 1995, Ware recommended these employees for the following merit pay increases: Lewis 13.5%; Swepston 13.5%; (See footnote 7) White 6%; Wardrep 5.5%; Tuckwiller 5%; Burns 3.5%, and Grievant 2.5%. During this period, Lewis received three merit increases and Grievant one.

15. In 1996, Ware became District Engineer of District 9, and no longer evaluated or recommended merit increases for Lewis. This personnel action allowed Ware to marry Lewis without violating DOH's nepotism policy. (See footnote 8)

16. DOH has one Maintenance Management Analyst in each of its ten districts, so that Grievant is the only Maintenance Management Analyst in District 9.

17. DOH collects and distributes data comparing the relative performance of its ten

Maintenance Management Analysts. 18. DOH did not compare Grievant with its nine other Maintenance Management Analysts when it awarded merit pay increases. (See footnote 9)

19. As of February, 1996, Grievant's salary was the second lowest of any Maintenance Management Analyst and, when expressed in terms of its relationship to the midpoint of his pay grade, the lowest at 19% below midpoint.

20. DOH's Administrative Operating Procedures provide for granting merit increases to a limited number of employees based upon meritorious performance, while taking into consideration such factors as equitable pay relationships and length of service.

21. Ware and Lewis were married on October 24, 1998.

DISCUSSION

As this decision 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 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id. Grievant alleges that his supervisor, Ware, engaged in favoritism when he gave several merit pay increases to a subordinate, Lewis, with whom he was having an intimate relationship. Grievant seeks a salary increase to the middle of his pay grade, effective the filing date of this grievance, December 14, 1995. Grievant also requests attorney fees. (See footnote 10)

In response, DOH argues that Grievant has failed to establish a prima facie case of favoritism; that Lewis deserved her merit increases because she is a better employee than Grievant; and that Grievant is not similarly situated to other employees within the pool of District 9 employees eligible for merit pay increases, because he is in a different classification than they are, and is not similarly situated to other Management Maintenance Analysts in other DOH districts, because they were not within the pool of District 9 supervisory employees eligible for merit pay increases.

An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary or capricious, or contrary to law or properly established policies or directives. Terry v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991).

A decision is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). In accordance with the rules of the West Virginia Division of Personnel, “salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance.” W. Va. Div. of Personnel Admin. Rule, 143 C.S.R. 1 § 5.08(a)(1993). See King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). Only "information that has been preserved in written form and can be referred to for later assessment" may be considered a "recorded measure of performance." Hodges v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-190 (Apr. 13, 1998). See Woods v. Dep't of Health and Human Resources, Docket No. 97-HHR-248 (Sept. 22, 1997); Riffle v. W. Va. Dep't of Transp., Docket No. 92-DOH-138 (Aug. 21, 1992); Tallman v. W. Va. Div. of Highways, Docket No. 91-DOH-162 (Jan. 31, 1992).

DOH's Administrative Operating Procedures, Volume IX, Chapter 15, Section C (Rev. August 15, 1981) at pp. 1-2, state, in pertinent part: “MERIT INCREASE POLICY[:] Purpose: [t]he purpose of this policy is to provide for granting merit increases to a limited number of employees (both hourly and salaried) based upon meritorious performance, while taking into consideration such factors as equitable pay relationships and length of service.”

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 differencein 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); Blake v. W. Va. Div. of Highways, Docket No. 97-DOH-416 (May 8, 1998); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Grievant established, by a preponderance of the evidence, that he was similarly situated, in a pertinent way, to other District 9 employees who were in the pool of employees eligible for merit pay increases in 1993, 1994, and 1995; who were subject to evaluation by Ware; and for whom Ware could recommend a merit increase. It is equally clear that Lewis was given advantage and treated with preference, in a significant manner not similarly afforded Grievant, when her paramour awarded her more than five times the amount of merit pay increase money accorded Grievant during the period. This difference in treatment caused a substantial financial inequity to Grievant.

