**ERIC BOLINGER,**

**Grievant,**

**v.** **Docket No. 04-DOH-106**

**WEST VIRGINIA DEPARTMENT OF**

**TRANSPORTATION/DIVISION OF HIGHWAYS,**

**Respondent.**

## DECISION

This is a non-disciplinary grievance filed by the grievant, Eric Bolinger ("Grievant"), against his employer, the respondent Division of Highways ("DOH"). Basically Grievant complains about discrimination, harassment, favoritism and a general lack of fairness in DOH's treatment of him.

## GROUNDS ALLEGED AND RELIEF SOUGHT

Specifically, Grievant alleged as follows in his Statement of Grievance:

> Operator 3's are primary operators on Operator 2 equipment. Harassment - Being singled out 9-16_03. Discrimination - not being aloud [sic] or utilized on equipment qualified for because I don't work O.T. all the time. Favoritism - allowing new hires who do not have probationary period finished as primary operator on truck. Also not being given the chance to be utilized to my fullest potential while having 7 y[ea]rs operator experience when other primary operators have 3 y[ea]rs or less. Also being chosen as a primary operator on only (1) a seasonal piece of equipment. (Roller).

In his request for relief, Grievant wrote "Grievance sought in full and be a primary operator on dump truck & 2½ % merit increase."

## PROCEDURAL HISTORY

The grievance was filed on September 17, 2003. After being denied at Levels I and II, it was appealed to Level III. After a hearing on January 15, 2004, (See footnote 1) the Level III hearing examiner issued a recommended decision denying the grievance. The recommended decision was adopted by DOH on March 3, 2004. An appeal to Level IV was filed with the West Virginia Education

and State Employees Grievance Board ("the Grievance Board") on March 10, 2004.

The Level IV hearing was conducted on July 21, 2004, in the Charleston office of the Grievance Board. Grievant was present in person and by his AFSCME (See footnote 2) representative, Richard Patrick. DOH was represented by legal counsel, Barbara L. Baxter, Esquire. This grievance matured for decision on August 31, 2004, after both parties had submitted proposed findings of fact and conclusions of law.

After careful review of the entire record, including the Level III transcript and exhibits, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

## FINDINGS OF FACT

1 1. Grievant, who has been employed by DOH for approximately eight years, is currently a Transportation Worker II Equipment Operator working in Jackson County (DOH District Three).

2 2. Grievant's supervisor is Danny Knopp, Jackson County Highway Administrator ("Administrator Knopp").

3 3. Grievant performs a variety of tasks for DOH. He is particularly valued for his skill at rolling asphalt, which is a task not everyone can perform well.

4 4. Advancement at DOH is predicated upon employee performance rather than the type of tasks, such as flagging or operating equipment, the employee performs.

5 5. Merit raises, when available, are based on employee performance.

### Primary Operator for New Truck

6 6. DOH assigns a primary equipment operator and a secondary equipment operator to each major piece of equipment. In general, the primary operator handles the assigned piece of equipment whenever that employee is at work. The secondary operator handles the assigned equipment in the absence of the primary operator. However, the assignments are flexible to accommodate the needs of DOH, to afford employees chances to sharpen their skills, and to accomplish cross-training.

7 7. During the winter season, the secondary operator is really the same as a primary operator because DOH runs two shifts.

8 8. Decisions regarding primary and secondary operator assignments are made by Administrator Knopp in conjunction with his two crew supervisors (also known as crew chiefs), Terry

Johns and Mike Donohew. These decisions are based primarily on the employee's qualifications, certifications, licensure, tenure, and experience both within DOH and from external sources.

9 9. Grievant is the primary operator for a roller, which is a seasonal piece of equipment used in the summer. During winter, Grievant is the primary operator for a truck during his shift.

10 10. Grievant has a Class B commercial driver's license ("CDL"). (See footnote 3) Pursuant to West Virginia Code section 17E-1-12(a)(2), the holder of a Class B CDL is allowed to operate "[a]ny single vehicle with a gross vehicle weight rating of twenty-six thousand one pounds or more and any vehicle towing a vehicle not in excess of ten thousand pounds."

11 11. At some point prior to September 2003, DOH in Jackson County obtained a new truck, number 371849 ("Truck 849").

