ROBERT KINSER,

Grievant,

v. **DOCKET NO. 05-DOH-070**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant filed this grievance on December 3, 2004, stating, “I am filling out a grievance on behalf of the upgrade I feel I am entitled to. In past practice when an employee has been here over 6 months he is given an upgrade in pay. My probation period ended 8-24-04. I am requesting a 7% upgrade, retroactive from 8-24-04.”

After being denied at the lower levels, a level four hearing was held in the Grievance Board's Charleston office on October 12, 2005. Grievant was self-represented, and Respondent was represented by counsel, Barbara Baxter. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant contends he was entitled to a raise when he completed his probationary period, as such practice has been followed in the past for other employees. His claim raises issues of discrimination and favoritism. Respondent denies there has been such a practice, asserts there is no written policy granting raises at the end of a probationary period, and that such a policy would violate Division of Personnel Rules.

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

Findings of Fact

1. Grievant is employed by Respondent as a Transportation Worker 2 (Mechanic) in District Two, Logan County, and began working in that position on February 24, 2004.

2. Neither Respondent nor the West Virginia Division of Personnel (DOP) has a policy or rule

that either permits or requires an employee to be given an automatic salary increase upon the completion of a six-month probationary period, or after any other time period worked in a position.

3. Since Grievant's beginning employment date, Respondent has implemented one merit pay increase program, but that plan required an employee to be certified permanent before July 2004 to be eligible. Grievant was not eligible at the time.

4. Respondent offered to reallocate Grievant to Transportation Worker 3, which would have permitted him to receive a 5% salary increase, but he refused the offer.

5. Jason Gore, another Transportation Worker, was hired August 1, 2001, and received a salary increase in January 2003 after Mr. Gore and some other workers filed grievances. Contrary to Grievant's belief, the reason he and the other workers were awarded a raise was not because they had completed a six-month probationary period, but because they should have been considered eligible for a merit pay increase and were not.

6. No employee of Respondent has been given an automatic salary increase upon completion of a probationary period.

7. Grievant is paid within the pay range for his classification.

Discussion

In non-disciplinary matters Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. *Unrue v. W. Va. Div. of Highways*, DocketNo. 95-DOH-287 (Jan. 22, 1996). In this case, Grievant has provided no evidence that supports his contention that there is a practice of awarding a raise automatically upon completion of a six-month probationary period. Grievant certainly believed such a practice occurred, and his anecdotal evidence that he was underpaid in light of the hard work he does and when compared to the private sector was sincere. However, he provided no evidence to support his allegations. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg*, Docket No.97-BOT-359 (Apr. 30, 1998); *See Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995).

Respondent, on the other hand, credibly explained the salary advancement of the one other employee who testified for Grievant, and the explanation was that the salary advance he received

was, while granted due to a grievance, within the regulations for permissibly doing so. As Respondent pointed out, pay raises are regulated by the DOP Administrative Rule. While grievant believes there is a policy of granting a raise at the end of a six-month probationary period, "[i]n actuality, [under the Administrative Rule,] there are only three ways in which a state employee may receive a raise: on promotion to a position in a different classification with a higher pay grade (§ 5.4), based on merit as shown by recorded measures of performance (§ 5.8) and by earning an annual increment increase (§ 5.9)." *Antolini, et al. v. Div. of Natural Res.*, Docket No. 03-DNR-094 (Oct. 29, 2003). The raise requested by Grievant does not fall into any of these categories. Contrariwise, Grievant was offered a permissible raise, to go along with a promotion to a classification in a higher pay grade, but he refused it.

The following conclusions of law support this discussion:

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg*, Docket No.97-BOT-359 (Apr. 30, 1998); *See Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995).

3. Under the DOP Administrative Rule, 143 C.S.R. 1, there are only three ways in which a state employee may receive a raise: on promotion to a position in a different classification with a higher pay grade (§ 5.4), based on merit as shown by recorded measures of performance (§ 5.8) and by earning an annual increment increase (§ 5.9). *See Antolini, et al. v. Div. of Natural Res.*, Docket No. 03-DNR-094 (Oct. 29, 2003).

4. Grievant did not meet his burden of proving entitlement to a pay raise upon completion of his six-month probationary period.

For the foregoing reasons, this grievance is hereby **DENIED**.

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 grievanceoccurred, 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.

October 28, 2005

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M. Paul Marteney

Administrative Law Judge