RICHARD MIDKIFF,

Grievant,

v. Docket No. 01-DOH-560

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Richard Midkiff, filed his first grievance against his employer, the Division of Highways ("DOH") on August 29, 2001. He filed a second grievance shortly thereafter dealing with the same set of facts and complaints. In his Statements of Grievance, Grievant alleges DOH engaged in favoritism and discrimination when it gave another employee, Darrell Quintrell, a 10 percent pay increase when he was reallocated, and Grievant received only a 5 percent pay increase when he was promoted. Relief Sought is "[a]n immediate wage increase of 10% effective 7/16/01 with all backpay[,] plus interest for every hour Darrell Quintrell has worked since his operator 3 was awarded." (See footnote 1)

This grievance was denied at all lower levels. Grievant appealed to Level IV on November 2, 2001. A Level IV hearing was held on December 4, 2001. This case became mature for decision on that date, as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant argued DOH violated its and the Division of Personnel's ("DOP") Rules and guidelines when it gave Mr. Quintrell a 10 percent pay increase upon his reallocation to an Equipment Operator III in June or July of 2001, as he had previously received a 21/2 percent merit increase. Grievant maintains it is against the rules for an employee to receive a salary increase greater than 10 percent in a year. Grievant asserts DOH engaged in discrimination

and favoritism with this action, because he did not receive the same increase in 1999, when he was promoted to the same classification.

Respondent asserts no rules or regulations were violated, and it did not engage in discrimination or favoritism in awarding Mr. Quintrell a 10 percent salary increase upon reallocation. Respondent notes this increase was in settlement of a grievance filed by Mr. Quintrell, and increases of 10 percent are common when a position is reallocated or an employee is promoted. Respondent maintained DOP's Rules limiting salary increases do not apply to reallocation or the settlement of a grievance, but only to merit increases. Further, Respondent cited to Mason v. Division of Highways, Docket No. 00-DOH-345 (March 28, 2001), which held an employee does not have standing to grieve the promotion or salary of another employee, if he cannot show harm to himself.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by DOH since February 1988, and he is currently classified as an Equipment Operator III. 2. Grievant applied for and received a promotion to an Equipment Operator III position in 1999, pursuant to posting. Both Grievant and Mr. Quintrell applied for this position, and Grievant was selected. Grievant was promoted on December 1, 1999, and given a 5 percent increase.

3. In January 2001, one of the Equipment Operator III's quit, creating a vacancy in that classification.

4. Mr. Quintrell, an Equipment Operator II, filed a grievance in 2001 requesting reallocation to an Equipment Operator III, and a 10 percent salary increase.

5. Wilson Braley, District Engineer for District 2, asked to post the vacant position and was given permission to do so.

6. In the interim, Jeff Black, Human Resources Director, decided it could be possible to resolve Mr. Quintrell's grievance by reallocating him to the Equipment Operator III position. Grt. Ex. No. 3, at Level II. Affidavit, Jeff Black, Human Resources Director, dated December 4, 2001.

7. Before a final decision was reached on this issue, the position was posted, and Mr. Quintrell was the only applicant. Mr. Braley recommended Mr. Quintrell for the position in June or July of 2001, with a 5 percent raise. Grt. Ex. No. 3, at Level II; Test. of Mr. Braley, Level III Hearing.

8. Through discussion and after mediation, DOH decided to grant Mr. Quintrell a 10 percent increase upon his reallocation/promotion as a settlement of his grievance. Grt. Ex. No. 3, at Level II. Mr. Quintrell then withdrew his grievance at Level IV on October 12, 2001. **(See footnote 3)**

9. In October 2001, Mr. Quintrell received a 21/2 percent merit increase.

10. It is not unusual for an employee to receive a 10 percent increase upon promotion. Test. of Mr. Braley, Level III Hearing.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

The parties raise several issues. The first relates to Grievant's standing.

I. Standing

Grievant also contested Mr. Quintrell's reallocation and 10 percent increase. Respondent alleged Grievant did not have standing to contest these issues.

"Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); See Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996). In order to have a personal stake in the outcome, Grievant musthave been harmed or suffered damages. Farley v. W. Va. Parkway Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for Grievant to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [he seeks] to protect by way of

the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, Grievant is without standing to pursue this grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990). Even if the employer has misapplied applicable regulations regarding the classification and/or a corresponding salary increase to another employee, where a grievant is not personally harmed, there is no cognizable grievance. See Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Mills v. W. Va. Dep't of Transp., Docket No. 92-DOH-053 (Apr. 24, 1992).

Grievant has not demonstrated how he has been personally injured by Mr. Quintrell's reallocation and 10 percent increase, aside from the possible morale problems that could be created within the organization. Without injury, Grievant does not have standing to contest Mr. Quintrell's reallocation, which did not personally harm him. Mason, supra.