12 12. Grievant's Class B license would have allowed him to operate Truck 849 as it was originally equipped. However, shortly after it arrived Truck 849 was modified. An electric braking system was added, allowing Truck 849 to pull a 20-ton trailer and the trailer that carries the roller for smoothing out asphalt.

13 13. After it was modified, Truck 849 required an operator with a Class A CDL.

14 14. Truck 849 was initially offered to Jim French ("Mr. French"), who had been the winter driver on the truck that was being replaced by Truck 849. He declined.

15 15. Truck 849 was ultimately assigned to Don Burrows (See footnote 4) ("Mr. Burrows"), who is qualified to operate the new truck, as modified, because he has a Class A CDL. Mr. Burrows was still a probationary employee when he received this assignment.

16 16. Both Mr. Burrows and Mr. French have the same classification as Grievant.

17 17. Grievant did not expect to be offered the assignment as primary operator on Truck 849 because there were other operators with greater seniority.

18 18. Grievant did not inform Administrator Knopp that he wanted to be the primary operator on Truck 849 or any other truck. Administrator Knopp was not aware of Grievant's aspiration in this regard.

**Merit Raises**

19 19. Grievant has received two merit raises during his tenure with DOH. One of those merit raises took effect on April 1, 2002, while Grievant was working in Jackson County.

20 20. DOH has, in the past, awarded "merit" raises on a rotational basis. In August 2001,

Grievant and others were advised that the improper, rotational policy was being abandoned and that future merit increases would, in fact, be based on merit in the employee's job performance.

21 21. Grievant did not receive an expected, additional merit raise because of this change in how such raises were awarded.

22 22. At the time this grievance was filed, there was a freeze on awarding merit raises.

**September 16 Disruption**

23 23. On September 16, 2003, Brian Hill, who was the crew leader (See footnote 5) for that day, attempted to announce the job assignments and give his crew, including Grievant, the orders for the day.

24 24. A number of different crews were present in the room while assignments were being announced. The whole room was so noisy that Brian Hill's crew members were not able to hear their assignments.

25 25. All of the other crews were able to hear the daily assignments. They were dismissed to go to work. Seven employees, including Grievant and the rest of Brian Hill's crew, remained in the meeting room. Administrator Knopp came to find out what happened during the meeting. He chastised Brian Hill's crew for being disrespectful to their crew leader and for failing to pay attention during the assignment meeting.

**DISCUSSION**

As noted, this grievance does not involve a disciplinary matter. Therefore, Grievant bears the burden of proving this grievance by a preponderance of the evidence. “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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

Grievant claims that he has suffered from actions by DOH that constitute discrimination, favoritism, and harassment. West Virginia Code section 29-6A-2(d) defines discrimination 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.” The statutory definition of favoritism is “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” W. Va. Code § 29-6A-2(h). In order to establish a *prima facie* case of discrimination or favoritism, Grievant must prove 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.

*Messinger v. Dep't of Transp*., Docket No. 04-DOH-081(July 13, 2004)(citing *Parsons v. Dep't of Transp*., Docket No. 91-DOH-246 (Apr. 30, 1992)).

Unless rebutted, a *prima facie* case would entitle a grievant to prevail. However, if a grievant meets the burden of establishing such a *prima facie* case of discrimination or favoritism, the employer can attempt to prove that there are legitimate, nondiscriminatory reasons for the employer's actions. This does not necessarily end the inquiry because a grievant may still prevail by proving that the reasons offered by the employer are a pretext to disguise an improper motive on the part of the employer.

Grievant claims that he was the victim of discrimination/favoritism in connection with the primary operator assignment for Truck 849 and in terms of merit raises. With respect to the primary operator assignment, it should be noted that Grievant admits that he never made a request for such assignment or talked to his supervisors about his interest. Employers are not required to be clairvoyant. If an employee wants a particularassignment or type of assignment, the employee bears some responsibility for informing his supervisors about his aspirations. (See footnote 6)

It appears that Grievant is attempting to compare himself to Mr. Burrows, who was ultimately given the primary operator assignment for the new truck. Grievant notes that the position was first offered to Mr. French, who was the primary operator for the truck that was being replaced. Like Grievant, Mr. French held a Class B CDL. (See footnote 7) An operator with a Class B license could have driven Truck 849 before it was modified. However, after having been modified so that it could pull a trailer and a roller, Truck 849 required an operator with a Class A CDL. Mr. Burrows has a Class A CDL. Although he was still a probationary employee with DOH at the time he was assigned as primary operator for Truck 849, Mr. Burrows had approximately 22 years of experience in

operating heavy equipment. He had operated dozers, backhoes, end loaders, dump trucks, pans, rollers, semi-trucks and other sorts of heavy equipment before coming to work for DOH. His prior experience also included loading and hauling equipment. By contrast, Grievant had over 8 years of experience, which included driving equipment such as a flatbed truck, dump truck, boomtruck and operating an endloader, mower, and roller. The length and quality of Mr. Burrows's experience was obviously superior to that of Grievant.

Perhaps more importantly, Grievant does not have the requisite license for operating the modified Truck 849. There does not appear to be any dispute that the modifications were necessary because Jackson County had obtained a second roller and needed a truck to pull it.

Grievant and Mr. Burrows are similarly situated in terms of their job titles. However, Mr. Burrows has significantly more pertinent experience and the proper licensure to operate Truck 849. In this respect, they cannot be deemed to be similarly situated. Even if the two employees were considered to be similarly situated, assigning Mr. Burrows as the primary operator on Truck 849 was related "to actual job responsibilities." Therefore, Grievant is unable to establish a *prima facie* case of discrimination or favoritism in connection with the primary operator assignment for Truck 849.

Essentially Grievant is dissatisfied with a management decision that he views as being disadvantageous to him. Standing alone, this does not provide a predicate for relief in a grievance. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. Va. Code 29-6A-2(i). *See*, *Ball v. Dept. of Highways*, Docket No. 96-DOH-141 (July 31, 1997).'" *Thewes v. Dep't of Health & Human Res.*, Docket No. 02-HHR-366 (Sept. 18, 2003)(citations omitted). There is no evidence that any of the listed exceptions apply to the circumstances surrounding the appointment of Mr. Burrows as the primary operator on Truck 849. Grievant also alleges discrimination in connection with merit raises. Specifically, Grievant asserts that he "has received one merit increase in the past four years which is inconsistent with certain other employees who have received several merit increases over a period of years."

To the extent that Grievant attempted to delve into the validity of his evaluations as an aspect of this claim, DOH objected. DOH correctly argued that if Grievant wanted to take issue with an evaluation he was required to file a grievance within ten days of receiving the offending evaluation.

W. Va. Code § 29-6A-4(a). The substantive aspects of Grievant's evaluations are not at issue herein. Nonetheless, the evaluations themselves may be pertinent to Grievant's claim that he has suffered from discrimination in connection with merit raises. In particular, evaluations might assist Grievant in establishing that he is similarly situated to other employees.

Grievant was unable to prove that he was similarly situated in a pertinent way to other employees who received merit raises when he did not. In response to a question about the basis for his belief that he had been subjected to discrimination with respect to merit raises, Grievant opined that he did not volunteer for overtime as often as some of his co-workers. Tr. 20. However, Grievant did not offer any evidence regarding the amounts of voluntary overtime attributable to other employees who received more than one merit increase in the past four years.

In addition, a review of the employees who received merit raises after Grievant's last merit raise reveals that they were awarded to employees with higher ratings than Grievant for the pertinent time period. Grievant's Exhibits 3 and 4 at Level IV. Don Barr was an employee who was identified by Grievant as having received more than one raise since1999. Tr. 50, Grievant's Exhibit 6 at Level III. However, Don Barr had “performance appraisals” that were “significantly higher” than Grievant's. Tr. 52. Therefore, Grievant was not similarly situated to Don Barr. Grievant has failed to prove that he was similarly situated, in a pertinent way, to Don Barr or to the employees who were awarded merit raises after Grievant received his last such raise in April 2002. He is thus unable to establish the first element of a *prima facie* case of discrimination in the context of merit raises.

Grievant also claims that he was a victim of harassment. West Virginia Code section 29-6A-2(l) defines harassment as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.”