However, DOH appeared to argue, at the Level IV hearing, that there is a justification for this difference in treatment: that Lewis was a substantially better employee than Grievant. (See footnote 11) DOH presented the testimony of Ware, who testified that his now-wife is a very good employee who goes beyond her secretarial duties; and that of James Lagos,a Highway Engineer V who worked at District 9 during the period of time relevant to this grievance, who testified that Lewis was an excellent employee and one of the best secretaries he had ever had, and that he always rated her as “meets or exceeds.” Tuckwiller testified that Lewis was a very good employee, with a good work ethic, who was very professional. Joe Hayes, the current District Administrator of District 9, testified that Lewis is an above-average employee who is very efficient and organized.

Concerning Grievant's performance, Tuckwiller testified that Grievant is a good employee who helps Lewis and other employees with their computers. District Design Engineer Steven Cole testified that Grievant is a good worker who helps others, including Lewis.

However, and as noted above, only "information that has been preserved in written form and can be referred to for later assessment" may be considered a "recorded measure of performance[,]" Hodges, supra. See Woods, supra, (an unrecorded disciplinary action cannot be used for merit evaluation); Tallman, supra, (unsubstantiated impressions of employees' performance are not proper basis for distribution of merit increases); Riffle, supra, (employee's "uncooperativeness," not the subject of any written disciplinary action, cannot be considered).

The only such recorded measures of performance in the record of this grievance are the

performance evaluations of Grievant and his co-workers and two memos comparing Grievant to DOH's nine other Maintenance Management Analysts. The performance evaluations show that Grievant, Lewis, Burns, Swepston, Tuckwiller, Wardrep, and White all received ratings of “meets or exceeds expectations” from Ware during the relevant timeperiod. (See footnote 12) These ratings do not reflect that Lewis is five times as meritorious an employee as Grievant. The memos show that, in 1998 and 2000, Grievant out-performed all other Maintenance Management Analysts in preparing their annual plans, but this information, of course, would not have been available to Ware in 1993 - 1995.

Therefore, according to the recorded measures of performance in the record of this grievance, Grievant and Lewis were employees of approximately equal merit. DOH failed to establish that Lewis was a substantially better employee than Grievant. Grievant established a prima facie case of favoritism.

In response to Grievant's prima facie case, which DOH may rebut by articulating a legitimate reason for its action, DOH apparently offers only the argument set forth above: that Lewis was a substantially better employee than Grievant. For the same reasons set forth above, that argument is rejected. Grievant has established that he was the victim of favoritism in the granting of merit pay increases by DOH. (See footnote 13) At the Level IV hearing in this grievance, DOH attempted to characterize this grievance as purely a question of who was the most deserving of merit pay increases, and offered little evidence on its central issue: favoritism. However, it is clear to the undersigned that Ware's favoritism towards Lewis simply manifested itself in the form of merit pay increases, as opposed to promotion, favorable assignments, or other favorable treatment. In arguing, in the Level IV hearing, that Grievant was less deserving of merit increases than Lewis, DOH used the same reasoning it employed in Honaker v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 99-DOH-393 (April 24, 2000): that Grievant is not similarly situated to other employees within the pool of District 9 employees eligible for merit pay increases, because he is in a different classification than they are, and is not similarly situated to other Management Maintenance Analysts in other DOH districts, because they were not within the pool of District 9 supervisory employees eligible for merit pay increases. In Honaker, the grievant, who was one of ten sign shop supervisors employed by DOH statewide, was permitted to compare his merit pay increase record to those of his counterparts in each of DOH's nine other districts. In the instant grievance, Grievant argues that he too should

have been compared, for merit pay increase purposes, to DOH's nine other Maintenance Management Analysts. Once again, DOH is arguing that one of its employees is an island unto himself, unable to compare his record of merit pay increases to that of any other DOH employee.

