GERALD BALL,

Grievant,

v. **Docket No. 96-DOH-141**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS AND

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Gerald Ball, alleges the Division of Highways ("DOH") has discriminated against him and shown favoritism in its granting of merit increases to Mr. Neil Reed. Relief sought is an "immediate salary increase to $3,129.00 monthly." This grievance was denied at all lower levels. Grievant appealed to Level IV, and two days of hearing were held on September 18, 1996, and November 14, 1996. (See footnote 1) This case became mature for decision on February 10, 1997, the date of the parties' final submissions. (See footnote 2) After a review of the complete record, the Undersigned makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by DOH for approximately twenty years. (See footnote 3) He is currently employed in District Three as a Senior Engineering Technician ("SET IV") - Maintenance, with a working title of Maintenance Assistant ("MA").

2. An MA assists and directs his assigned County Supervisors ("CS") in the performance of their duties. The MA reports directly to the Assistant District Engineer. The CS's direct the work of the county employees.

3. In District Three there are currently two MA's, Grievant and Mr. Reed. Grievant oversees three counties: Wirt, Roane, and Calhoun and no interstate areas. Mr. Reed used to oversee Wood County, but now oversees Jackson County and the Medina interstate area. Mr. George Shinsky is, and has been, their direct supervisor for some time, and Mr. Robert Epler was assigned as the

District Engineer for District Three in 1993.

4. Mr. Reed performs numerous duties in addition to his MA position. These duties are: Maintenance/Equipment ManagementAnalyst, NICET Coordinator, Drug and Alcohol Testing Coordinator, and Training Coordinator. Additionally, Mr. Reed performs the duties of an Administrative Assistant II ("AA") in an acting capacity, and has been acting in this capacity since approximately 1989. The AA duties include personnel work (job postings, interviews), public relations and media information, and serving as contact person for local persons and elected officials. (See footnote 4) Although some of these duties were assigned by Mr. Epler, Mr. Reed has performed many of these duties since 1988 or 1989.

5. Mr. Reed and Grievant received merit increases on November 16, 1989, December 16, 1990, and June 16, 1994. They also received "across the board" pay increases, an increase on promotion, and an increase as the result of a grievance decision. Mr. Reed received an additional promotional increase on November 16, 1991 (See footnote 5) , and received additional merit increases on November 16, 1990, November 16, 1994, (See footnote 6) and October 16, 1995.

6. Mr. Shinsky did not perform performance evaluations on Grievant or Mr. Reed in 1992 or 1993.

7. In the absence of performance evaluations and at the direction of DOH's Division of Personnel, Mr. Epler and his staffused other recorded measures of performance to select employees for merit increases in 1994 and 1995. Mr. Shinsky recommended Grievant and Mr. Reed for the June 1994 merit increases they received. He did not recommend either employee for additional merit increases in 1994 or 1995.

8. Mr. Reed was recommended for the second merit increase in 1994, and the merit increase in 1995 by Mr. Epler, and these increases were based on the administrative and district duties he performed at Mr. Epler's direction. Mr. Epler also based these increases on phone calls and letters he received about Mr. Reed's job performance.

9. At the time of filing this grievance, in October 1995, Grievant's monthly salary was $2,662.00. Mr. Reed's monthly salary was $3,129.00.

10. Grievant filed a grievance in 1992 or 1993 concerning the difference in his salary as compared to Mr. Reed. It was denied at Level II, and Grievant did not pursue the matter further because of health reasons.

11. Grievant has more seniority than Mr. Reed, as he was rehired in 1978 and Mr. Reed was first hired in 1983. Grievant has a Board of Regents college degree while Mr. Reed has approximately two years of college course work and many continuing education courses. Both employees have worked in a variety of positions for DOH.

12. Because of the numerous duties Mr. Reed performs, he was unable to give an estimate of how much of his time is spentperforming MA duties. Mr. Epler believed these duties took approximately 50% of his time, and Mr. Shinsky took "a wild guess" and opined Mr. Reed's MA duties, in Jackson County, took 25% to 33% of his time.

13. Previously, there were three MA's in District Three and shortly before this grievance, was filed another employee was performing some MA duties on an acting basis. The third position was posted some time during this grievance. Mr. Shinsky has been performing the MA duties in Pleasants, Ritchie, and Wood Counties.

Issues

There is some confusion about the time frame of Grievant's allegations and grievance. This grievance was filed four days after Mr. Reed received his October 16, 1995 merit increase. Grievant's lengthy Statement of Grievance states, in part, "[i]t is difficult to see how job assignment could influence the decision to grant Mr. Reed a 5% wage increase while I was ignored." This statement goes on to mention Mr. Reed's 1994 merit increase. At the Level III and IV hearings, Grievant dated the discrimination and favoritism from 1989, and sought to prove these allegations. When asked by the Undersigned what was the time frame of his grievance, as it was unclear from his grievance form, Grievant indicated he wished to grieve the events from 1989 on, but the relief he sought was not specific merit increases. Grievant wanted his salary to be made greater than or equal to Mr. Reed's. DOH argued the issue was the most recent merit increase and noted Grievant let a prior grievance concerning similar issues drop in 1992 or 1993. (See footnote 7) DOH also argued the situation was a Largent type issue, and Grievant was being paid within his pay grade. (See footnote 8)

The Undersigned notes neither Grievant nor Mr. Reed received a merit increase in 1991, 1992, or 1993. Both received a merit increase in early 1994. Mr. Reed received two merit increases in 1990 and Grievant received one. Apparently, the key precipitating factor in Grievant filing a grievance at

this time is Mr. Reed's receiving merit increases in 1994 and 1995 that he did not. Given all this conflicting data and information, the Undersigned holds the time frame of this grievance is that which is stated on the grievance form. The issue that will be discussed and resolved by this Decision will be the merit raises of 1994 and 1995, as they relate to the issues of favoritism and discrimination.

