DONALD L. ROY,

Grievant,

v. **DOCKET NO. 05-DOH-150D**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant Donald L. Roy filed a grievance on April 11, 2005, claiming discrimination in pay and classification. On July 12, 2005, the undersigned issued an Order Granting Default in this case, finding Respondent had defaulted at level two. Respondent requested a hearing to determine whether the relief requested by Mr. Roy was contrary to law or clearly wrong, and that hearing was held in the Grievance Board's Charleston office on August 10, 2005. Grievant represented himself, and Respondent was represented by counsel, Barbara Baxter. The matter became mature for decision on September 12, 2005, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Mr. Roy is employed by DOH in District Two as a Transportation Worker 3 (TW3). 2. On April 11, 2005, Mr. Roy filed a grievance relating to his salary. The grievance was denied at level one on April 13, 2005, and Mr. Roy appealed to level two on April 14, 2005.

3. Respondent defaulted on the grievance at level two, entitling the Grievant to a presumption that he had been discriminated against in classification and pay compared to other TW3s.

4. The relief Grievant requested in his grievance filing was stated as, “10% pay raise. Make all TW3's certified on large crane. Stop Discrimination and Favoratism [sic].”

5. Another TW3 in Grievant's district, Mr. Bias, earns $1.20 per hour more than Grievant,

though he is not certified on the crane and has less seniority than Grievant, although he was not originally hired into the bridge department.

Discussion

"The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud." (See footnote 1) "Upon finding a default occurred, it is presumed the grievant prevailed on the merits of the grievance, and the respondent must prove by clear and convincing evidence that to grant the remedy requested would be contrary to law or clearly wrong. This standard requires a 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." (See footnote 2) The employer may rebut the presumption by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true. (See footnote 3) In this case, Respondent's burden is difficult to meet, because Grievant has not clearly stated what those facts are, and no lower-level record was ever developed to more fully flesh out the complaint. Respondent avers that although not all TW3s receive the same amount of pay, they all, including Grievant, are paid within their classification. Respondent argues, therefore, that *Largent v. W. Va. Div. of Health* (See footnote 4) deems such practice non-discriminatory because W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but that *Code* Section does not require these employees to be paid exactly the same.

Grievant's complaint seems to be based on the fact that he was required to obtain a crane operator's certification, but at least one other TW3 who is not so certified, and who has less TW3 seniority, is paid more. Mr. Bias, the other TW3, makes $1.20 per hour more than Grievant. Grievant's rate of pay is not in evidence, so there is no way of knowing how that amount compares to the 10% increase Grievant is seeking.

Respondent admits the facts underlying this grievance, but challenges the interpretation of those facts as evidence of discrimination. In order to overcome the presumption of discrimination, though, Respondent should have offered clear and convincing evidence that the facts were not as Grievant stated. Respondent has therefore not met its burden of proof, and Grievant is entitled to remediation

of his complaint. "In making a determination regarding the remedy . . . [i]f the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole." (See footnote 5) The undersigned can find no logical connection between Grievant's requested relief of making all TW3s certified on the large crane and his claim that he has been discriminated against in pay and classification, so that relief is clearly wrong. With no evidence on Grievant's current rate of pay, there is no way to tell if a 10% raise would be contrary to law, but a raise would not be clearly wrong in light of the presumption of discrimination. This relief will be modified, however, and Grievant will be awarded an increase of $1.20 per hour.

The following conclusions of law support this discussion:

Conclusions of Law

1. "The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a). When a grievant asserts that his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence.

2. The language in W. Va. Code § 29-6A-3(a)(2) creates a presumption that the grievant prevailed on the merits of the case when the employer does not timely respond to the complaint, resulting in a default. *Lohr v. Div. of Corrections*, Docket No. 95-CORR-157D (Nov. 15, 1999). 3. "Upon finding a default occurred, it is presumed the grievant prevailed on the merits of the grievance, and the respondent must prove by clear and convincing evidence that to grant the remedy requested would be contrary to law or clearly wrong. This standard requires a 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." *Headley v. Div. of Highways*, Docket No. 04-DOH-397D (Aug. 22, 2005) citing *Lohr, supra.*

4. The employer may rebut the presumption by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true. *Bailey, et al. v. Dep't of Health and Human Res. and Div. of Personnel*, Docket No. 03-HHR-167D (June 30, 2004).

5. Respondent has not met its burden of overcoming the presumption that Grievant has been discriminated against.

6. "In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole." *Headley, supra.*

7. In light of such presumption, requiring other TW3s to be certified on the large crane would be clearly wrong, but Grievant is entitled to a pay increase of $1.20 per hour. For the foregoing reasons, this grievance is hereby **GRANTED**, and Respondent is **ORDERED** to award Grievant a pay increase of $1.20 per hour, effective ten days prior to the grievance being filed at level one. (See footnote 6)

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 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.

September 23, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

W. Va. Code § 29-6A-3(a).

Footnote: 2

Headley v. Div. of Highways, Docket No. 04-DOH-397D (Aug. 22, 2005).

Footnote: 3

Bailey, et al. v. Dep't of Health and Human Res. and Div. of Personnel, Docket No. 03- HHR-167D (June 30, 2004).

Footnote: 4

192 W. Va. 239, 452 S. E.2d 42 (1994)

Footnote: 5

Headley, supra.

Footnote: 6

At level two, Grievant was awarded a 2.5% merit increase, but this award was not implemented due to Grievant's default claim and continued pursuit of this grievance. That award is vacated due to Grievant's apparent rejection, and the relief ordered herein is not to be applied in addition to the level two award, but instead of such award.