However, all parties agree that DOH established a pool of merit pay increase money for employees within District 9, and it is completely settled that Grievant may compare himself to other DOH employees within the pool of District 9 employees eligible for meritpay increases, even if they are differently classified. Parsons/Clemmer v. W. Va. Dep't of Transp./Div. Of Highways, Docket No. 97-DOH-289 (Oct. 30, 1997)(Transportation Worker IV compared to Crew Leader); Hall v. W. Va. Dep't of Transp./Div. Of Highways, Docket No. 96-DOH-035 (Jan. 31, 1997)(Transportation Worker II compared to Supervisor); Ratliff v. W. Va. Dep't of Transp./Div. Of Highways, Docket No. 96-DOH-004 (Jan. 31, 1997) (Transportation Worker II compared to Equipment Operator IIs and Crew Leaders); King, supra (All employees of one DOH office in same pool for merit pay increases); Tallman, supra (Heavy Equipment Operator II compared to Maintenance Crew Leader I).

Grievant's claim of favoritism is also supported by the testimony of DOH officials. Human Resources Director Black credibly testified that a husband should not evaluate his wife, as rater bias is likely. Ware credibly testified that he evaluated and recommended merit increases for his then-paramour, Lewis, and that he also evaluated and recommended merit increases for Grievant, Burns, Swepston, Tuckwiller, Wardrep, and White from 1993 until 1996, when he changed jobs in order to marry Lewis without violating DOH's nepotism policy. James Lagos, a Highway Engineer IV/Director of Engineering for DOH, who has evaluated employees and recommended merit increases at District 9, credibly testified that a supervisor evaluating his lover would be unduly influenced, which is why “you don't mess with the hired help.” See Wilson v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-019 (May 16, 1996). Given the ample evidence of favoritism present in the record of this grievance, this Grievance Board finds it unnecessary to address Grievant's claim that he should have been compared, for merit pay increase purposes, to DOH's nine other Maintenance Management Analysts. Finally, it is noted that the discovery dispute in this grievance did not end with the undersigned's Show Cause Order of May 10, 2000, requiring DOH to show cause why it should not be sanctioned for extreme bad faith in discovery. The discovery dispute that was the subject of that Order continued unabated until the date of the Level IV hearing in this grievance. Without cataloging every exchange in that dispute, suffice it to say that the parties exchanged an additional three and

one-eighth inches worth of letters; motions in limine, to compel, and to quash subpoenas; interrogatories; requests for production; stipulations; settlement offers and responses; and documentation; between May 10, 2000, and the Level IV hearing on the merits of this grievance. (See footnote 14) Included in this exchange were Grievant's counsel's letters of September 19, and November 6, 10, 14, and 16, 2000, in which she again had to request that which DOH had been repeatedly directed by the undersigned to provide, as well as DOH's letter of October 30, 2000, in which its counsel refused to speak ever again with Grievant's counsel, and its letter of November 1, 2000, in which its counsel accused Grievant's counsel of bad faith.

DOH's actions continued to create substantial delays. For example, by letter of October 16, 2000, DOH finally provided a partial listing of the “control amounts” directed to be produced by the undersigned's letter of June 8, 1999. Drema Smith, an Administrative Services Manager in Employee Relations for DOH, credibly testified that shehad been able to find, at the District 9 office, evaluations requested by Grievant that had not previously been provided to him. Administrative Assistant Thomas Ball credibly testified that he provided merit pay increase documents pursuant to Grievant's requests, but that he had not been asked for those documents until six months before the Level IV hearing on the merits of grievance (some 15 months after the undersigned directed they be produced). Grievant's Exhibit I lists 22 specific documents directed to be provided, but never supplied, by DOH.

As noted in the undersigned's Order of January 12, 2001, the resolution of this grievance was hindered by DOH's extreme bad faith in discovery, a pattern of delay and refusal completely inconsistent with what the legislature intended to be a simple and expeditious process, cooperative and informal in nature. A three year discovery dispute, resulting in a grievance that takes more than five years to conclude, is anathema to that process. Here, a tremendous amount of unnecessary effort by all concerned was required to resolve what turns out to have been a fairly straightforward grievance about favoritism.

Between 1993, when Ware's affair with Lewis began, and 1996, when Ware stopped evaluating and recommending merit pay increases for her, a practice that would have violated DOH's nepotism policy had they been married, Lewis received merit pay increases at a rate more than five times Grievant's, increases not justified by recorded measures of performance, but convincingly explained by favoritism. These raises diminished the finite pool of merit pay increase money available to other District 9 employees, including Grievant. The favoritism proved in this grievance resulted in merit

pay increase decisions that were unreasonable, arbitrary and capricious, and contrary to law. W. Va. Code § 29-6A- 2(h).

