LARRY A. TOWNER,

Grievant,

v. **Docket No. 06-DOH-095D**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

On March 13, 2006, Grievant filed a claim for default at level four, alleging a default occurred in the processing of his grievance at level two. Grievant has claimed entitlement to a 2.5% pay increase that has been granted to other employees who have obtained equipment certification, which he was denied, because of a ban on merit raises. After this default claim reached level four, the Division of Highways ("DOH") admitted default, so this matter proceeded to a hearing regarding the remedy requested. That hearing was held in Westover, West Virginia, on June 26, 2006. Grievant was represented by counsel, Julie Romain, and Respondent was also represented by counsel, Barbara Baxter. The parties declined to submit post-hearing briefs, so this grievance became mature for decision at the conclusion of that hearing.

The following facts are undisputed by the parties.

Findings of Fact

1. Grievant has been employed by the DOH for 34 years, and is currently working as an equipment operator. 2. Equipment operators in Grievant's district were encouraged to obtain additional certifications, which would be accompanied by a 2.5% salary increase, which was meant to encompass the annual cost of keeping the license/certification.

3. In 2005, Grievant and three other employees attended training for crane certification.

4. The three other employees completed their training in early 2005 and received a 2.5% salary

increase.

5. On April 29, 2005, a memorandum was issued to all West Virginia Cabinet Secretaries, stating that, pursuant to a directive from Governor Joe Manchin, “merit or salary advancements” should not be granted “until further notice.”

6. Grievant obtained his certification on August 8, 2005.

7. Due to the governor's prohibition on merit increases, Grievant did not receive a salary increase for obtaining crane operator certification. He also had to personally incur the $75 cost of the license for the first year, which was paid by DOH for the previous employees who became certified.

8. Due to Respondent's default at level two, Grievant is presumed to have prevailed on the merits of his grievance and to be entitled to a 2.5% salary increase.

Discussion

When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed that the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3. The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. This standard requires Respondent to produce evidence substantially more than a preponderance of theevidence, 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).

Respondent may rebut the presumption created in W. Va. Code § 29-6A-3(a)(2) that the grievant prevailed on the merits, by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true. *Roy v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-150D (Sept. 23, 2005); *Bailey, et al. v. Dep't of Health and Human Res. and Div. of Personnel*, Docket No. 03-HHR-167D (June 30, 2004); *Allison v. Div. of Highways*, Docket No. 02-DOH-256D (Mar. 20, 2003).

The instant case presents an unusual situation, in that DOH has not rebutted the presumption that Grievant is entitled to his requested remedy. However, DOH feels constrained to grant Grievant what is essentially a merit increase, in light of the governor's prohibition on discretionary salary increases.

A very similar issue was recently addressed in the case of *Haller v. Regional Jail & Correctional Facility Authority*, Docket No. 06-RJA-027 (Apr. 14, 2006). In that case, the grievant was denied a

salary increase normally given to all employees who were selected as Employee of the Year, which he was denied, due to the prohibition on merit increases. However, it was ruled in that case that denial of the increase amounted to discrimination, and "[r]egardless of its reason, a gubernatorial directive cannot justify unlawful discrimination." *Haller*, *supra*.

"'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 inwriting by the employees." W. Va. Code § 29-6A-2(d). 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.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Lusher v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

As established in *Haller*, *supra*, there can be no question that Grievant is similarly situated to the other equipment operators who obtained crane certification and received a corresponding salary increase. The reason for denying Grievant the increase was neither related to job duties nor agreed to in writing, so Grievant is entitled to the same 2.5% salary increase, retroactive to the date he obtained his certification. In addition, DOH must reimburse him for the cost of the license he was required to pay himself.

The following conclusions of law support this decision.

Conclusions of Law

1. When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed that the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3. The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. This standard requires Respondent to produce evidence substantially more than apreponderance 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).

2. Respondent may rebut the presumption created in W. Va. Code § 29-6A-3(a)(2) that the grievant prevailed on the merits, by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true. *Roy v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-150D (Sept. 23, 2005); *Bailey, et al. v. Dep't of Health and Human Res. and Div. of Personnel*, Docket No. 03-HHR-167D (June 30, 2004); *Allison v. Div. of Highways*, Docket No. 02-DOH-256D (Mar. 20, 2003). 3. 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.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Lusher v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

4. "Regardless of its reason, a gubernatorial directive cannot justify unlawful discrimination." *Haller v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 06-RJA-027 (Apr. 14, 2006).

5. Respondent has failed to prove by clear and convincing evidence that Grievant is not entitled to the requested remedy.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to increase Grievant's salary by 2.5%, retroactive to August 8, 2005, plus interest at the statutory rate, and in addition shall reimburse him for the cost of his crane operator's license.

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 19, 2006

DENISE M. SPATAFORE

Administrative Law Judge