ALBERT FIORINI, JR.,

Grievant,

v. **DOCKET NO. 98-DOH-001**

WEST VIRGINIA DIVISION

OF HIGHWAYS,

Respondent.

DECISION

Grievant, Albert Fiorini, Jr., challenges his reduction in salary, which was the result of a prior level four Grievance Board decision. That decision found that a 10 per cent salary increase awarded to Grievant in 1994 was the result of favoritism and, thus, improper. On January 5, 1998, this matter was filed directly at level four, pursuant to W. Va. Code §29- 6A-4. (See footnote 1) After a continuance for good cause shown, a hearing was held in the Grievance Board's office in Morgantown, West Virginia, on June 3, 1998. Grievant was represented by Michael Niggemyer, Esquire, and the Division of Highways ("DOH") was represented by Timbera Wilcox, Esquire. This matter became mature for consideration on August 7, 1998, the deadline for submission of the parties' written arguments.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by DOH as a Transportation Operator II in theMonongalia County office. He has been employed by DOH since 1979.

2. Effective February 1, 1994, all employees of DOH earning less than $20,000 annually were granted a 3.5% raise.

3. Grievant was the only employee earning less than $20,000 who did not receive the 3.5% increase. (See footnote 2)

4. Upon discovering that Grievant was the only employee entitled to the increase who

did not receive it, Grievant's father spoke with George Sidiropolis, who at that time was an Assistant Commissioner for DOH.

5. After the discussion with Grievant's father, Mr. Sidiropolis directed DOH Human Resources Director Jeff Black to raise Grievant's salary by 10%, effective May 16, 1994.

6. Mr. Sidiropolis' reason for granting Grievant such a large raise was that Grievant was complaining about not having received the 3.5% raise, along with not having been awarded a promotion to a supervisory position in the county office.

7. When instructed to give Grievant a 10% raise, Mr. Black was not informed that the raise was being given as settlement of a potential grievance or any other claim.

8. No written document exists which explains the understanding between Mr. Sidiropolis and Grievant's father regarding the reasons for the 10% raise.

9. On June 24, 1994, Marvin Swanger, one of Grievant's coworkers in the Monongalia County DOH office, filed a grievance, alleging that Grievant's 10% raise wasthe result of favoritism.

10. In a level four grievance decision entitled Swanger v. W. Va. Div. of Highways, Docket No. 95-DOH-063 (Nov. 19, 1997), Senior Administrative Law Judge Keller found that Grievant's raise was the result of favoritism, as prohibited by statute. She ordered that Grievant's salary be adjusted so that he would only receive the 3.5% raise awarded to all other similarly situated employees.

11. By letter dated December 10, 1997, Jeff Black informed Grievant that he was being "demoted in salary" pursuant to the fourth level grievance decision in Swanger, supra. The effective date of the salary reduction was January 1, 1998, and prompted the filing of the instant grievance.

Discussion

Although this Grievance Board has historically refused to allow employees to attack a prior grievance decision through the grievance process, Toney v. Lincoln County Bd. of Educ., Docket No. 95-22-118 (June 30, 1995), this practice was recently deemed by the West Virginia Supreme Court of Appeals to be improper. In Monk v. Knight, No. 24366 (Nov. 24, 1997), the Court held that an employee affected by an alleged misinterpretation or

misapplication of the law has no duty to file a grievance until the alleged misinterpretation or misapplication of the law occurs. Thus, as in the instant case, Grievant had no duty to intervene in Mr. Swanger's grievance, because Grievant's job situation was not adversely affected until that decision was implemented.

As a preliminary matter, Grievant contends that he should not bear the burden of proof in this case, because it is a disciplinary matter. See W. Va. Code §29-6A-6. The basis for this allegation is DOH's characterization of the salary reduction as a "demotion." However, there is obviously no disciplinary action involved in this matter. Grievant's salary was undisputedly reduced because of a level four grievance decision, not to punish him for any misconduct. Accordingly, Grievant must prove his claims by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

Grievant contends that the 10% salary increase he received in 1994 was compensation for settlement of potential claims he may have asserted against DOH. Along with having been "passed over" for the 3.5% raise for employees earning under $20,000, Grievant claims that, although he was the most qualified candidate, he had not been selected for a supervisory position in the Monongalia County office. An agreement was allegedly reached between Grievant's father and Mr. Sidiropolis, whereby Grievant would receive the 10% raise in exchange for not pursuing any claims against DOH. Grievant was not a party to this conversation, and he testified at level four only to what he had been told by his father. Grievant's father was not called as a witness.

The only verification of this alleged "settlement agreement" is an affidavit from Mr. Sidiropolis, which states, in pertinent part, as follows:

> In or about May, 1994, it came to my attention that [Grievant], who was classified as an Equipment Operator II at the Goshen Road Garage, was asserting a complaint regarding his level of pay and classification. I recall that he was complaining that he did not receive a pay raise in February 1994, as most all other employees had, and that his level of pay was inordinately low in general.
>
> Gene [Albert] Fiorini also asserted that he had been denied a promotion to a better job classification in lieu of a less experienced employee and that such denial was improper.

> I reviewed Mr. Fiorini's record and ascertained that there was significant merit to his complaints. I was especially concerned with his level of pay. Therefore, I endeavored to resolve the complaint in order to avoid litigation of a grievance or other personnel action by offering Gene Fiorini aten percent (10%) pay raise in return for his not asserting a claim any further concerning his complaints. A ten percent (10%) pay raise was not extraordinary.
>
> I considered this to be a full and fair settlement of the matter on behalf of the Division and Mr. Fiorini. I would have expected the settlement to be reduced to writing and endorsed or approved by the appropriate parties. Apparently, the perfection of the settlement did not occur due to an oversight.

This affidavit was submitted to the undersigned after the conclusion of the level four hearing. While agreeing that the affidavit could be presented, DOH counsel argued that this document should not be given great weight, because Mr. Sidiropolis was not subject to cross examination. The undersigned finds that Mr. Sidiropolis' statements are not sufficient evidence that Grievant received a 10% raise as settlement of a potential grievance. No written settlement agreement has been presented, and the "parties" to the alleged agreement have not presented credible testimony subject to cross examination in this grievance. The affidavit is not corroborated by any other evidence, and is not sufficient to provide a basis for finding that a settlement existed.

Jeff Black, Human Resources Director, testified at the level four hearing in this case. He recalled being instructed by Mr. Sidiropolis to implement a 10% raise for Grievant, but there was no discussion of settlement of any potential claims by Grievant. Mr. Black was told that there was some political pressure to place Grievant in a supervisory position, and that the 10% raise was meant to "pacify" him, because he was not going to be promoted. Mr. Black also testified that it is DOH policy and practice to reduce all settlement agreements for money to writing, signed by all parties. Rather than corroborating the affidavit of Mr. Sidiropolis, Mr. Black's testimony, presented in person and subject to cross examination, disputes it. "The law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation." McDowell County Bd. of Educ. v. Stephens, 191 W.Va. 711, 447 S.E.2d 912 (1994). This Grievance Board has recognized the principle that grievance settlements should be upheld unless it is proven by a preponderance of the evidence that the

settlement was not fairly made or was in contravention of some law or public policy. Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23- 190 (Mar. 15, 1996). However, absent a stipulation by the parties that such an agreement existed, or a written settlement agreement submitted as evidence, the undersigned cannot find that a such an agreement existed in this case.

Grievant contends that he received the 10% raise as a settlement, which should not have been disturbed by implementation of the Swanger, supra, decision. However, the undersigned finds that Grievant has not established by a preponderance of the evidence that a valid settlement agreement existed. Grievant's knowledge of this alleged "settlement" came secondhand from his father, who did not testify. Moreover, Mr. Sidiropolis' self-serving statements in his affidavit do not establish the justification for Grievant's 10% raise. While it is clear, as it was in Swanger, supra, that Grievant was entitled to the 3.5% raise given to all employees earning under $20,000, there is no evidence explaining the reason for the extra 6.5% increase he received in 1994. The record is devoid of any evidence regarding the nature of Grievant's prospective "promotion," his alleged entitlement to it, or the qualifications of the successful candidate. Thus, it is impossible for the undersigned to determine whether any valid claim in thatregard ever actually existed, let alone whether or not DOH settled such a claim. **(See footnote 3)**

Grievant has also argued that the administrative law judge's finding in Swanger, supra, that his raise was the result of favoritism was unsubstantiated. Grievant contends that, in the Swanger case, Mr. Swanger did not meet his burden of proof. No new evidence has been submitted in the instant case regarding the favoritism claims or their basis, so the undersigned has absolutely no basis upon which to address this issue. Since Mr. Swanger is not a grievant presenting a case of favoritism before the Grievance Board in this case, the undersigned cannot and will not determine whether he has met any "burden of proof," because he has none as a non-party to this grievance. Clearly, Mr. Swanger met his burden of proof before this Grievance Board in his case, and the undersigned has no authority or basis upon which to disturb that finding.

In summary, the evidence in this case does not establish that Grievant's reduction in salary, pursuant to this Grievance Board's decision in Swanger, supra, was contrary to any

law, policy or regulation.

Conclusions of Law

1. In a non-disciplinary grievance, the grievant bears the burden of proving each element of his claim by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988); See W. Va. Code §29-6A-6.

2. "The law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation." McDowell County Bd. of Educ. v. Stephens, 191 W.Va. 711, 447 S.E.2d 912 (1994). 3. Grievant did not establish by a preponderance of the evidence that he received a 10% salary increase in 1994 as settlement of potential claims against DOH.

4. Grievant has not proven that DOH's compliance with a prior level four grievance decision was improper or contrary to any law, policy, 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 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. 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.

Date: August 17, 1998

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

When notifying Grievant of his salary reduction, the Division of Highways characterized it as a "demotion" and instructed him that he could file an expedited grievance. The parties agreed to proceed at level four, so this grievance is properly before the undersigned for consideration.

Footnote: 2

The record does not reflect any confirmed reason for Grievant being "passed over" when the raises were given. However, there was some unsupported speculation that his personality conflicts with the county supervisor were a contributing factor.

Footnote: 3

It is also quite likely that Mr. Sidiropolis' actions in this regard were ultra vires, since no other DOH officials have verified that a settlement actually took place.