TAMMY CAIN,

Grievant,

v. **Docket No. 01-DOH-366**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Tammy Cain ("Grievant") initiated this grievance on October 23, 2000, alleging Respondent Division of Highways ("DOH") improperly granted a 5% salary increase to employees in the office assistant and secretary classifications. She seeks as relief to be granted a 5% merit increase, retroactive to October 1, 2000. Grievant's immediate supervisor was without authority to grant relief, and Grievant appealed to level two on October 23, 2000. The grievance was denied at that level on October 31, 2000. Upon appeal to level three, a hearing was held on February 21, 2001, and the grievance was denied in a written decision dated May 11, 2001. Grievant appealed to level four on May 22, 2001, and a hearing was held in Wheeling, West Virginia, on July 27, 2001. Grievant represented herself, and DOH was represented by counsel, Jennifer E. Francis. This matter became mature for consideration on August 1, 2001, upon notification that DOH did not wish to file fact/law proposals.

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 Engineering TechnicianAssociate, which is in Pay Grade 11. She is assigned to District 6.

2. On October 1, 2000, DOH granted a 5% salary increase to all employees in the classifications Office Assistant I, II and II, along with Secretary I and II. These classifications are in

various pay grades ranging from 3 through 9.

3. Fifteen employees in District 6 received salary increases as a result of the office assistant and secretary raises.

4. Of the 15 employees who received raises in Grievant's district, only five have a higher salary than Grievant, all of whom have been employed by DOH for many more years than Grievant.

5. Grievant and the clerical employees in District 6 are all being compensated within the pay ranges assigned to their respective classifications.

6. DOH granted the 5% increase to office assistants and secretaries to address the low salaries which were being paid to those groups of employees.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Grievant has alleged that she should have also received a salary increase, because she had a better evaluation than at least one of the clerical employees in her district, and employees with fewer years of experience than her received the increase. Conversely, Grievant argues that the raises were improper.

The evidence presented at the hearings in this grievance fails to explain whether theraises granted to DOH clerical employees were merit increases or some other type of salary increases. The District Six administrator testified at level three concerning the raises, but he did not know whether or not the Division of Personnel had been involved in the implementation of these salary increases or what they were specifically called. (See footnote 1) However, he did believe that the raises were only granted to employees in the applicable classifications if they had acceptable performance evaluations. 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 indicators of performance. W. Va. Div. of Personnel Administrative Rule, 143 C.S.R. 1 § 5.08(a) (1998). See Morris v. W. Va. Dep't of Transp. , Docket No. 97-DOH-167 (Aug. 22, 1997); King v. W. Va. Dep't of Transp. , Docket No. 94-DOH-340 (Mar. 1, 1995). 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. Little v. W. Va. Dep't of Health & Human Resources , Docket No. 98-HHR-092 (July 27, 1998); Morris , supra ; Salmons v. W. Va. Dep't of Transp. , Docket No. 94-DOH-555 (Mar. 20, 1995); Terry v. W. Va. Div. of Highways , Docket No. 91-DOH-186 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Serv. , Docket No. 89-RS-051 (May 16, 1989).

Although not articulated as such, it is presumed that Grievant believes it was discriminatory for DOH to grant raises to other employees while excluding her. W. Va.Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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." A grievant alleging discrimination must establish a prima facie case by 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 the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

The evidence is undisputed that only the secretary and office assistant classifications received a 5% salary increase on October 1, 2000, and Grievant's job is not assigned to either of those classifications. Accordingly, it is impossible for Grievant to establish a prima facie case of discrimination, because she is not similarly situated to the employees who received the salary increase. Underwood v. W. Va. Dep't of Transp., Docket No. 95-DOH-509 (May 21, 1996); See Reed v. Div. of Corr., Docket No. 95-CORR-033 (Apr. 30, 1996).

In addition, if it were assumed that these raises were merit increases, Grievant would be required to prove she is more entitled to the raise than another employee whoreceived such an increase.

Tallman v. W. Va. Div. of Highways, Docket No. 91-DOH-162 (Jan. 31, 1992). Grievant has only compared herself to one employee who was granted a pay raise, and, although both received a "meets expectations" evaluation, Grievant's overall evaluation score was somewhat higher. Nevertheless, this alone does not establish that Grievant was entitled to a salary increase, especially since she has failed to prove the basis upon which these raises were granted, aside from classification. Once again, it has been established that only employees in specific classifications received salary increases, and Grievant's classification was not one of them. This Grievance Board has never found any statutory or other violation was committed in cases where merit raises have been allocated based upon employees' salaries as compared to the salaries of other employees, or whether or not they had received a raise in recent years. See Marcum v. Dep't of Transp., Docket No. 00-DOH-155 (Aug. 10, 2000); Tucci v. Dep't of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995). Raises given to employees to correct "salary inequities" or to compensate a specific group of low-paid employees have also been upheld. Underwood, supra; See Underwood v. W. Va. Division of Highways, Docket No. 99-DOH- 204 (Jan. 28, 2000).

Accordingly, based upon a preponderance of the evidence presented, Grievant has failed to prove she is entitled to the salary increase granted to other employees on October 1, 2000. The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & StateEmployees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't 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. Little v. W. Va. Dep't of Health & Human Resources , Docket No. 98-HHR-092 (July 27, 1998); Salmons v. W. Va. Dep't of Transp. , Docket No. 94-DOH-555 (Mar. 20, 1995); Terry v. W. Va. Div. of Highways , Docket No. 91-DOH-186 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Serv. , Docket No. 89-RS-051 (May 16, 1989).

3. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure,

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."

4. A grievant alleging discrimination must establish a prima facie case by 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 the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Oncea prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

5. Grievant has failed to establish a prima facie case of discrimination with regard to salary increases granted to secretaries and office assistants.

6. Grievant has not proven any violation of statute, policy, regulation, or written agreement applicable to her employment.

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. 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.

Date: September 5, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

DOP's Administrative Rule also permits "pay differentials," which are salary increases meant "to address circumstances such as class-wide recruitment and retention problems."