**ALVIN MESSINGER,**

**Grievant,**

**v v.**

**Docket No. 04-DOH-081**

**WEST VIRGINIA DEPARTMENT OF**

**TRANSPORTATION/DIVISION OF HIGHWAYS,**

**Respondents.**

## D E C I S I O N

Grievant, Alvin Messinger, filed this grievance on April 24, 2003, against his employer, the Division of Highways ("DOH"). His Statement of Grievance states:

> I am being denied equal opportunity to better myself through training and am suffering job harassment. These actions by management are detrimental to my standard of living and job career, based on years of service. I feel this is a form of discrimination against me.
>
> Relief sought: That I be compensated accordingly, and made whole in every way.

This grievance was denied at Levels I and II, and granted at Level III. Grievant appealed to Level IV on February 23, 2004, and a Level IV hearing was held on May 6, 2004. At the close of the hearing, the parties agreed this grievance would become mature for decision that day. Several days later, Grievant called to complain because DOH was allowed to present evidence at the Level IV hearing, and stated he now wished to submit proposed findings of fact and conclusions of law. This request was granted, DOH was notified, and this case became mature for decision on June 7, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

### Issues and Arguments

Because this grievance had been granted below, and Respondent was required to offer Grievant the training he had not attended, the undersigned Administrative Law Judge asked Grievant what

further relief he was seeking at Level IV. Grievant asserted several issues and complaints. First, he stated he wanted to make sure the Level III Decision was enforced; second, he wanted to know why he was not allowed to attend the training in the first place; third, he stated the lack of training could prevent him from getting another state position; and fourth, if people who had received training had greater salaries because of this training, he wanted his salary increased as well.

Respondent noted Grievant had been offered a portion of the same training when it was rescheduled for other district's BSI's, and he refused to attend. DOH's reasons for not including Grievant in the training have not changed. Further, Respondent noted Grievant's salary was one of the highest within his classification in his district. Additionally, Grievant testified he had not applied for any other positions.

After the hearing, Grievant called to complain that DOH was allowed to present testimony at Level IV, and because of this error he now wished to submit proposals. He asked that all evidence presented by DOH at Level IV be stricken from the record. The undersigned Administrative Law Judge wrote Grievant, told him DOH was allowed to present evidence just as he had been allowed to do, and indicated briefs would be due June 7, 2004.

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

## Findings of Fact

1. Grievant is employed by Respondent as a Bridge Safety Inspector ("BSI"). 2. BSI's were usually assigned to the Bridge Section, but at some time prior to filing this grievance, Grievant was assigned to the Design Section. Grievant still continued to inspect bridges, but they were less than twenty feet long.

3. On January 30, 2003, a training for BSI's who inspected bridges under the National Bridge Inspection Standards ("NBIS") inspection program, was given. Because Grievant inspects bridges that are less than twenty feet long, they are not covered under the NBIS inspection program.

4. Grievant found out about the training and asked to attend. This request was denied because Grievant was not under the NBIS program.

5. Grievant was upset by this denial and filed a grievance.

6. This grievance was granted at Level III. The Grievance Evaluator stated Grievant had been

discriminated against and directed Respondent to "actively seek training classes comparable to those classes from which Grievant was excluded. . . ." Level III Decision dated February 3, 2004.

7. Prior to the Level III hearing, Grievant was offered the opportunity to attend one of the exact classes he had complained about not being able to attend. He refused to attend the class. Grievant was unable to identify a reason for his failure to attend the later class other than he should have been able to go to the first one with other BSI's in his area.

8. Grievant has not applied for any other positions within DOH.

9. During the course of this grievance, Grievant's supervisor retired, and Grievant was transferred back to the Bridge Section. 10. Grievant's salary is within the range of his pay grade and is higher than several other BSI's in his district. (See footnote 2)

11. Grievant presented no evidence at Level III or Level IV about his salary in relation to other individuals within his classification. (See footnote 3)

## Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievances 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 Res., 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 preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id

Grievant asserts he has been discriminated against and other employees have been treated more favorably. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "anydifferences 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 "unfair treatment 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 4) 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, 179 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). At Level III, the Grievance Evaluator found Grievant had met his burden of proof and demonstrated he had been treated differently than other BSI's. She granted this grievance, and DOH was directed to allow Grievant to attend classes. Even before the Level III decision was entered, DOH offered Grievant this opportunity and he refused. While it is clear Grievant is very upset about DOH's failure to allow him to attend classes earlier, he was unable to articulate what other relief he seeks at Level IV.

Grievant stated he wanted the Level III Decision enforced, and DOH has already attempted to comply. In fact, Grievant testified he really did not need the offered training cause he had had it before. This is the opposite of what he stated at Level III. The undersigned Administrative Law Judge affirms the Grievance Evaluator's order, but cannot see what affect this order will have if Grievant does not take advantage of these opportunities.

Grievant also stated he was afraid this lack of training would affect his advancement and salary. He has not applied for any positions and indicated he did not really plan to do so. Further, he presented no evidence that this lack of training had affected his salary. As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). In fact, the evidence was the opposite, Grievant's salary is the same or greater than other BSI's in his district and section. Additionally, the undersigned Administrative Law Judge does not understand if this is Grievant's belief, that the lack of training will affect his compensation, why he did not take advantage of the training when it was offered. Next, Grievant wanted to know why he was not allowed to attend the training in the first place. Grievant has been repeatedly told him it was because he was not an inspector in the NBIS program. Grievant apparently does not like or believe this answer, but the undersigned Administrative Law Judge has found no evidence to the contrary. Of course, it would appear DOH could have allowed Grievant to attend the first round of training classes, but there is no evidence to demonstrate DOH's was required to allow Grievant to attend as he has different job duties.

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 Res., 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 preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No.97-BOT-359 (Apr. 30, 1998); See

Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

3. Grievant did not identify what additional relief he is seeking and did not present evidence to demonstrate entitlement to any further relief.

Accordingly, this grievance **remains GRANTED**, and the relief of the Level III Hearing Examiner is **AFFIRMED**. DOH is directed to continue to offer Grievant the same training opportunities as those offered to other employees within his classification.

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: July 13, 2004**

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Footnote: 1

*Grievant represented himself, and Respondent DOH was represented by Barbara Baxter, Esq.*

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Footnote: 2

*Grievant objected to this evidence because Mr. Campbell did not have written documentation of this statement. This objection was overruled, as it is the norm that supervisors are aware of the salaries of their employees, and because Grievant had no data that would rebut this statement.*

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Footnote: 3

*During the Level III Hearing, the Grievance Evaluator asked Grievant to explain his relief sought. Grievant indicated there might be a difference in his compensation since he had not had the training. The Grievance Evaluator informed Grievant she had no evidence before her to make such a comparison and without evidence could not grant that type of relief. At Level IV Grievant still did not have any evidence to support this contention.*

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Footnote: 4

*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).*