GLENN D. ALLISON,

Grievant,

v. **Docket No. 02-DOH-256D**

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Glenn D. Allison, employed by the Division of Highways (DOH or Respondent) as a Transportation Worker III (Mechanic), filed a level one grievance on April 19, 2002, in which he alleged that an Office Assistant had been shown favoritism in receiving a merit raise. For relief, Grievant requested a similar increase in salary. Grievant filed a claim for default dated August 19, 2002, stating that a level two conference had not been scheduled within the time lines. Respondent conceded that a default had occurred and filed a request for hearing with the Grievance Board on October 2, 2002. A hearing to determine whether the requested relief was contrary to law or clearly wrong was conducted in the Wheeling office on February 13, 2003. Grievant was represented by Kevin Church of WVSEU, and Respondent was represented by Barbara Baxter, Esq. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, and the matter became mature for decision at the conclusion of the hearing.

Findings of Fact

1. Grievant has been employed by DOH since December 1986, and has held the classification of Transportation Worker III (Mechanic) at all times pertinent to this grievance. 2. Sometime in early 2002, Grievant requested a merit raise from County Administrator Samuel DeCapio. Grievant had last received a two and one-half percent merit raise in October 2000, and his compensation was somewhat less than other Mechanics.

3. DOH “Merit Increase Guidelines” provide that increases shall be based on performance evaluations and other recorded measures of performance, and that equitable pay relationships and length of service may be considered as a secondary factor.

4. By memorandum dated March 1, 2002, Mr. DeCapio recommended that Office Assistant JoAnn Cicchirillo be given a five percent merit increase. This recommendation was approved.

5. Grievant received a two and one-half percent merit increase effective September 1, 2002.

Discussion

When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed that the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3. The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. This standard requires Respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999). Respondent may rebut the presumption created in W. Va. Code § 29-6A-3(a)(2) that the grievant prevailed on the merits, by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true, and/or that the relief requested would be clearly wrongas the merit increases were processed in compliance with all applicable rules, regulations, and guidelines.

Grievant's allegation was that Respondent had shown favoritism to the Office Assistant by awarding her an unusually large merit increase. Favoritism is defined by W. Va. Code § 29-6A-2(h), as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." It is presumed that Grievant established 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/havenot, in a significant particular; and

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

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

Assistant District Engineer Lloyd Adams testified that each Section is allocated a number of quarterly merit raises, which are generally allocated at two and one-half percent, but that larger increases may be awarded with justification. Mr. DeCapio stated that he supervises twenty-three

employees, and tries to insure that everyone receives a merit raise within a two year period. However, he opined, and Mr. Adams concurred, that the Office Assistant does an excellent job. Mr. DeCapio also stated that he had tried to get the Office Assistant a five percent increase previously, because she was “way down the scale.” Noevidence was offered to illustrate this claim.

Respondent has proven that Grievant is not similarly situated to the Office Assistant since they hold distinctly different classifications. Even if they were similarly situated as employees of DOH, the most recent performance evaluation of the Office Assistant rated her at 2.65 out of a possible 3.0, while Grievant was rated at 2.43. Both were very good, but the higher rating of the Office Assistant would justify a greater merit raise. Since DOH has proven by clear and convincing evidence that the basic facts underlying the presumption that Grievant prevailed on the merits of the favoritism claim are untrue, it would be clearly wrong to grant the relief requested.

In addition to the foregoing findings of fact and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed that the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3. The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. This standard requires Respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999). Respondent may rebut the presumption created in W. Va. Code § 29-6A-3(a)(2) that the grievant prevailed on the merits, by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true, and that the relief requested would be clearly wrong as the merit increases were processed in compliancewith all applicable rules, regulations, and guidelines.

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

3. Respondent has rebutted the presumption that Grievant prevailed on the claim of favoritism by demonstrating that the underlying facts were untrue, and that to award Grievant the requested

remedy would be clearly wrong.

Accordingly, the grievance is **DENIED.**

Any party or the Division of Personnel 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 GrievanceBoard 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: MARCH 20, 2003 **----------**

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE