EVERETT HEADLEY,

Grievant,

v. **Docket No. 04-DOH-397D**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Everett Headley ("Grievant"), employed by the Division of Highways ("DOH") as a Transportation Worker III, filed a level one grievance on October 26, 2004, asserting discrimination occurred when he did not receive a merit raise. For relief, Grievant requested the merit raise. Grievant's immediate supervisor lacked authority to grant the requested relief, and Grievant appealed to level two on November 3, 2004. By letter dated November 19, 2004, Grievant claimed the level two decision had not been issued within the statutory time lines, and that he prevailed by default. A hearing was conducted on this issue, and DOH was found to have defaulted. A hearing to determine whether the requested relief was contrary to law was conducted on June 28, 2005. Grievant represented himself, and DOH was represented by counsel, Barbara Baxter. The grievance became mature at the conclusion of the level four proceedings after both parties waived the opportunity to file post-hearing proposed findings of fact and conclusions of law.

The following facts essential to this grievance are undisputed.

Findings of Fact

1. Grievant has been employed by DOH for approximately fourteen years, and has served as a Transportation Worker III, in District Six, Tyler County, at all times pertinent to this grievance. 2. Grievant was on a medical leave of absence from August 2003 through March 2004. He was not given a performance evaluation for 2003.

3. Grievant's last merit increase was on April 1, 2002.

4. DOH awarded five merit raises effective July 1, 2004, and five more effective October 1, 2004, based on the 2003 performance evaluations.

5. Of the five merit increases granted in July 2004, three of the individuals had not received a

merit increase since 2001, and the remaining two employees had never received a merit increase.

6. Of the five merit increases granted in October 2004, one individual had not had an increase since 2001, two employees had increases in April 2002, and the remaining two had received merit increases in September and October, 2002.

7. Grievant prevailed on a claim that DOH defaulted when a level two decision was not issued within the statutory time lines.

Discussion

W. Va. Code § 29-6A-3 provides that once a default has been found the employer may request a hearing for the purpose of showing that the remedy sought by the grievant would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3 states:

In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

Upon finding a default occurred, it is presumed the grievant prevailed on the merits of the grievance, and the respondent must prove by clear and convincing evidence that togrant the remedy requested would be contrary to law or clearly wrong. This standard requires a respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corr., Docket No. 99-CORR-157D (Nov. 15, 1999). In this case, the statutory presumption requires the undersigned to find that DOH engaged in discrimination when it failed to consider Grievant for a merit increase.

DOH contends that it has proven by clear and convincing evidence that the merit increases were awarded in a non-discriminatory manner, and it would be clearly wrong to award Grievant a merit increase. Grievant argues that he was due a merit increase based on the two-year rotation schedule used by DOH to grant the salary increases.

DOH no longer awards merit raises strictly on a rotational schedule, and Grievant is not regularly entitled to a merit salary increase on that basis. However, without a performance evaluation for the eight months Grievant worked in 2003, DOH cannot prove by clear and convincing evidence that the relief would be clearly wrong or contrary to law. Further, the fact that Grievant's last increase was

during a time period comparable to those employees granted a merit raise in October 2004, and there is no evidence that he was subject to discipline or would otherwise have been disqualified from consideration, supports a finding that Grievant would been a likely candidate to have received an increase, had he been considered. Therefore, the undersigned finds that DOH failed to rebut the presumption that Grievant was discriminated against, and it would not be clearly wrong or contrary to law to grant Grievant the requested remedy of a merit pay increase. Respondent shall award Grievant all applicable back pay effective fifteen days prior to the filing of the grievance. The following conclusions of law support the decision reached.

Conclusions of Law 1. Once a Grievant is presumed to have prevailed by default, the burden of proof is upon Respondent to prove by clear and convincing evidence that the relief requested by Grievant is clearly wrong or contrary to law. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999). 2. When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3(a)(2). 3. Respondent has failed to rebut the presumption that Grievant was discriminated against by clear and convincing evidence, or that granting Grievant the requested remedy of a merit salary increase would be contrary to law or clearly wrong. Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to award Grievant a merit increase, effective fifteen days prior to the grievance being filed at level one.

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: AUGUST 22, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE