JOHN PORTER,

Grievant,

v. **Docket No. 05-DOH-231**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

John Porter ("Grievant") initiated this proceeding on March 8, 2005, alleging entitlement to a 5% pay increase after obtaining grader certification. After denials at the lower levels, Grievant appealed to level four on June 30, 2005. Once a level four hearing was scheduled, the parties elected to submit this grievance for a decision based upon the record developed below, accompanied by fact/law proposals, which were submitted by Respondent on December 13, 2005. (See footnote 1) This matter was transmitted to the undersigned administrative law judge on December 19, 2005.

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

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") for approximately sixteen years, assigned to District Two, Wayne County. He became a Transportation Worker 3 ("TW 3"), Equipment Operator, in 2000. 2. Grievant obtained DOH training in order to become certified as a grader operator, and his certification was effective October 11, 2005.

3. Richard Massie is also employed in District Two as a TW 3, Equipment Operator. He became certified as a grader operator in October of 1988, while classified as a TW 3.

4. Mr. Massie received a pay raise after he obtained his grader certification, but the record contains no evidence regarding the reason for the increase.

5. Daniel Keith Viers is employed in District Two as a TW 3, Equipment Operator. He became certified as a grader operator on July 21, 1989, and was classified as a TW 3 at that time. Mr. Viers received a pay raise sometime after becoming certified, but the record contains no evidence regarding the reason for the increase.

6. Wilmer Napier and Randal Meddings are employed by DOH in District 2. Both became certified on certain equipment while classified as Transportation Worker 2s (TW 2). After obtaining equipment certification, both were reallocated to TW 3 and received a 5% pay raise as a result of the reallocation.

7. Roy Caldwell is employed by DOH as a Transportation Worker 3, and he became certified as a grader operator on June 27, 1989. There is no information of record regarding whether he received a pay raise close to that time.

8. Employee Information Forms for all of the individuals whom Grievant claims received salary increases related to certification show that--at various times throughout their work history--they received salary adjustments, which are across-the-board pay increases granted by the state, and salary advancements, which are merit pay increases.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 contends that he has been subjected to unlawful discrimination, arguing that other employees in his classification have obtained equipment certification and received a 5% salary increase as a result of becoming certified. 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). In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that

"[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

In the instant case, Grievant simply has not provided evidence to support his allegations. Although Mr. Massie and Mr. Viers both testified that they received a 5% pay increase *because of their certification*, DOH records do not support their contentions. The evidence of record only shows that both have received merit increases and across-the-board pay increases over the years. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No.97-BOT-359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). While other employees may have been reallocated to a higher classification after obtaining equipment certifications, there can be no dispute that Grievant is not similarly situated to such employees.

Moreover, there is no mechanism, either in law or fact, for providing employees with a pay raise related to obtaining certification, beyond that granted to employees who are reallocated. As recently noted in Kinser v. Department of Transportation, Docket No. 05- DOH-070 (Oct. 28, 2005), under the Division of Personnel's Administrative Rule, 143 C.S.R. 1, there are only three ways in which a state employee may receive a raise: on promotion to a position in a different classification with a higher pay grade, based on merit as shown by recorded measures of performance, and by earning an annual increment increase. See Antolini, et al. v. Div. of Natural Res., Docket No. 03-DNR-094 (Oct. 29, 2003). Clearly, none of these situations apply to Grievant, so he has proven no entitlement to a pay increase.

The following conclusions of law are consistent with the foregoing.

Conclusions of Law

1. In a non-disciplinary grievance, Grievant has the burden of proving his 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. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No.97-BOT- 359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

3. Grievant has failed to prove by a preponderance of the evidence that DOH employees have received pay raises solely because they received certification to operate particular equipment.

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." 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: January 25, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant, who was represented by Steve Kitchen at level three, submitted no proposals. Respondent was represented by Carrie Dysart, Esquire, at level three, and by Barbara Baxter, Esquire, at level four.