OTIS MEADOWS,

Grievant,

v. **Docket No. 05-DOH-145**

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Otis Meadows, filed this grievance against his employer, the Division of Highways ("DOH") on October 25, 2001, alleging:

> **For approximately 16 years, I have been in charge of other employees during winter months and boss'es [sic] vacation without additional pay. In 1999, I found out that I was entitled to an upgrade in pay for times I was in charge. The supervisor now refuses to allow me to continue as I have for 16 years due to my lack of education, which is discrimination. Supervisor refuses to put this in writing at my request.**
>
> **Relief sought: I request that I be allowed to continue to be in charge as I have for last 16 years and receive upgrade for the same. Further, I request compensation for those periods that I was in charge during [the] last 16 years as I understand other employees in other counties were compensated.**

This grievance was denied at Levels I and II. The Level III hearing was held on May 29, 2002, but the Level III decision was not issued until April 19, 2005. Grievant appealed to the Grievance Board on April 29, 2005. After numerous continuances for good cause, a Level IV hearing was held on October 28, 2005. 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 1) **After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.**

Findings of Fact

1. Grievant has been employed by DOH for more than thirty years. He is an Transportation Worker/Equipment Operator 3 and runs a grader. From 1991 to 1999, Grievant frequently served as a Crew Leader as the request of his then-supervisor, Doyle Williams. (See footnote 2) **The majority of Grievant's service as a Crew Leader occurred during Snow Removal and Ice Control ("SRIC") season. When Grievant or anyone else served as a Crew Leader during this time, they did not complete the required paper work, a DOT 12. Mr. Williams or his supervisor, Jimmy Collins, did, or the report was called in to an office secretary.**

2. Neither Grievant nor anyone else at his outpost was upgraded or compensated during this time when they served as a Crew Leader.

3. Although Grievant completed the seventh grade, he cannot read or write, but can sign his name and perform simple math, such as addition and multiplication. Grievant has never been diagnosed with any type of learning disability, nor did he testify he was placed in a special education classroom.

4. Grievant heard from some other employees that he was entitled to be upgraded with compensation if he served as a Crew Leader, and he asked his supervisor about this issue.

5. Mr. Collins discussed the issue with his supervisor, and he was informed that employees who performed all the duties of the Crew Leader position were entitled to upgrade compensation.

6. Because Grievant could not read or write, Grievant could not fill out the required forms. The Crew Leader is required to state on the DOT 12, the employees who worked, the equipment they used, the routes they worked on, the amount of materials they used, and to note on the back any unusual occurrences, such as picking up a dead deer or an injury to an employee. This form is important because it records the materials used and the work hours of the employees. Test. Collins, Level IV Hearing.

7. Grievant is adamant he cannot complete this form. Test. Grievant, Level III & IV Hearing.

8. At some point in 1999, Grievant filed a grievance over not being compensated when he was upgraded to the Crew Leader position. This, it is clear he was aware of the grievance process. Test. Grievant, Level III Hearing.

9. Mr. Collins discussed the situation with Grievant and his supervisor, and all parties agreed the duties of the Crew Leader position for the 1999 - 2000 SRIC season could be split between Grievant and Charles Smith, another Grader operator.

10. Grievant agreed with this resolution, and dropped his grievance when he agreed to share the position with Mr. Smith. (See footnote 3) **11. Grievant was directed to watch Mr. Smith and learn to complete the forms because he was required to perform all the duties of the position in order to be compensated for it.**

12. Grievant did watch Mr. Smith complete the forms occasionally, but never even attempted to complete the sections he knew how to do, such as the section requiring numbers and simple math.

13. Before the start of the 2000 - 2001 SRIC season, Mr. Collins asked Grievant if he had learned to complete the required paperwork, and Grievant responded, "No."

14. Mr. Collins decided to let Grievant again try to learn the paper work during the next SRIC season, but informed Grievant if he did not learn this duty, he would not be upgraded the following year.