W. Va. Code § 29-6A-5(b) provides that "[h]earing examiners may provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules or regulations of the board or the provisions of this article[.]" In construing the virtually identical language of W. Va. Code § 18-29-5, regarding the grievance procedure for education employees, the West Virginia Supreme Court of Appeals in Graf v. West Virginia University, 189 W. Va. 214, 429 S.E.2d 426 (1992), held as follows: “[c]learly the Legislature intended to give the examiners who hear the grievances the power to fashion any relief they deem necessary to remedy wrongs done to educational employees by state agencies.”

Accordingly, this grievance will be Granted, and Respondent DOH will be Ordered to award Grievant the same salary increases it awarded Lewis, effective the dates they were awarded to her, with interest. (See footnote 15) Specifically, Grievant is awarded a 3.5% merit pay increase effective February 1, 1994, with interest; a 5% merit pay increase effective November 16, 1994, with interest; and a 5% merit pay increase effective October 16, 1995, with interest. Consistent with the foregoing discussion, the following Conclusions of Law are made.

CONCLUSIONS OF LAW

1. As this decision 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 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

2. An employer's decision on merit increases will generally not be disturbed unless shown to be

unreasonable, arbitrary or capricious, or contrary to law or properly established policies or directives. Terry v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991).

3. A decision is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). 4. DOH's Administrative Operating Procedures, Volume IX, Chapter 15, Section C (Rev. August 15, 1981), provide for granting merit increases to a limited number of employees based upon meritorious performance, while taking into consideration such factors as equitable pay relationships and length of service.

5. Under the rules of the West Virginia Division of Personnel, “salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance.” W. Va. Div. of Personnel Admin. Rule, Series I, 5.08(a) (1993). See King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995).

6. Only "information that has been preserved in written form and can be referred to for later assessment" may be considered a "recorded measure of performance." Hodges v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-190 (Apr. 13, 1998). See Woods v. Dep't of Health and Human Resources, Docket No. 97-HHR-248 (Sept. 22, 1997); Riffle v. W. Va. Dep't of Transp., Docket No. 92-DOH-138 (Aug. 21, 1992); Tallman v. W. Va. Div. of Highways, Docket No. 91-DOH-162 (Jan. 31, 1992).

7. 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 differencein treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

8. 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); Blake v. W. Va. Div. of Highways, Docket No. 97-DOH-416 (May 8, 1998); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

9. Grievant established a prima facie case of favoritism .

10. Respondent DOH failed to rebut Grievant's prima facie case.

11. Grievant's supervisor engaged in favoritism when he gave several merit pay increases to a subordinate with whom he was having an intimate relationship.

Accordingly, this grievance is **GRANTED**, and Respondent DOH is **ORDERED** to award Grievant the same salary increases it awarded Lewis, effective the dates they were awarded to her, with interest. (See footnote 16) Specifically, Grievant is awarded a 3.5% merit pay increase effective February 1, 1994, with interest; a 5% merit pay increase effective November 16, 1994, with interest; and a 5% merit pay increase effective October 16, 1995, with interest. 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 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.

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ANDREW MAIER

Administrative Law Judge

Dated: May 11, 2001

Footnote: 1

1 This hearing was Mr. Paul's first appearance in this grievance.

Footnote: 2 By letter of January 19, 2001, Grievant submitted a statement of costs and fees, including attorney fees. This statement was not copied to DOH. By letter of March 5, 2001, the undersigned advised Grievant to send a

copy of its statement of costs to DOH, and reminded Grievant that attorney fees had not been awarded. By letter of March 13, 2001, which was copied to DOH, Grievant submitted a revised statement. By letter of March 19, 2001, the undersigned gave DOH until April 19, 2001, to dispute Grievant's statement of costs and fees. By letter of April 17, 2001, DOH did so. A Level IV telephonic hearing on this issue was held on April 18, 2001. Grievant was represented by Jennifer Keadle, Esq., and DOH was represented by Jennifer Francis, Esq. The arguments of counsel were fully heard and considered. By Order of May 3, 2001, DOH was ordered to pay Grievant $428.56 as a sanction for its extreme bad faith.