Discussion

Grievant has alleged the merit increases received by Mr. Reed reflect discrimination and favoritism, and states he was treated differently than Mr. Reed, a similarly situated employee. (See footnote 9) W. Va.Code § 29-6A-2(d) defines discrimination 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." W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

It is clear Grievant does not have the evidence to support his case. To prove discrimination or favoritism a grievant must establish a prima facie case which consists of demonstrating:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Although Grievant and Mr. Reed are both classified as MA's, it is clear from Mr. Epler's testimony, that the reasons for Mr. Reed's recent merit increases are the performance of his job

duties as an acting AA as well as the other assigned district-wide responsibilities. Mr. Epler believes Mr. Reed performs these duties well, and relieves him of a great number of administrative tasks. Grievant and Mr. Reed are not similarly situated, and the merit increases granted to Mr. Reed are related to the actual job duties Mr. Reed performs that Grievant does not.

Mr. Epler disputed the beliefs of several witnesses that Mr. Reed is in charge of District Three, and that Mr. Epler is, in essence, just a figurehead. Mr. Epler noted that several witnesses were in error about the way numerous issues were resolved, and that, indeed, he was the one who makes the final decisions to hire, fire, and discipline employees. Mr. Epler gave specific examples of his decision-making which contradicted the assumptions of the witnesses.

It became clear, throughout the course of this hearing, that District Three is rife with rumors and misinformation, and that many employees' beliefs and assumptions are based on partial information and a distrust of others based on their political affiliations. The decision to grant Mr. Reed the merit increases in 1994 and 1995 does not appear to be based upon his political affiliation, but on the duties he performs for Mr. Epler.

Grievant also argues Mr. Reed is misclassified, and therefore he cannot receive pay increases within his SET IV classificationfor duties he performs as an acting AA. Grievant did not identify any statute, rule, or regulation that is being violated by Mr. Reed performing the AA duties in an acting capacity. As Mr. Epler stated at Level IV, it is his job to see all duties are carried out with the employees he has at hand. If he can work effectively with an employee willingly doing more than one job, then this is appropriate management. Grievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety. W. Va Code § 29- 6A-2(i). Grievant has not shown such violations, interference, or detriment.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In a non-disciplinary grievance, the grievant has the burden of proving his case by a preponderance of the evidence. W. Va. Code § 29-6A-6.

2. Grievant failed to establish a prima facie case of discrimination or favoritism in the granting

of the 1994 and 1995 merit increases.

3. A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee'seffective job performance or health and safety. W. Va Code § 29- 6A-2(i).

4. Grievant did not demonstrate Mr. Epler's management decisions violated any rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety.

5. Mr. Reed's merit increases for the performance of administrative duties while classified as a MA did not violate any statute, rule, or regulation.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision 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. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 31, 1997

Footnote: 1

The Division of Personnel did not participate in this grievance.

Footnote: 2

On or about July 24, 1997, Respondent's attorney called the Undersigned Administrative Law Judge. He stated the parties had discussed the possibility of settlement in this grievance, and he wanted to know how much time he had before this Decision would be issued. I informed him the Decision was to be issued on either July 29 or 30, and I would need to know

by that time what the parties' decision on settlement was. He indicated that did notgive him much time to effect a settlement. I then informed him if he would send me a letter by July 30, 1997, I would hold this Decision until I received further notification from him. As of this afternoon, July 31, 1997, having heard nothing further from any of the parties, and not wishing to delay resolution any longer, this Decision was issued.

Footnote: 3

Grievant had worked at DOH for various periods in the past prior to his most recent start date. The most recent date of hiring is 1978, and this is seen as his seniority date.

Footnote: 4

Some of the previously stated non-MA duties could be seen as AA responsibilities.

Footnote: 5

Grievant received this promotional increase earlier.

Footnote: 6

Grievant alleged Mr. Reed received another merit increase on December 16, 1994. This statement is incorrect. Mr. Reed was to receive a 5% pay increase on November 16, 1994. This increase was mistakenly sent in as a 2 1/2%, and the December 16, 1994, 2 1/2% increase was to correct the prior error. Level II Trans. at 31.

Footnote: 7

Grievant was unclear as to when he abandoned this prior grievance, and the time frame from 1992-1993 was as close as he could come to the dates of the prior grievance.

Footnote: 8

Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1993).

Footnote: 9

In his opening statement, Grievant's counsel argued Mr. Epler's decision of having Mr. Reed cover only one county while performing his other assigned duties, had allowed "the quality of work to suffer" in District Three, and Mr. Epler had made a badmanagement decision. This statement is not part of the original grievance, and, even if it were, would not be an appropriate subject for a grievance by this employee.