DAVID SHEETS,

Grievant,

v. DOCKET NO. 05-DOH-366

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant David L. Sheets filed three separate grievances on January 5, 2005, claiming discrimination, favoritism and “loss of wages.” The grievances were consolidated at level three after being denied at the lower levels, and on appeal to level four, Grievant withdrew all but the favoritism claim, for which he stated the relief sought as “to stop favoritism, fair and equal, all cost paid for, and 10% pay raise.”

A level four hearing was held in the Grievance Board's office on January 26, 2006. Grievant was represented by David Reed, and Respondent was represented by counsel, Barbara Baxter. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant claims another employee was temporarily upgraded into a exempt position he used to have, but the other employee was permitted to work part of the time in another, non-exempt position that allowed him to earn overtime pay. This is essentially a claim offavoritism. Grievant was denied overtime opportunities when he was in the position. Respondent contends Grievant was not treated any differently, and was not harmed by the treatment of the other employee.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent in District 3 as a Transportation Crew Chief - Maintenance (TCCMain). For a period of time, he was employed in a temporary upgrade position as

acting supervisor of heavy maintenance.

2. Adrian D. Witte is the current District 3 supervisor of heavy maintenance. He was given a temporary upgrade assignment as Acting County Administrator of the Wood County operations, for about fifteen months from September 2003 to January 2005. This created the temporary vacancy in the heavy maintenance supervisor position filled by Grievant as described in Finding of Fact 1. When Mr. Witte returned to his original position, Grievant was also returned to his original position.

3. Mr. Witte returned to his original position because he felt he was losing money, even though the base salary of the position was an increase, because he no longer worked as much paid overtime. The county position generally required a 40-hour work week, but in the heavy maintenance position, he usually worked 50 hours per week.

4. Toward the end of his tenure as Acting County Administrator, from August 2004 to the end of December 2004, Mr. Witte was permitted to work part of the time in the Heavy Maintenance organization. He was instructed to work 80% of his time in the County position, and 20% of his time in Heavy Maintenance, but he was not advised how manyhours total he should work. His temporary upgrade status was ended, yet he kept the title of “Acting Wood County Supervisor.” As part of the arrangement, District Engineer Rusty Roten decreed that “Due to the difference in salaries between the two, Adrian [Witte] shall be considered for up to a 5% merit increase effective October, 2004.” (See footnote 1) Level four Respondent's Exhibit No. 3.

5. The purpose of allowing Mr. Witte to work in heavy maintenance was so he could earn overtime pay. Mr. Witte worked his forty hours Monday through Thursday at the county supervisor job, then went back to the heavy maintenance department on Fridays and Saturdays to work overtime. At the time, Grievant still filled the heavy maintenance supervisor position in a temporary upgrade status, so there was no open position for Mr. Witte to fill, and he had no duties to perform other than familiarizing himself with the current heavy maintenance projects. He supervised no one, made no decisions, and did no actual work.

6. The change in Mr. Witte's status had no effect on Grievant's job, and he continued to do the same duties for the same pay, and to work the same hours as he had before, until Mr. Witte returned full-time to his previous position on January 1, 2005. In 2004, Mr. Witte worked a total of 320 overtime hours, and Grievant worked 885.

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid thannot. (See footnote 2) Grievant's claim that Mr. Witte was given a benefit that he was not amounts to an allegation of favoritism. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." (See footnote 3)

Under the Grievance Procedure, favoritism claims are materially the same as discrimination claims, except that the employee alleges another, similarly-situated employee was treated more favorably rather than that the grievant was singled out for less favorable treatment compared to other, similarly-situated employees.

