THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JEFF WELLMAN,

Grievant,

v. **DOCKET NO. 05-DOH-323**

M. Paul Marteney,

Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Employer.

DECISION

Grievant Jeff Wellman filed this grievance on March 18, 2005, claiming he should have received an automatic promotion and 15% pay increase after working for Respondent for two years.

A level four hearing was held in the Grievance Board's Beckley office on August 25, 2006. Grievant was represented by counsel, Thomas M. Janutolo, Jr. 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.

Synopsis

Prior to the level four hearing, the parties agreed to narrow the scope of inquiry to whether Grievant was entitled to a 15% pay raise after he had been employed by Respondent in the Bridge Safety Inspector 1 classification for two years. Grievant had transferred out of the bridge department for part of his tenure due to a hostile supervisor, and did not acquire the requisite work experience or training. Grievant failed to prove he wasdiscriminated against despite the fact that other inspectors normally receive the promotion after two years in the classification.

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

Findings of Fact

1. Grievant has been employed by Respondent since February 2004, in the classification of Bridge Safety Inspector 1 (BSI1).

2. Between February 2004 and November 2004, Grievant was assigned to work in the District 10 Bridge Department, on one of two crews inspecting bridges, under the supervision of Crew Leader James Williams.

3. Mr. Williams subjected Grievant to various forms of verbal and physical harassment, as he did to many other Bridge Department employees. Then-District Engineer William Bennett did not believe Mr. Williams' “obnoxious and abrasive personality” or his “drinking problem” justified corrective action, (See footnote 1) despite a high turnover in the Bridge Department caused by Mr. Williams' conduct.

4. Grievant also had personal problems with the other Bridge Department Crew Leader, Jimmy Joe Martin. Grievant received good performance evaluations and Respondent identified no issues with Grievant's work.

5. Grievant complained of his treatment to District 10 Bridge Safety Inspection Coordinator Rick Wood and to Clark Shreve, Mr. Wood's supervisor, who asked Grievant if he would like to transfer to Mercer County headquarters to get away from Mr. Williams,or whether he would like to work on Mr. Martin's crew. Grievant agreed to be transferred and was transferred to a Transportation Crew Worker 2 position with no reduction in pay and no change in his classification as BSI1.

6. During the pendency of this grievance, both Mr. Williams and Mr. Martin have retired, and Grievant returned to the Bridge Department as a BSI1 in February 2006, with no further problems.

7. Normally, a BSI1 completes a training course based on the Federal Highway Administration's "Bridge Inspector's Training Manual" within two years, and had Grievant stayed in the Bridge Department, he would have had the opportunity to complete this course before now.

8. As a matter of course, a BSI1 is promoted to BSI2 after two years of experience and completion of the training course. The Division of Personnel Classification Specification for BSI2 lists as “Minimum Qualifications” for BSI2:

Training:

Education equivalent to graduation from a standard four-year high school.

Experience:

Two years of full-time or equivalent paid part time experience in bridge safety inspection.

Special Requirements:

Successful completion of a training course based on the Federal Highway Administration's "Bridge Inspector's Training Manual" is required. Possession of a valid driver's license.

Note: Certification as an Associate Engineering Technician Bridge by the National Institute for Certification in Engineering Technologies (NICET) may be preferred for promotional purposes.

9. Upon promotion to BSI2, an employee receives a 15% pay increase due to the difference in pay grades. 10. Grievant has not received a promotion to BSI2 or a 15% pay increase.

Discussion

In non-disciplinary matters Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. (See footnote 2) Although the original grievance filing was intended to return Grievant to the Bridge Department and provide relief from Mr. Williams' harassment, the scope has narrowed to whether Grievant is entitled to the 15% pay increase he surely would have received had he stayed there all along. Grievant contends his transfer was similar to a constructive discharge, in that, although it was voluntary, he had no choice but to transfer in order to avoid the hostile treatment to which he was subjected. He claims it is discriminatory to promote other BSI1's after two years of experience when he was not. Respondent counters that Grievant was given a choice of transferring or of being placed in Mr. Martin's crew, but he refused to stay in the bridge department of his own free choice, and he was aware of the salary-related consequences.

The evidence establishes that Grievant's factual argument is correct: the promotion to BSI2 is automatic for those BSI1's who stay on for two years and complete the required on-the-job training.

Being in the same classification in the same district office implies Grievant is similarly situated to those BSI1's who have received the promotion, triggering Grievant's discrimination claim. 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.” (See footnote 3) In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]hecrux of such claims is that the complainant was treated differently than similarly situated employees[.]” (See footnote 4)

Despite the similarities in Grievant's classification and ostensible workplace assignment, he is not similarly situated to other BSI1's who have two years of actual experience in bridge inspection work and have completed the required training course. A large part of Grievant's tenure as a BSI1 was performing craftworker work, a job Grievant described as a general laborer, doing everything from flagging to “a little of everything” at the Mercer County headquarters.

In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show: (See footnote 5)

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Grievant has not made this prima facie showing because he is not similarly situated, and even if he were considered to be so based on his on-paper status, the difference in treatment would be directly related to his job responsibilities: he had no bridge inspection job responsibilities for a large portion of his two years. Grievant has been a BSI1 for more than two years, but he does not have two years of experience in bridge safety inspection, and he has not completed the required training. The specification does not speak to timein the classification as a prerequisite to promotion, but instead requires time actually doing the work. Therefore, he does not meet the minimum requirements for the

BSI2 classification, and he cannot be summarily promoted to that classification.

Grievant's “constructive removal” from the bridge department poses a different problem. As was determined by the level three grievance evaluator, Grievant's supervisor was unbearable and Grievant should not have had to put up with his hostile treatment. The record is rife with credible anecdotes about Mr. Williams' behavior, and it is hard to understand why it was allowed to go on for so long, affecting so many of his subordinates. However, Grievant provided very little evidence why he could not have gotten along with Mr. Martin, the other Crew Leader. Based on the record, there in insufficient evidence to conclude Grievant's only recourse was completely absenting himself from the department. Grievant was offered the transfer as a solution to the concerns he had, and he accepted that as a solution of his own accord. There is no evidence Respondent deceived Grievant about the fact that he would not, as a result, get the automatic promotion to BSI2 after two years.

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. “'Discrimination' means 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).

3. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

White, supra; *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

4. Grievant has not met his burden of proving discrimination.

5. Grievant has not met his burden of proving entitlement to a fifteen percent salary increase.

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 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 andshould 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.

August 31, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

On one occasion where it was confirmed Mr. Williams was intoxicated at work, he was "written up, and . . . sent home for a couple of days."

Footnote: 2

Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

Footnote: 3

W. Va. Code § 29-6A-2(d).

Footnote: 4

Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

Footnote: 5

White, supra; Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).