The incident upon which Grievant predicates his claim of harassment took place on September 16, 2003. The Jackson County DOH employees were gathered in the usual room to receive their work orders for the day. There was a lot of teasing, noise and commotion going on when Brian Hill attempted to give the day's assignments to his crew, which included Grievant. As a consequence, the seven members of Brian Hill's crew did not hear their orders. The other crews left for their assignments while Brian Hill's crew remained and were addressed by Administrator Knopp.

There is some discrepancy in how this action on the part of Administrator Knopp was perceived. He considered it investigatory in that he was trying to ascertain what happened during the meeting at

which daily assignments were being announced. Grievant and other members of the crew perceived that they were being chastised. Both views maywell have merit but there is no need to resolve the divergence in perception for purposes of this grievance.

Grievant's assertion that he established “that he was wrongfully singled out after a meeting for causing disruptive behavior” is not supported by the record. Grievant was one of seven employees who were addressed by Administrator Knopp. He cannot be said to have been “singled out.”

Even if Grievant could prove this allegation, this isolated incident is not the sort of on-going, repetitive conduct that constitutes harassment. It simply does not meet the statutory definition. This issue was addressed in *Swinler v. Dep't of Tax & Revenue*, Docket No. 04-T&R-052 (June 24, 2004), in which the grievants characterized their supervisor's tone of voice and the comments he made during a Level II conference as harassment. It was noted that “[i]n order to establish harassment in violation of W. Va. Code 29-6A-2(l), the Grievants must show a pattern of conduct, rather than a single improper act. This is viewed as a single incident rather than a 'pattern of conduct,' and simply does not constitute harassment.” *Swinler* at 7 (citations omitted). This same reasoning applies to Grievant's claim of harassment arising out of the September 16, 2003, incident. The claim is not proven.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

**CONCLUSIONS OF LAW**

1 1. This is not a disciplinary grievance. Therefore, Grievant bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2000); *Howell v. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. Grievant must prove his allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000). “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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3 3. Grievant failed to establish that he was similarly situated, in a pertinent way, to the employee who was assigned to be the primary operator for Truck 849. Therefore, Grievant is unable to establish a *prima facie* case of discrimination with respect to that primary operator assignment.

4 4. Even if Grievant could be considered to be similarly situated to the employee who

received the primary operator assignment, differences in treatment between Grievant and that employee were related to job responsibilities. Thus, Grievant could not meet the third element needed to prove a *prima facie* case of discrimination.

5 5. Grievant failed to establish that he was similarly situated, in a pertinent way, to employees who received merit raises when Grievant did not. Thus, he failed to establish a *prima facie* case of discrimination with respect to merit raises.

6 6. The record does not support Grievant's assertion that he was “singled out” for disruptive behavior at a work assignment meeting.

7 7. The isolated incident of September 16, 2003, lacks the on-going or repetitive character required for actions to rise to the level of harassment. Therefore, Grievant has failed to prove that he was the victim of harassment.

8 8. Grievant has failed to prove any claims that would support his request for relief.

Accordingly, this grievance is **DENIED**.

Any party 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 West Virginia Code section 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: October 26, 2004**

_____

**JACQUELYN I. CUSTER**

**Administrative Law Judge**

---

Footnote: 1

*References to pages in the transcript of the Level III hearing shall appear as "Tr. __."*

---

*Footnote: 2*

*American Federation of State, County and Municipal Employees.*

---

*Footnote: 3*

*DOH has agreed to provide Grievant with the additional training he needs in order to obtain a Class A CDL, which will expand the type of equipment he can drive.*

---

*Footnote: 4*

*It appears that Don is a nickname for Hayward Burrows.*

---

*Footnote: 5*

*Brian Hill was crew leader as a temporary upgrade.*

---

*Footnote: 6*

*During this grievance process, DOH was made aware that Grievant would like to obtain his Class A CDL. As reflected in note 3, above, DOH has assured Grievant that it will assist him in this effort. Such communication could, and should, take place outside of the grievance process.*

---

*Footnote: 7*

*At Level III, Grievant testified that he thought Mr. French had a Class A license. At Level IV, Administrator Knopp testified that he thought Mr. French had a Class B CDL. No dispositive evidence was presented on this point. The testimony of Administrator Knopp is accepted because he is in a supervisory position with respect to Mr. French and because it does no harm to Grievant's case to accept that Mr. French had a Class B license.*