"'Discrimination' means 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." (See footnote 4) These definitions are identical to the definitions of the same terms contained in the grievance procedure for education employees. (See footnote 5) Recently, the West Virginia Supreme Court of Appeals, in *The Board of Education of the County of Tyler v. White*, (See footnote 6) interpreted these provisions and developed a test for discrimination as defined in West Virginia Code section 18-29-2, and that same test, by extension of the analogy, applies to discrimination claims under Code section 29-6A-2. Although the Court in *White* did not specifically address favoritism claims, it did expressly reject the previous favoritismtest set forth in *Flint v. Board of Education of the County of Harrison*, (See footnote 7) and its progeny. Despite the lacuna created by the rejection of an existing test and the failure to create a new one, the court's logic and analysis is easy to follow and allows for reworking the old test to conform.

First, the court's determination that, under the grievance procedure, "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees" (See footnote 8) applies equally to discrimination and favoritism, in that neither definition addresses whether the difference in treatment is motivated by an impermissible factor. The *White* discrimination test also requires that there be no written agreement by the grievant to the difference in treatment, but this element would not apply to favoritism claims, as employees are not privy to the arrangements or agreements under which their coworkers are employed. Therefore, to prevail in a claim for favoritism under W. Va. Code

§ 29-6A- 2(h), a grievant must show by a preponderance of the evidence that:

> (a) one or more appositely similarly situated employee(s) have been granted preferential, exceptional or advantageous treatment that the grievant has not; and
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees;

If the employees have differing job responsibilities that justify the difference in treatment, then they are not similarly-situated. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the favoritism.

In this case, Grievant and Mr. Witte have never been similarly situated. At the time Mr. Witte given special treatment so he could earn more money, he was performing entirelydifferent duties than Grievant and had entirely different job responsibilities. When Mr. Witte's temporary upgrade ended, even though he reverted to the same classification (as a permanent employee) that Grievant then held on a temporary basis, the two gentlemen still had very different job responsibilities. (See footnote 9) At the time the grievance was filed, Grievant had reverted back to his former, permanent position.

Even if Grievant had been able to prove favoritism, the remedy he seeks would be unavailable. The ten percent raise he seeks is not logically tied to the difference in treatment he alleges, and he has shown no harm such as would be necessary for injunctive relief. Mr. Witte's earning of overtime did not take away overtime opportunities from Grievant, and although Grievant was required to actually work for his overtime, this cannot be seen as harmful as he was paid what he earned. Had Grievant and Mr. Witte been similarly-situated, it would not be in the authority of the undersigned Administrative Law Judge to order Respondent to pay Grievant for unneeded overtime work even though that is what Respondent did for Mr. Witte.

The following conclusions of law support this discussion:

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va.*

Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17,1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. "'Favoritism' means 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).

3. To prevail in a claim for favoritism under W. Va. Code § 29-6A-2(h), a grievant must show by a preponderance of the evidence that:

> (a) one or more appositely similarly-situated employee(s) have been granted preferential, exceptional or advantageous treatment that the grievant has not; and
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees;

If the employees have differing job responsibilities that justify the difference in treatment, then they are not similarly-situated. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the favoritism. *See Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

4. Although Grievant did show Mr. Witte was granted unusually preferential treatment, he has not met his burden of proving he is similarly situated to Mr. Witte, so he has not met the requirement for proving favoritism, and he has not demonstrated that he was harmed by the highly questionable conduct.

For the foregoing reasons, this grievance is hereby **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 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.

March 10, 2006

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M. Paul Marteney

Chief Administrative Law Judge

Footnote: 1

There is no evidence Mr. Witte actually received this ostensible "merit raise."

Footnote: 2

See Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Footnote: 3

W. Va. Code § 29-6A-2(h).

Footnote: 4

W. Va. Code § 29-6A-2(d).

Footnote: 5

See W. Va. Code §§ 18-29-2(m) and (o).

Footnote: 6

216 W. Va. 242, 605 S.E.2d 814 (2004).

Footnote: 7

207 W. Va. 251, 256, 531 S.E.2d 76, 81 (1999).

Footnote: 8

Bd. of Educ. v. White, 216 W. Va. 242, 246 (W. Va. 2004).

Footnote: 9

It is unclear what position Mr. Witte held, as Grievant was at the same time filling Mr. Witte's former position, and there is no evidence a new position was created.