CONNIE L. FAUBLE,

Grievant,

v. **Docket No. 06-DMV-041**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF MOTOR VEHICLES,

Respondent.

DECISION

Connie Fauble ("Grievant") initiated this proceeding on October 31, 2005, alleging entitlement to a pay increase that was given to other, similarly situated, employees who had received "cross training" as Customer Service Representative/Driver Examiner. Because Grievant did eventually receive the pay increase, effective December 1, 2005, she now seeks back pay to the date that the other employees received the increase, on November 15, 2004. After denials at the lower levels, Grievant appealed to level four on February 1, 2006. A hearing was held in Westover, West Virginia, on June 23, 2006. (See footnote 1) The parties elected not to file post-hearing proposals, so this matter became mature for consideration at the conclusion of that hearing.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by the Division of Motor Vehicles ("DMV") in the Martinsburg Regional Office since September of 2003. 2. Prior to her employment with Respondent, Grievant was employed as a Driver License Examiner in the state of Florida for 18 years.

3. Grievant has been a certified "Driver Examiner," having met all requirements of the American Association of Motor Vehicle Administrators ("AAMVA"), since June of 1987.

4. In November of 2003, Grievant was notified by AAMVA that, in order to avoid a lapse in her AAMVA certification, updated documentation of her training and experience was required.

5. Grievant submitted the required documentation to her supervisor, who was responsible for renewing her AAMVA certification.

6. DMV initiated a “cross training” program in 2004, whereby employees would perform the duties of both a Customer Service Representative and Driver Examiner, which would be accompanied by a salary increase. Employees in this program were required to attend classes, obtain AAMVA Driver Examiner certification, and perform both jobs for a period of six months.

7. Grievant began cross training in 2004, and she was performing driver testing by November of 2004.

8. In November of 2004, Grievant's name was submitted, along with many other cross-trained employees, to receive a 7% salary increase for completing all cross-training requirements.

9. In December of 2004, Grievant discovered that she had not received the salary increase, due to AAMVA's belief that her certification had lapsed at the end of 2003. 10. Although it is still somewhat unclear from the record, it appears that Grievant's previous supervisor may have failed to submit the documentation to renew her AAMVA certification.

11. After several months of communication with AAMVA, it was finally verified sometime in mid-2005 that there had, in fact, been no lapse in Grievant's certification, and her certification renewal was issued.

12. Grievant received the salary increase for completing cross-training requirements on December 1, 2005.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims 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).

Grievant claims that it was improper and unfair for her to be excluded from the November, 2004,

pay increases, when the “paperwork glitch” was not her fault. Although Grievant's previous supervisor did not testify, as he is no longer employed by DMV, Grievant's allegation that her certification documents were discovered on his desk manymonths after they were to be submitted was uncontroverted by Respondent. In addition, as Grievant has noted, there has, in fact, been no lapse in her certification, which has been continuous since 1987. Accordingly, she had completed all cross training requirements by November of 2004, and should have received the salary increase at the time she was originally recommended for it.

Grievant's claims are tantamount to discrimination, which 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.” *W. Va. Code* § 29-6A-2(d). In order to establish a claim of discrimination, an employee must show:

> (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.

Bd. of Educ. 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).

The undersigned finds that Grievant has established that she has been subjected to discrimination under the circumstances presented. It is undisputed that she had completed all cross training requirements before November of 2004 and that there was no lapse in her AAMVA certification at any time. Accordingly, she was similarly situated to the other cross-trained employee who were recommended for and received a salary increase at that time, and the reason for the difference in her treatment was not related to anydifferences in job duties. Accordingly, it was discriminatory for Respondent not to grant Grievant the pay increase retroactive to November of 2004. (See footnote 2)

The following conclusions of law support this decision.

Conclusions of Law

1. Grievant has the burden of proving her claims 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).

2. "Discrimination" is defined 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." *W. Va. Code* § 29-6A-2(d).

3. In order to establish a claim of discrimination, an employee must show:

(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.

Bd. of Educ. 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. Grievant has established that it was discriminatory for her to not receive the same salary increase in November 2004 that was given to other employees who completed cross-training requirements.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to grant Grievant a 7% cross-training pay increase, retroactive to the date in November of 2004 when it was granted to other employees.

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.

Date: July 26, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant represented herself, and Respondent was represented by Janet E. James, Assistant Attorney General.

Footnote: 2

Although Grievant is being awarded back pay for the salary increase she should have received in 2004, it must be noted that, per the decision recently rendered in Witt v. Dep't of Transp./Div. of Motor Vehicles, Docket No. 05-DMV-334 (July 21, 2006), DMV has been ordered to reevaluate the pay increases given to cross-trained employees between July and December of 2004, because they were granted illegally. It is unclear from the present record what, if any, consequences this decision may have for Grievant.