15. After the 2000 - 2001 SRIC season, Grievant's outpost lost a grader operator, and Mr. Collins was required to place Grievant and Mr. Smith on different shifts. 16. During the 2001 - 2002 SRIC season, Mr. Smith served in the Crew Leader position on the night shift alone. Grievant has not been upgraded since the 2000 - 2001 SRIC season.

17. The "Nature of Work" section of the Transportation Crew Chief class specification states this employee:

> **Under general supervision, an employee in this class leads and participates in a crew or crews performing maintenance and repair on highways, upkeep and management of buildings or engaged in core drilling activities. May be exposed to hazardous working conditions and inclement weather. Core drilling requires frequent travel. Performs related work as required.**

18. The second shift supervisor/Crew Leader during the SRIC season is not expected to perform all the tasks identified in the class specification. The pertinent dutieslisted under "Examples of Work," for second shift supervisor during the SRIC season in the class specification are:

> **Reviews work schedule, determines equipment and materials needed, and assigns crew members to various tasks and leads the crew in completion of the project.**

Oversees and participates in a crew performing maintenance and repair work on roads such as: concrete and asphalt patching, bridge deck repair, cleaning culverts, mowing and brush cutting, snow removal, guardrail repair, or removal and repair of landslides.

Oversees the progress and checks the quality of work performed by the crew.

Keeps records of materials and equipment used on the project.

Keeps time and attendance records of the crew.

Completes a daily report of the project and submits to supervisor.

Trains crew members on individual tasks on maintenance and repair projects.

Prepares reports of drilling activity, materials and equipment used.

Repairs drilling rig and related equipment of minor mechanical and structural problems.

Organizes and directs the work of crews cleaning buildings, repairing and maintaining mechanical and electrical equipment, plumbing systems, and building structure.

Ensures compliance with fire, electrical, OSHA, and other applicable laws, rules, and regulations.

Develops, interprets, and revises blueprints for specific maintenance projects.

(Emphasis added).

19. The employee who is temporarily upgraded should meet or be within three months of satisfying the minimum requirements of the upgraded position. Division of Personnel "Temporary Classification Upgrade" Policy at § F. The "Knowledge, Skills and Abilities" expected of an upgraded Crew Leader include:

Knowledge of highway maintenance techniques.

Knowledge of the standard safety procedures of the Division of Highways.

Knowledge of the maintenance standards of the Division of Highways.

Knowledge of the capabilities of construction and maintenance equipment.

Knowledge of the standard methods, practices, tools, and equipment used in building maintenance.

Knowledge of employee policies, procedures and supervisory techniques.

Knowledge of local, state, and federal building safety codes.

Ability to plan work and schedule crews and train and lead a crew in the various tasks of highway maintenance.

Ability to understand and follow oral and written instructions.

Ability to operate equipment used in highway maintenance and repair.

Ability to maintain routine records.

Ability to maintain effective working relationships with others.

Ability to perform basic arithmetic calculations to determine amounts of materials needed.

Ability to operate a heavy truck to transport drilling rig and related equipment.

(Emphasis added).

20. Grievant is a good worker, and Mr. Collins had no complaints about Grievant's work.

21. Grievant filed this grievance on October 25, 2001, after learning he would not be upgraded to Crew Leader for the next SRIC season.

Issues and Arguments

Grievant argued he should be allowed to fulfill the duties of a Crew Leader by filing an oral report as an accommodation for his learning disability. He also asserts he did not file this grievance sooner as he was unaware of the grievance process.

Respondent asserts Grievant has not proven he has a learning disability, but has only shown he did not learn to perform the essential job duties of a Crew Leader. DOH notes it gave Grievant two seasons to learn how to fill out the forms and provided someone to train him, but Grievant never even attempted to complete any portion of the form. Respondent also asserts the request for back pay is untimely.

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 (2004); 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).

I . Timeliness

DOH contends the backpay portion of this grievance was untimely filed, as it was not initiated within the time lines contained in W. Va. Code § 29-6A-4(a). Where an employer seeks to have a grievance dismissed on the basis it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991). The timeliness issue is governed by the time lines set out in W. Va. Code § 29-6A- 4(a), which states a grievance must be filed:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance . . . .

The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

In this case, it appears Grievant did file the first grievance in 1999, within the required ten-day time period, but then abandoned this grievance. When a prior grievance has been abandoned by the failure of the grievant to proceed to the next level, it cannot be refiled at a later date. Holmes v. W. Va. State College, Docket No. 99-BOD-216; Pack v. Kanawha County

Bd. of Educ., Docket No. 93-20-483 (June 30, 1994); Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994). Accordingly, the back pay issue will not be addressed further.

II. Duties of the position/discrimination

Grievant asserts he has been discriminated against because of his learning disability and alleges there has been a violation of the Americans with Disabilities Act ("ADA"). "It has previously been held that this Grievance Board does not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeal's holding in Vest v. Board of Education of County of Nicholas, 193 W. Va.222, 455 S.E.2d 781 (1995)." Adkins v. Dep't of Labor, Docket No. 04-DOL-071 (Jan. 25, 2005)(citing Teel v. Bureau of Employment Programs Workers' Compensation Div., Docket No. 01-BEP-466 (June 10, 2002)). See Prince v. Bd. of Trustees/W. Va. Univ., Docket No. 7-BOT-276 (Nov. 5, 1997); Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25, 1995).

Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination" as that term is defined in W. Va. Code § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the ADA. In other words, the Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims. Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). See Vest, supra. (See footnote 4)

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." In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 5)

> **(a) that he or she has been treated differently from one or more similarly-situated employee(s);**

> **(b) that the different treatment is not related to the actual job responsibilities of the employees; and,**

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant has not met his burden of proof and established the key elements of the above-stated test. First, Grievant did not identify any similarly situated employees that had been treated differently. Second, it is clear the reason Grievant is no longer upgraded is his inability to perform the actual job responsibilities of the position of Crew Leader. Unfortunately, as established by Findings of Fact 18 & 19, Grievant cannot perform the necessary "Examples of Work," and does not have the requisite "Knowledge, Skills and Abilities" expected of an upgraded Crew Leader. It is also clear that if Grievant were to learn to complete the DOH 12 form, DOH would be willing to place him in a temporary upgrade.

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 (2004); 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).

2. When a prior grievance has been abandoned by the failure of the grievant to proceed to the next level, it cannot be refiled at a later date. Holmes v. W. Va. State College, Docket No. 99-BOD-216; Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994); Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994).

3. Grievant cannot refile a grievance on the back pay issue. Id.

4. 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."

5. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing:

> **(a) that he or she has been treated differently from one or more similarly-situated employee(s);**
>
> **(b) that the different treatment is not related to the actual job responsibilities of the employees; and,**
>
> **(c) that the difference in treatment was not agreed to in writing by the employee.**

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

6. Grievant has not met his burden of proof and established the key elements of the above-stated test, as he did not identify any similarly situated employees that had been treated differently, and because it is his inability to performance the actual job responsibilities of the position of Crew Leader which prevents his placement in to the position.

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, 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 are 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 appealingparty 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

Date: December 30, 2005

Footnote: 1

Grievant was represented by Howard Blyler, Esq., and Respondent was represented by DOH Attorney Barbara Baxter.

Footnote: 2

At the time Grievant filed this grievance, the length of time he would have served as Crew Leader would have been eight years, not sixteen.

Footnote: 3

Apparently, the parties did not remember during the Level IV that Grievant had testified at the Level III hearing that he had previously filed this grievance, and then dropped it, after the agreement was reached. This testimony is contained in the Level III transcript at 21.

Footnote: 4

It should be noted Grievant did not prove he had a disability requiring accommodation.

Footnote: 5

In this case, the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, andemployers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).