J. STEPHEN WILSON,

Grievant,

v. **Docket No. 01-DOH-380D**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

On June 4, 2001, J. Stephen Wilson ("Grievant") submitted an appeal to level four of the grievance procedure, requesting relief by default, pursuant to the provisions of W. Va. Code § 29-6A-3. His statement of grievance reads:

> Other Operator 3's are being treated with favoritism in regard to upgrade opportunities and rate of pay, in Upshur Co.-0749, compared to myself. I claim I am being discriminated against and treated unfair as an Operator 3 in Upshur Co.

Thereafter, on August 1, 2001, Respondent conceded that a default occurred at level one of the grievance procedure, and requested a hearing regarding whether the remedy requested was contrary to law or clearly wrong. A hearing was held in the Grievance Board's office in Westover, West Virginia, on August 27, 2001. Grievant represented himself, and Respondent was represented by counsel, Jennifer E. Francis. This matter became mature for consideration upon receipt of the parties' fact/law proposals on September 11, 2001.

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

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") as a Transportation Worker III-Equipment Operator ("Operator III") in Upshur County. He has been employed by DOH since October 8, 1993.

2. Of the six employees classified as Operator III in Upshur County, Grievant has the least overall tenure with DOH and is the lowest paid.

3. DOH's “Temporary Upgrade Policy” allows the District Engineer or Division Director to assign employees to perform the duties of a higher classification on a temporary basis, not to exceed ninety days in a twelve-month period. Only Transportation Worker IIs and IIIs may be upgraded to Transportation Crew Chief (“TCC”).

4. Between January 1, 2001, and the date this grievance was filed (April 24, 2001), Grievant and three other Operator IIIs in Upshur County were upgraded to TCC on a regular basis. Only one Operator III was upgraded more frequently than Grievant, and he is assigned to a different substation.

5. Grievant is being paid within the pay range assigned to his classification.

6. Grievant's requested relief in this grievance is “a 5% merit raise, that the practice and upgrade procedures used in Upshur County be applied equally to all Operator 3's in Upshur County. To be upgraded to crew leader for the dates of April 18, 2001, April 20, 2001, specifically and other dates going back to January 25, 2001, where applicable and in any other way made whole.”

Discussion

Once it has been determined that the employer has defaulted in processing agrievance pursuant to the provisions of W. Va. Code § 29-6A-3, it is presumed that the grievant has prevailed upon the merits of the case. Respondent then has the burden of proving that the remedy requested is contrary to law or clearly wrong. See Hoff v. Bd. of Trustees, Docket No. 93-BOT-104 (June 30, 1994); Flowers v. W.Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). This Grievance Board has determined that the employer must prove its case by clear and convincing evidence, which requires the party with the burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. In the case of a default matter, this requires the employer to prove by this standard that the basic facts underlying the presumption are not true. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

Grievant contends he is being discriminated against, as compared to other Operator IIIs in Upshur County, with regard to upgrades and salary. Respondent presented evidence in support of its

arguments that there has been no discrimination within Grievant's job classification in either regard. It argues that Grievant has, in fact, been upgraded on a regular and frequent basis, even moreso than some other Operator IIIs, and Grievant's low salary is merely a result of his shorter tenure with DOH. In addition, Respondent notes that, pursuant to its policy, upgrades rest solely within the discretion of the supervisor.

W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but it does not require these employees to be paid exactly the same. Previous decisions of this Grievance Board have interpreted that provision to mean that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their properemployment classification. Nafe v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997); Brutto v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-076 (July 24, 1996); Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dep't of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992). See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989).

Moreover, the West Virginia Supreme Court of Appeals has held that "employees who are performing the same tasks with the same responsibilities should be placed within the same job classification," but a state employer is not required to pay these employees at the same rate. Syl. Pts. 2 & 3, Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S. E.2d 42 (1994). Additionally, 128 C.S.R. 62, § 19.4 states any classified employee "whose base salary is at least at the equity step for that pay grade, shall be deemed to be equitably and uniformly compensated in relation to other classified employees within the pay grade . . .". As noted by the Supreme Court in Largent, pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." Id. at 246. A state employee's salary is the result of many factors, especially when the employee has worked for the state for many years.

The evidence introduced by Respondent demonstrates that Grievant has received regular salary increases since he began employment with DOH. Although he contendedat the level four hearing that

he did not mean to request a “merit increase” as relief, but only a general 5% increase, he stated in his post-hearing submission that he did not desire to amend his original grievance. Assuming Grievant wishes to abide by his original request for relief, he has asked for a 5% merit raise. In accordance with the rules of the West Virginia Division of Personnel (DOP), 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 Administrative Rule, 143 C.S.R. 1 § 5.08(a) (2000). 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). 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. 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). Respondent has shown by clear and convincing evidence that Grievant is being paid within his assigned pay grade, and that there has been no discrimination with regard to Grievant's salary increases as opposed to other employees in his classification. (See footnote 1) Moreover, whether Grievant is requesting a “merit increase” or some other type of increase, Respondent has shown thathe is not entitled to any increases aside from those he has already been awarded. To award Grievant a salary increase for no justifiable reason would be contrary to DOP's administrative rule and clearly wrong.

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. Grievants may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Because there is a presumption that Grievant has prevailed in his default claim, the burden of proof at this point is upon Respondent to prove there are non-discriminatory reasons for the manner in which upgrades were accomplished and the method by which salary increases were granted. As discussed above, Respondent has proven that Grievanthas received all salary increases to which he his entitled, and he has also received more upgrades than all but one other employee in his classification, thereby rebutting the presumption of discrimination. Grievant argued in his post-hearing submission that Respondent failed to introduce evidence regarding upgrades which occurred prior to January of 2001 or after April of 2001. However, Grievant's requested relief specifically related to this time period, during which it is clear that he was upgraded as much, and moreso, than other employees in his classification. Grievant is not entitled to the remedy requested, in view of the overwhelming evidence introduced by Respondent, demonstrating that Grievant has been treated fairly vis-a-vis other employees in his classification.

Respondent has proven by clear and convincing evidence that Grievant has not been discriminated against with regard to salary and upgrades. The following conclusions of law support the decision reached.

Conclusions of Law

1. Once it has been determined that the employer has defaulted in processing a grievance pursuant to the provisions of W. Va. Code § 29-6A-3, it is presumed that the grievant has prevailed upon the merits of the case.

2. The employer must prove by clear and convincing evidence that the remedy requested by a grievant in a default claim is contrary to law or clearly wrong. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

3. Respondent has proven by clear and convincing evidence that Grievant has not been discriminated against with regard to salary and temporary upgrades, and the requested relief of a 5% salary increase and upgrades would be contrary to law and clearlywrong.

Accordingly, Grievant's requested default remedy 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 21, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant has also insisted throughout this proceeding that, because he has worked for the state for a total of fourteen years, this should be calculated into his pay. However, Grievant fails to understand that DOH is a separate agency from his prior employer, and only his tenure with DOH is relevant to his salary history with his current employer.