JOHN BAILEY, ET AL., .

.

Grievants, .

.

v. . Docket No. 94-DOH-389

.

WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION, DIVISION OF .

HIGHWAYS, .

.

Respondent. .

D E C I S I O N

This grievance was filed by John Bailey, Henry Hess, Paul Strickland, Ernest Samples, Lewis Withrow, Jon Carpenter and Gary Flowers (Grievants) against the West Virginia Department of Transportation, Division of Highways (DOH), alleging:

> District One Building and Grounds employees seek relief in the fact that they were not given a Safety Award when they have the same Absolute Zero Rating as Amma and Clay County.
>
> District One Building and Grounds employees have a Zero Rating that makes them more than qualified for Safety Awards.
>
> Employees were verbally told by Safety man Jeff Beverly that these employees had won Safety with Zero Rating.
>
> Category Six were given Safety Awards with a 39.51 Rating.

Memo states that each organization in a class will be recognized as a winner if they achieve an Absolute Zero Rating.

Grievants submitted their grievance at Level I on April 25, 1994. After the grievance was denied at Levels I and II, a Level III hearing was conducted on July 7, 1994. Thereafter, Commissioner Fred VanKirk denied the grievance at Level III in a decision issued on July 28, 1994. Grievants appealed to Level IV on August 8, 1994, submitting this matter for resolution on the basis of the record developed below. This grievance became mature for decision upon receipt of the parties' written arguments on September 15, 1994.

BACKGROUND

The facts in this case are essentially undisputed. Sometime in 1992 DOH promulgated a policy entitled "Commissioner's Safety Awards Program." G Ex 1. That policy contains the following provisions pertinent to resolution of this grievance: (See footnote 1)

The Commissioner's Annual Safety Awards Program began on January 1, 1992 and continued through December 30, 1992.

The following criteria has (sic) been established to better understand how winners will be selected:

A. Who:

1. One County Maintenance Organization per District will be nominated. There will be one Statewide award. Other finalists will receive special recognition.

2. Bridge Departments will compete Statewide. There will be one Statewide winner.

3. Sign Departments will compete Statewide. There will be one Statewide winner.

4. District Equipment Shops will compete Statewide. There will be one Statewide winner.

5. Interstate and Corridor Maintenance Headquarters will compete Statewide. There will be one Statewide winner.

6. All District Heavy Maintenance Detachments will compete Statewide. There will be one Statewide winner.

7. Special safety award(s). Nominators will be expected to submit data and summary indicative of exceptional and/or exemplary safety performance. Candidates may include Construction, Administrative, Censforces, Building and Grounds, etc., personnel.

B. What:

1. Category 1. There will be one county maintenance organization Statewide winner. Other finalists will receive special recognition awards.

2. Categories 2 through 6: There will be one Statewide winner per category.

3. Category 7: Award(s) presentation will be determined by submitted data and other information justifying award winner(s).

4. Award winners will be presented with a plaque. Also, each individual will receive a hat adorned with a special awards' symbol.

5. Exception to above: Each organization in a class will be recognized as a winner if they achieve an absolute zero rating.

* * * *

D. How:

1. Awards selection committee will be com prised of three individuals, generally District Engineers. Each year a new committee member will be selected. Chairperson will be individ ual appointed from lowest number District. Chairperson will be responsible for acquiring plaques and other awards' materials and organizing awards ceremony.

2. A point system will be used to ascertain winners in categories 1 through 6.

* * * *

5. The goal of each organization should be to achieve a zero rating during the Safety Program because the higher rating the less opportunity there is to win.

6. In the event of a tie in the ratings, the winner will be determined by the organization with the most hours worked except in cases where a zero rating is achieved.

7. All organizations should be prepared to submit data for means of verification.

8. Each District Engineer will appoint an employee to monitor his/her respective Dis trict's personal injury, vehicle and/or property damage. This individual will be responsible for ensuring the correct assessment of points previously outlined.

9. Other organization administrators may choose to appoint an employee who will be responsible for monitoring personal injury, vehicle, and/or property damage. This individual will also be responsible for ensuring the correct assessment of points as previously outlined. This will enable all interested organizations to participate and offer nominations for the Category 7: Special Safety Award(s).

10. Category 7 Special Safety Award Winners will be determined based on the rating as ascertained by the aforementioned detailed formula. In addition, it will be necessary to submit information that substantiates the nominee's exemplary safety performances.

The record below indicates that the organization to which Grievants are assigned, District One Building and Grounds, was one of six organizations in District One which received an "absolute zero" safety rating for 1993. G Ex 2. Moreover, Wayne Hess, Supervisor of Building and Grounds Maintenance in District One andGrievants' supervisor, testified at Level III that he was told by Jeff Beverly, District One Safety Monitor, (See footnote 2) and Laura Conley-Rinehart, Assistant District Engineer, that his organization had won a safety award for 1993.

DISCUSSION

It is well-settled law that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syllabus Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). In the instant matter, DOH established a Commissioner's Safety Awards Program which included a proviso stating: "Each organization in a class will be recognized as a winner if they achieve an absolute zero rating." This language is clear and unambiguous. Indeed, it is fully consistent with the language employed by DOH in paragraphs A7 and B3 which allows for the possibility of multiple awards being given to organizations in the Grievants' category of employment. This provision, which establishes an entitlement to an award if certain conditions are met (an absolute zero rating), is not effectively modified by any subsequent provisions in the document nor has it been superseded by a revised policy.

The employer's representative at the Level III hearing, Mr. Thompson, presented information to the grievance evaluators which included unsworn testimony in regard to the intent of the individuals who wrote the DOH policy at issue, based upon his discussions with one or more such individuals. Not only did this unsworn testimony involve hearsay statements by parties not present, it also

constituted parol evidence (See footnote 3) attempting to contradict the plain language of the policy. As an argument or closing statement, this was within the bounds of propriety. However, DOH relied on this information in the Level III decision and based at least part of its argument at Level IV upon these statements, as if they were established facts. While formal rules of evidence do not apply in hearings under the grievance procedure for state employees, this hearsay evidence is substantively immaterial, as well as being technically inadmissible. See W. Va. Code § 29-6A-6; Dominguez v. Dept. of the Air Force, 803 F.2d 680, 682 (Fed. Cir. 1986). Respondent's claim to deference in regard to interpretation of its internal awards regulation, comparable to the deference extended to the Division of Personnel when interpreting classification matters under West Virginia Department of Health v. Blankenship, 431 S.E.2d 681 (W. Va. 1993), is without merit because there is no statute specifically delegating authority to DOH to promulgate an internal safety awards program for its employees. See Security Nat'l Bank v. First W. Va. Bancorp, 277 S.E.2d 613 (W. Va.1981). Further, even if such a policy is sanctioned under statutes granting DOH general authority to perform its operations, the instant policy is so clear and unambiguous that any further interpretation is precluded.

Grievants have established, by a preponderance of the evidence, that they attained the prerequisite perfect safety rating and, under the terms of the DOH safety awards program, became entitled to a safety award. Accordingly, DOH is required, by the terms of its own written policy, to award Grievants' organization a plaque indicating the 1993 safety award which they attained and to give each Grievant an appropriate "hat," as described in paragraph B4 of the safety awards policy.

The remainder of this decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. In accordance with a memorandum dated February 5, 1993, the Division of Highways maintained a Commissioner's Safety Awards Program in accordance with a policy issued in 1992. G Ex 1 & 2.

2. Grievants are employed in District One Building and Grounds and were eligible to compete for a safety award in accordance with provisions applicable to Category 7 in the awards policy.

3. The policy at issue contains a provision stating: "Exception to above: Each organization in a class will be recognized as a winner if they achieve an absolute zero rating." G Ex 1.

4. District One Building and Grounds was one of six organizations which achieved an absolute

zero rating for 1993 in accordance with the terms of the award policy. G Ex 2.

5. District One Building and Grounds did not receive a safety award for 1993.

CONCLUSIONS OF LAW

1. In accordance with the clear and unambiguous terms of the DOH policy governing safety awards, Grievants established by a preponderance of the evidence that they attained the prerequisite safety rating entitling them to an appropriate safety award for 1993 as set forth in the policy. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977).

Accordingly, this grievance is **GRANTED**. The Respondent Division of Highways is **ORDERED** to award an appropriate plaque to District One Building and Grounds recognizing Grievants' organization as a safety award winner for calendar year 1993, and to give each Grievant a hat as described in the awards policy. Since the 1993 awards were presented sometime ago, DOH may present this award in conjunction with any presentations made in regard to awards for calendar year 1994.

Any party may appeal this decision 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. Neither the West Virginia Education and StateEmployees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: December 20, 1994

Footnote: 1While the text only addresses calendar year 1992, a February 5, 1993 memorandum indicates that the policy was intended to apply prospectively from 1992 forward. G Ex 2.

Footnote: 2Mr. Hess identified Mr. Beverly as the "District One safety man" in his testimony. L III HT at 6. However, it is clear from the context of Mr. Beverly's duties that he was serving as the monitor described in paragraph 8 of the DOH Commissioner's Safety Awards Program. G Ex 2 at 4.

Footnote: 3*Under the parol evidence rule, "parol or extrinsic evidence is not admissible to add to, subtract from, vary or contradict judicial or official records or documents, or written instruments which dispose of property or are contractual in nature, and which are valid, complete, unambiguous and unaffected by accident or mistake." Wheeler, Kelly & Hagny Inv. Co. v. Curts, 158 Kan. 312, 147 P.2d 737, 740 (1944).*