JOE DALE MORRIS,

Grievant,

v. **Docket No. 97-DOH-167**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

This is a grievance by Joe Dale Morris (Grievant) against the West Virginia Department of Transportation, Division of Highways (DOH), alleging that his employer engaged in discrimination prohibited by W. Va. Code § 29-6A-2(d) when it failed to award him a merit raise in 1995. This grievance was filed on November 8, 1995, and advanced to Level III without resolution. A Level III hearing was held on January 22, 1997. On March 17, 1997, DOH Commissioner Fred VanKirk denied the grievance at Level III. Grievant appealed to Level IV, indicating that this matter could be decided upon the record developed through Level III. Following an opportunity for the parties to submit written arguments, this matter became mature for decision on May 13, 1997, upon receipt of Respondent's written submission. The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible evidence contained in the transcript and exhibits from Level III.

FINDINGS OF FACT

1. Grievant is employed in DOH District Seven, which includes Braxton County.
2. Grievant is an Equipment Operator II assigned to the DOH maintenance garage at Gassaway, in Braxton County, West Virginia.
3. Grievant last received a merit raise in 1994.
4. Based upon available funding, seven employees in Braxton County were awarded merit

raises on October 16, 1995. Grievant did not receive a merit raise.

5. Frank Belknap, County Supervisor for Braxton County, and Grievant's second-level supervisor, considered employee performance evaluations for 1994 when he awarded the merit raises described in Finding of Fact Number 4.

6. Of the employees awarded merit raises by Mr. Belknap, all except Dwight Copeland, an Equipment Operator III, received higher evaluations than Grievant for 1994. Grievant and Mr. Copeland received substantially equivalent evaluations for 1994. See G Ex 2 and A Ex 1.

7. In deciding to award a merit raise to Mr. Copeland, rather than Grievant, Mr. Belknap determined that Mr. Copeland's performance was underrated by his immediate supervisor on his 1994 evaluation, and that Mr. Copeland's duties as an Equipment Operator III are more difficult than Grievant's duties as an Equipment Operator II.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

In accordance with the rules of the West Virginia Division of Personnel, salary advancements must be based on merit as indicated by performance evaluations and other recorded measures of performance, such as quantity of work, quality of work, and attendance. W. Va. Div. of Personnel Admin. Rule, 143 C.S.R. 1 § 5.08(a) (1995). See King v. W. Va. Dept. of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). However, an employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious, or contrary to law or properly-established policies or directives. (See footnote 1) Terry v. W. Va. Div. of Highways, Docket No. 91-DOH-185 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Services, Docket No. 89-RS-051 (May 16, 1989).

Grievant contends that his treatment by DOH constitutes discrimination prohibited under W. Va. Code § 29-6A-2(d). Discrimination is defined therein 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). This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 2) of discrimination

under § 29-6A-2(d), must demonstrate the following:

> (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 the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992). Once a grievant establishes a prima facie case of discrimination, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH- 435 (Feb. 28, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dept. of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Applying this prima facie analysis to the facts presented here, Grievant demonstrated that he was in the pool of Braxton County employees considered for merit raises in 1995, and another employee in the pool with a substantially identical evaluation receiveda merit raise, while Grievant did not. Thus, the undersigned administrative law judge finds that Grievant has shown that he was treated differently from a similarly situated co-worker to his detriment, establishing a prima facie case of discrimination under W. Va. Code § 29- 6A-2(d).

In response to this prima facie case, DOH provided testimony from Grievant's second-level supervisor that the duties of the Equipment Operator III selected for a merit raise are more demanding than Grievant's duties as an Equipment Operator II. Likewise, the witness indicated that he was personally familiar with the work performance of the two employees, and believed that the

employee awarded the merit raise should have received a higher rating on his 1994 performance evaluation. This latter claim is not persuasive because any anomalies in the employees' respective ratings should have been corrected earlier. However, in order to break an apparent "tie" between two similarly situated employees, the second-level supervisor's consideration of the more complex duties assigned an Equipment Operator III articulated a job-related circumstance which was not demonstrated to be arbitrary and capricious or an abuse of discretion.

In these circumstances, DOH established a job-related, non-discriminatory reason for the decision to award a merit raise to the other employee rather than Grievant. Because Grievant failed to establish that the reasons articulated were merely a pretext for discrimination, the presumption created by establishment of a prima facie case is rebutted. Therefore, Grievant has not established that he was subjected to impermissible discrimination by a preponderance of the evidence. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Shepherdstown Vol. Fire Dept. v. W. Va. Human RightsComm'n, 309 S.E.2d 342, 352 (W. Va. 1983); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

In addition to the foregoing, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. "An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious or contrary to law or properly established policies or directives." Terry v. W. Va. Div. of Highways, Docket No. 91-DOH- 185 (Dec. 30, 1991).

3. In accordance with the rules of the West Virginia Division of Personnel, salary advancements must be based on merit as indicated by performance evaluations and other recorded measures of performance, such as quantity of work, quality of work, and attendance. W. Va. Div. of Personnel Admin. Rule, 143 C.S.R. 1 § 5.08(a) (1995). See King v. W. Va. Dept. of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995).

4. In order to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), a grievant must demonstrate the following:

(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 the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

5. Although Grievant established a prima facie case of discrimination under W. Va. Code § 29-6A-2(d) in regard to the award of merit raises to Braxton County employees in 1995, DOH established a legitimate, non-discriminatory, and job-related reason for its action. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

6. Grievant did not demonstrate that DOH violated any statute, policy, rule, regulation, or applicable written agreement, or acted in an arbitrary and capricious manner when it awarded merit raises in 1995.

Accordingly, this grievance is **DENIED**.

Any party 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 theintent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: August 22, 1997

Footnote: 1

Grievant argued at the Level III hearing that the employer's action in awarding a merit raise to a less senior employee with a substantially identical performance evaluation violated the Administrative Operating Procedures of DOH. However, this policy was not included in the record, and the undersigned is unable to take administrative notice of this document.

Footnote: 2

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).