Footnote: 3 *This hearing was preceded by telephonic pre-hearing conferences scheduled for April 7, 1998, May 18, 1998, May 29, 1998, May 28, 1999, June 7, 1999, November 21, 2000, and by continuances of the Level IV hearings scheduled for February 5, 1998, April 8, 1998, and June 29, 1998.*

Footnote: 4 *At various points in the Level IV hearing, Naomi Jeanne Lewis Ware was called Naomi Lewis, Naomi Ware, Jeanne or Jeannie Lewis (or Ware), etc.*

Footnote: 5 *These employees were evaluated by Ware throughout the relevant time period. Other District Nine employees were evaluated by different raters. The record does not contain seniority or classification information for these employees.*

Footnote: 6 *DOH bases its merit pay increase decisions on the previous year's evaluations.*

Footnote: 7 *This figure is taken from Respondent's Exhibit A at Level IV. Other documentation, and Grievant's proposals, place this figure at 10%.*

Footnote: 8 *Neither party submitted this policy. However, DOH's nepotism policy, which is entitled "Procedure - Employment of Immediate Family Members," was described in Wyant v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 00-DOH- 219 (Nov. 29, 2000) as follows: "[t]his Policy's purpose was to detail the guidelines for DOH's employment of family members. It defined nepotism as 'the act of favoritism shown to immediate family members especially by employing them into desirable positions.' This policy further stated: It shall be the policy of the Department of Highways to prohibit the employment or transfer of immediate family members into the same organizational units . . . where they would be under the direct or indirect supervision of an individual whose relationship to them would fall within the immediate family members definition. In addition, the Department shall take exception to any situation where a supervisor recommends his/her immediate family members for employment within the same organizational unit . . . ." W. Va. DOH Administrative Operating Procedures (11/01/85). See Hudkins v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-403 (Feb. 14, 1997).*

Footnote: 9 *The record does not reflect whether DOH compared Grievant to other NICET IIIs.*

Footnote: 10 *Attorney fees are not awarded by this Grievance Board. Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).*

Footnote: 11 *As DOH did not submit proposed findings of fact and conclusions of law, its position will be summarized from its closing arguments at Level IV.*

Footnote: 12 *It is noted that Ware rated Lewis higher than Grievant within the "meets or exceeds" category. Specifically, in 1992, 1993, and 1994, Grievant was rated satisfactory in all categories, with Lewis rated satisfactory in three categories and excellent in five. In 1995, Grievant was rated satisfactory in all categories, with Lewis rated satisfactory in four categories, satisfactory/excellent in one, and excellent in four. These figures are taken from Respondent's Exhibits I and J. However, these differences are found not to be significant given the ample evidence of favoritism by Ware in the record, including evaluations where Ware rated Lewis as "very attractive."*

Footnote: 13 *This conclusion was also supported by the credible testimony of Jolene KIdd, who testified that when she was having the intimate relationship with Ware described in Finding of Fact Five, she received merit increases based in part upon that relationship.*

Footnote: 14 *It is noted that DOH produced some documents, which the undersigned directed produced on June 8, 1999, immediately prior to the August 27, 2000, Level IV hearing on the merits of this grievance. Grievant's counsel was given time to review this material, and agreed that the hearing could proceed. Grievant's counsel modified Grievant's Exhibits F and G during the course of the hearing as a result of receiving this material.*

Footnote: 15 *Grievant's requested relief, a salary increase to the mid-point of his pay grade (an increase of 19%), is rejected because an increase of that size was not available to him, and was not awarded to the subject of DOH's favoritism, Lewis, during the relevant time period.*

Footnote: 16 *Grievant's requested relief, a salary increase to the mid-point of his pay grade (an increase of 19%), is rejected because an increase of that size was not available to him, and was not awarded to the subject of DOH's favoritism, Lewis, during the relevant time period.*