BEVERLY DINGESS,

Grievant,

v. **Docket No. 05-DOH-439**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Beverly Dingess ("Grievant") initiated this proceeding on or about August 8, 2005, requesting to receive "a class action settlement" allegedly received by a coworker who performs the same duties as Grievant. After denials at levels one and two, a level three hearing was conducted by Brenda Craig Ellis on September 29, 2005, and on October 4, 2005. The grievance was denied in a level three decision dated November 29, 2005. Grievant appealed to level four on December 7, 2005. Subsequently, the parties advised the Grievance Board that they had agreed to submit this grievance for a decision based upon the lower level record. (See footnote 1) This matter was assigned to the undersigned administrative law judge on February 7, 2006.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by Respondent Division of Highways ("DOH") as a NICET Enrollee 1 in the Maintenance Division of District Two. 2. NICET Enrollee 1 is an entry level technician position in which the employee performs work and receives training which ultimately leads to NICET certification.

3. Christie Hensley is also employed in Maintenance for District Two, and her job title is Transportation Engineering Technician Associate.

4. Grievant and Hensley work together often and perform the same job duties, which includes spraying herbicide around DOH signs and guardrails.

5. On an unspecified date, Ms. Hensley received a cash settlement, reflecting back pay, along with an increase in her salary as the result of a class action settlement in a civil case entitled Farley, et al., v. Department of Transportation/Division of Highways. (See footnote 2)

6. Grievant was not involved in the class action lawsuit and did not receive any part of the settlement.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "The preponderance standard generally requires proof that a reasonable person wouldaccept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Although not specifically articulated as such, Grievant's contentions are tantamount to discrimination, in that she is contending that she is entitled to similar treatment to that afforded Ms. Hensley, who performs the same work as she does. Discrimination is defined as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” W. Va. Code § 29-6A-2(d). In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004). In light of the evidence contained in the record of this case, it is quite impossible to determine whether or not Grievant is “similarly situated” to Ms. Hensley. There is no evidence or documentation which explains the nature of the civil court settlement of which Ms. Hensley was a beneficiary. Therefore, since the reason for the lawsuit itself and the determination regarding which employees received portions of the settlement remain a mystery, Grievant has simply failed to meet her burden of proof here. Although it is undisputed that Grievant and Ms. Hensley have, in the past, performed similar work, this is insufficient evidence upon which to base a determination that Grievant was entitled to the benefits of

a civil lawsuit settlement to which Ms. Hensley was, apparently, a party and Grievant was not.

Moreover, as has often been cited in past grievance decisions, "'[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlementrather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.' Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968)." Syl. Pt. 1, McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994). In addition, we have recognized that "[a]n agency . . . is free to settle one case and not another even if the facts of the two are parallel." Smith v. W. Va. Dep't of Health and Human Res., Docket No. 90-H-470 (Sept. 30, 1991). See Farley v. Mason County Bd. of Educ., Docket No. 94-26-243 (Dec. 14, 1994). There is simply no evidence in this case that the settlement in which Ms. Hensley was involved was unreasonable or violated any of these principles.

The following conclusions of law support this decision.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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 discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004). 3. Grievant has failed to prove by a preponderance of the evidence that she was the victim of discrimination by Respondent.

Accordingly, this grievance is **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 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.

Date: March 1, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant represented herself, and Respondent was represented at level three by Robert Miller, Esquire. The parties elected not to file fact/law proposals at level four.

Footnote: 2

The record contains no further details regarding this lawsuit or the terms of the class action settlement.