THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

CALVIN COOK, et. al,

Grievants,

v. **Docket No. 06-DMV-131**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF MOTOR VEHICLES,

Respondent.

DECISION

Grievants (See footnote 1) filed grievances at various times alleging discrimination because all Grievants participated in cross-training and were promised raises. After completing the cross-training requirements, they were told Respondent could not provide them with raises, as the Governor had placed a freeze on merit salary increases on April 5, 2005. Grievants were not told of this until January 23, 2006. For relief, Grievants seek to obtain seven percent raises as promised and to be made whole in every way, including back pay. Grievants' cases were consolidated at Level IV, and a hearing was held in the Grievance Board's Charleston office on November 3, 2006. Grievants appeared *pro se*, and Respondent was represented by Janet James, Assistant Attorney General. This case became mature for decision on November 3, 2006, the parties declining to file proposed findings of fact and conclusions of law.

Issues and Arguments

Grievants assert they are victims of discrimination because other employees were cross-trained and received raises. Grievants were told they would receive a seven percent raise upon successful completion of cross-training. However, a freeze was placed on merit salary increases, and

Respondent could not give them raises. Grievants also claim discrimination because employees who were hired under the new job description which combined the duties two positions received seven percent raises.

Respondents assert the cross-training initiative ceased with the Governor's memorandum freezing merit increases.

Findings of Fact

1. Grievants work for the Respondent in various field offices. All Grievants have participated in cross-training and are now doing the jobs of Customer Service Representative and Driver Examiner. Both Customer Service Representative and Driver Examiner classifications are in paygrade 7.

2. On November 25, 2003, Glenn Pauley, Director Vehicle and Field Services, sent a memorandum to the Division of Personnel ("DOP") explaining the consolidation of duties. In the memorandum, Mr. Pauley also explains Respondent had, at that time, fourteen employees who had been cross-trained to perform both jobs, and Respondent would like to offer them merit raises, if the budget allowed. Mr. Pauley inquired as to whether a new classification was needed or whether Respondent had enough latitude to add the additional duties without a reclassification or salary adjustment. (See footnote 2)

3. Grievants were originally hired to perform only the job of Customer Service Representative. 4. Grievants were promised a seven percent raise upon successful completion of cross-training and a six month period of successfully performing the tasks of both Customer Service Representative and Driver Examiner by their immediate supervisors and by Mr. Pauley and by Pete Lake, Director. (See footnote 3)

5. In March, 2004, Respondent, with the permission of DOP, consolidated the job duties for Driver Examiner and Customer Service Representative. Since both jobs were a paygrade 7, the paygrade for Customer Service Representative remained the same. (See footnote 4)

6. When the job duties were consolidated with permission of DOP in March 2004, newly hired employees still received a seven percent raise after receiving formal training for Driver Examiner and working in the position for six months.

7. The Governor issued an order on April 5, 2005, that stopped the granting of all merit raises for state employees.

8. On January 23, 2006, Joseph Cicchirillo, Commissioner, issued a memorandum to all DMV

employees explaining the cross-training incentive program ended effective, April 5, 2005, as a result of the Governor's order stopping all merit raises for state employees.

9. Respondent gave employees merit raises for performing the jobs of Customer Service Representative and Driver Examiner up through October 25, 2005.

Discussion

Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their 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 Grievants have not met their burden. *Id.*

Grievants claim they have been the victims of discrimination. 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.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievants have compared themselves to individuals who received seven percent raises prior to being notified of the halt on merit raises. According to DOP Rules, there are two ways an employee can receive a raise. First, an employee can be reallocated, which requires approval of DOP. Second, an employee may receive a merit increase based on written indicators of performance.

Clearly, the seven percent raises that were given to Grievants' co-workers were not the result of reallocation. Instead they were merit raises. A similar case concerning the issues of raises with

respect to cross-training was recently decided by the Grievance Board, *Witt, et al. v. Div. of Motor Vehicles*, Docket No. 05-DMV-334, (July 21, 2006). In *Witt*, employees who did not receive raises filed a grievance alleging discrimination and favoritism. The first issue this Grievance Board had to determine was whether the raises given as a result of cross-training were merit raises. In holding the raises provided to employees were merit raises, it was also determined Respondent did not abide by the DOP rules in deciding who should receive the merit increases. Respondent's method for granting the merit increases in *Witt* was determined to be arbitrary and capricious, and because the grievants in *Witt* proved discrimination and favoritism, Respondent was ordered to recalculate these raises given following DOP rules relating to merit increases.

In the current case, Grievants have compared themselves to co-workers who are performing the exact same duties as they are. Some of these co-workers received a seven percent increase after the Governor's order ceasing all merit increases went into effect. Respondent provided no evidence, documentary or otherwise, to explain how or why this was allowed to continue. Clearly, Grievants have carried their burden of proving Respondent once again engaged in discrimination with respect to providing raises.

While the Governor's order ceasing merit raises for state employees was issued on April 5, 2005, Respondent continued to somehow process raises for newly hired employees and recently cross-trained employees. It should be noted that while the Governor's order was placed into effect on April 5, 2005, Respondent was not informed ofthe order with respect to cross-training until January, 2006. The undersigned was never provided with the reason why, some nine months after the halt on merit increases, Respondent decided to inform its employees the cross-training incentive program ceased back on April 5, 2005, especially since numerous raises continued to be processed.

W. Va. Code § 29-6A-5 states, "That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole." Because Grievants completed the cross-training prior to being informed of the Governor's order on merit raises, it is only appropriate that Grievants be made whole and each given seven percent raises with interest from the date they completed the requirements.

The following conclusions of law support this decision.

Conclusions of Law

1. Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their 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 Grievants have not met their burden. *Id.* 2. 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.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

3. *W. Va. Code* § 29-6A-5 states, "That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole."

Accordingly, this grievance is **GRANTED**. Respondent is ordered to provide Grievants with seven percent raises with back pay and interest to the time they completed all the cross-training requirements.

Any party 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 (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 withthe civil action number so that the record can be prepared and properly

transmitted to the appropriate circuit court.

DATE: December 7, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Calvin Cook, Charlotte Ballenger, Kathryn Alt, Linda Gregory, Pamela Carter, Tony Pennington, and Michelle Masters.

Footnote: 2

The undersigned was never provided with any testimony or documentation concerning DOP's response to this memorandum.

Footnote: 3

While the parties did supply information that Mr. Lake was a Director, his official title was not supplied. Mr. Lake was not called to testify.

Footnote: 4

The new job posting was not presented as evidence, so the undersigned has very little information concerning the classification title.