II. Salary advancement **Grievant alleged DOH violated the following DOP Rules: 4.7, 5.5, and 5.8.** (See footnote 4)

> **4.7. Position Reallocation - Whenever substantial changes occur in the duties and responsibilities permanently assigned to a position, the Director shall reallocate the position to its proper class. The incumbent or the appointing authority may seek a reconsideration of the allocation action by submitting a written request to the Director within ten (10) calendar days of the effective date of the action. The Director shall not reallocate a position based on temporary changes in the duties and responsibilities assigned to the position.**

> **5.5 Pay on Promotion - When an employee is promoted, the employee's pay shall be adjusted as follows:**

> **(a) Minimum Increase - An employee whose salary is at the minimum rate for the pay grade of the current classification shall receive an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted. An employee whose salary is within the range of the pay grade for the current classification shall receive an increase of one increment, as established by the State Personnel Board, per pay grade advanced to a maximum of 3 pay grades, or an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted, whichever is**

greater. In no case shall an employee receive an increase which causes the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted.

. . .

(c) Additional Increase - The appointing authority may grant additional incremental increases, as established by the State Personnel Board, to an employee being promoted if the employee has sufficient qualifications in excess of the minimum required for the new class. The employee must possess at least six months of pertinent experience or an equivalent amount of pertinent training for each additional incremental increase granted. In no case shall the additional incremental increase cause the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted.

5.8. Salary Advancements/[Merit Increases]

(a) Basis - All salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance.

(b) Eligibility - Salary advancements are limited to permanent employees.

(c) Amount - Salary advancements are limited to a maximum established and subject to change by the State Personnel Board, and shall not cause the new salary to exceed the maximum of the pay grade to which the employee's class is allocated. The State Personnel Board shall establish the maximum for salary advancements by policy on implementation of the pay plan [i.e. as of 5/1/94, no more than 10% in any 12-month period] as specified in subsection 5.2. of this rule.

Reallocation is defined as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." Salary advancement is defined as "[a] discretionary advancement in salary granted in recognition of the quality of job performance." Promotion is defined as "[a] change in the status of an employee from a position in one class to a vacant position in another class of higher rank as measured by salary range and increased level of duties and/or responsibilities." Mr. Quintrell was reallocated and promoted with approval of DOP. He was granted a 10 percent increase to resolve his grievance and as a result of his reallocation/promotion, pursuant to DOP Rule 5.5.

This increase was not a salary advancement, and the 10 percent limit does not apply.

III. Discrimination and favoritism

Grievant also alleges discrimination and favoritism. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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(h) defines favoritism as "unfairtreatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 5) of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), 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. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't 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. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb.

23, 1995). Grievant has not met his burden of proof and established a prima facie case of discrimination or favoritism. Grievant is not similarly situated to Mr. Quintrell. Grievant was promoted in 1999, and Mr. Quintrell was reallocated/promoted in 2001. (See discussion Section II). Mr. Quintrell's 10 percent increase was the result of a settlement of a grievance and a reallocation which resulted in a promotion. Grievant was promoted and did not challenge his 5 percent increase at the time it occurred. Accordingly, Grievant has not met his burden of proof.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); See Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996). In order to have a personal stake in the outcome, Grievants must have been harmed or suffered damages. Farley v. W. Va. Parkway Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for Grievant to "allege an injury in fact,either economic or otherwise, which is the result of the challenged action and shows that the interest [they seek] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, Grievant is without standing to pursue this grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990). Even if the employer has misapplied applicable regulations regarding the classification and/or a corresponding salary increase to another employee, where a grievant is not personally harmed, there is no cognizable

grievance. See Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Mills v. W. Va. Dep't of Transp., Docket No. 92-DOH-053 (Apr. 24, 1992).

3. Grievant does not have standing to contest Mr. Quintrell's reallocation, which did not personally harm him. Mason v. Div. of Highways/Dep't of Transp., Docket No. 00- DOH-345 (Mar. 28, 2001).

4. The granting of a 10 percent increase to settle a grievance, and as the result of a reallocation, did not violate DOP rules or regulations.

5. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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." 6. 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."

7. A grievant, seeking to establish a prima facie case of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), 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;**
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> **and,**
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> **(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. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

8. Once a grievant establishes a prima facie case of discrimination and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may

show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't 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. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

9. Grievant has not met his burden of proof and established a prima facie case of discrimination and/or favoritism. Grievant is not similarly situated to Mr. Quintrell.

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." Any 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 14, 2002

Footnote: 1

Grievant stated at Level IV he had also filed another grievance concerning favoritism and discrimination in the assignment of overtime, but this grievance was settled. He still wished the undersigned Administrative Law Judge to review the overtime documents as examples of favoritism and discrimination, and these were admitted at Level III. Grievant did not discuss these documents nor did he discuss the overtime hours of other employees other than Mr. Quintrell, who had considerably more overtime than Grievant. Given the fact the overtime grievance was settled, and the very limited amount of evidence presented, this issue will not be examined or discussed further.

Footnote: 2

Grievant represented himself with assistance from co-worker Randy Adkins, and Respondent DOH was represented by Attorney Jennifer Francis.

Footnote: 3

The undersigned Administrative Law Judge takes administrative notice that Mr. Quintrell filed a grievance at Level IV, and it was withdrawn as settled.

Footnote: 4

Grievant also cited to the Rules on reclassification, but they are not applicable here as no one was reclassified.

Footnote: 5

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).