EDWARD L. GRAHAM, .

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Grievant, .

.

v. . Docket No. 94-PEDTA-448

.

WEST VIRGINIA PARKWAYS ECONOMIC .

DEVELOPMENT AND TOURISM AUTHORITY, .

.

Respondent. .

D E C I S I O N

This is a grievance by Edward L. Graham (Grievant) alleging that the Respondent West Virginia Parkways Economic Development and Tourism Authority (PEDTA) filled a job vacancy in violation of the agency's personnel policy. This grievance was initiated on May 16, 1994, and denied at Levels I and II. A Level III hearing was conducted on July 14, 1994, and a decision issued denying the grievance on August 10, 1994. Grievant appealed to Level IV where, following a series of continuances, each of which was granted for good cause, a hearing was conducted in this Board's Beckley office on January 26, 1995. Thereafter, the parties filed timely post-hearing submissions and this matter became mature for decision on March 6, 1995.

BACKGROUND

The facts in this case are not in dispute. Grievant is employed by PEDTA as a Daywatchman assigned to a worksite located at Ghent, in Section 1. (See footnote 1) He has held that position since August 1993. L III HT at 25. Around September 1993, a position vacancy was posted soliciting candidates for a newly-created Maintenance Technician position located at the PEDTA worksite at

Standard, in Section 3. William Forrest, Director of Engineering and Maintenance, testified that this employment opportunity resulted from a management decision to fund a previously unfunded position. (See footnote 2) Grievant did not apply for the posted vacancy.

A Selection Board was conducted to screen applicants for that vacancy. The top candidate, Mark Miller, was selected to fill the posted vacancy.

PEDTA was experiencing a shortage of available personnel in Section 3 at Standard. This personnel shortfall primarily resulted from the absence of Larry Wills, a permanent, full-time Highway Technician who had been on workers' compensation for over two years. Although PEDTA had historically hired temporary or part-time employees to perform seasonal work and alleviateshortages resulting from employees on extended leave of absence due to illness or injury, PEDTA's General Manager, William Gavan, elected to also hire the Selection Board's second-ranking candidate, Michael Cottle. Carrie Roache, PEDTA's Director of Human Resources, noted that the duration of Mr. Wills' absence had been greater than any other employee on workers' compensation.

Thereafter, effective sometime around December 1993, Vincent Smith retired from his position as a Highway Technician in Section 1 at Ghent. Thus, Section 1 became short-handed. At the time of Mr. Smith's retirement, the General Manager was in the process of reviewing all vacant positions for possible elimination. Accordingly, no immediate decision was made to post Mr. Smith's former position. Following a 28-month absence, Mr. Wills returned to work from workers' compensation in April or May of 1994, albeit on limited duty. As there was now a "surplus" employee at Standard, the General Manager elected to transfer Mr. Miller to Ghent in late May 1994, to alleviate the personnel shortage resulting from Mr. Smith's retirement in late 1993.

Grievant alleges that PEDTA violated Personnel Policy 1-1, "Employment Procedures" (Policy 1-1). Pertinent portions of that policy provide as follows:

A. Policy

> Employing personnel is a basic administrative function, the proper procedures of which must be familiar to all echelons of management in each department. The Supervisor and Department Head will be guided by the services of the Director of Human Resources who will recruit qualified applicants, assist in conducting interviews, establish selection boards when appropriate,make necessary reference checks, and provide advice and counselling concerning personnel matters as needed.

B. Procedure

The Supervisor, Department Head and Director of Human Resources must work together to assure the most effective and professional practices are maintained. To establish uniformity in hiring practices the following procedures will be adhered to by all management personnel.

1. Each supervisor who has a vacancy will submit to the Director of Human Resources a "Request for Personnel Action" (Form Per 1), which will be approved by the appropriate Department Head prior to submission. (Sample form attached)

2. Permanent Full-time and Part-time Employees- Once the Director of Human Resources has advertised, screened and selected qualified candidates for interviewing, the resumes and applications will be forwarded to the Department Head for further screening. It shall then become the responsibility of a Selection Board to interview and select the candidate who is the most qualified for the position. Selection board results and recommendations will then be presented to the General Manager for final approval. Notification of the selectee will be the responsibility solely of the Personnel Office. The Supervisor will schedule the selectee to come to the Administration Building at Charleston for orientation and the proper filling out of all employment documents.

3. Selection Boards will be established to select for employment opportunities that occur as a result of vacancies in existing positions. Such positions may be advertised both within the organization and outside the organization for a period of 10 working days.

In the case of newly created positions the Authority may choose to appoint qualified personnel to the position based on recognized merit, proven performance and expressed desire to assume the new duties.

Upon selection of the successful candidate the selectee will be scheduled to come to the Administration Building at Charleston for orientation and the proper filling out of documents.

G Ex 2 at L III.

DISCUSSION

Grievant presented two arguments in support of his claim that he was improperly denied an opportunity to compete for a Highway Technician position in Section 1 at Ghent. First, Grievant argues that Policy 1-1 requires that any vacancy be filled by posting with a Selection Board being convened to select the best applicant. Alternatively, Grievant contends that, if PEDTA has authority to transfer employees to fill a vacancy, this particular transfer was invalid because the transferred employee was improperly hired when two employees were selected from a posting for a single vacancy. In order to prevail under either theory, Grievant must prove the allegations in support of his position by a preponderance of the evidence. Parker v. W. Va. Dept. of Health & Human Resources, Docket No. 91-HHR-282 (Apr. 22, 1992); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). These contentions will now be addressed in reverse order.

Initially, PEDTA objects to consideration of Grievant's claim that the employer violated its written personnel policy by hiring two applicants from a posting for a single vacancy in Section 3 at Standard in September 1993, in that Grievant is "bootstrapping" the present grievance to contest an earlier personnel action. However, the undersigned administrative law judge finds that this same theory was effectively raised and addressed without objection at Level III. Accordingly, this matter is not necessarily excluded from consideration at Level IV. See W. Va. Code § 29-6A-3(j);W. Va. Dept. of Health & Human Resources v. Hess, 432 S.E.2d 27 (W. Va. 1993).

Further, although Grievant clearly did not raise this issue within 10 days of its occurrence, W. Va. Code § 29-6A-4(a) permits a grievance to be filed "within ten days of the date on which the event became known to the grievant." A preponderance of the evidence supports a finding that Grievant was not aware that two persons were hired under the posting for a Maintenance Technician at Standard until 10 days or less before he filed the instant grievance. Accordingly, this grievance was timely filed as to that issue. See W. Va. Code § 29-6A-4(a); Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990); Duruttya v. Bd. of Educ., 382 S.E.2d 40 (W. Va. 1989). (See footnote 3)

Nonetheless, Grievant did not apply for the posted vacancy at Standard and indicated he would not have applied, even if the posting had indicated there were two Highway Technician positions being filled. Grievant testified that he would have applied for a position at Standard only if he had

been made aware that an employee hired at Standard might subsequently be transferred to fill a vacancy occurring in the same classification at Ghent. Therefore, there was no direct harm to Grievant and he would not ordinarily have standing to contest the selection of either Mr. Miller or Mr. Cottle to the positions at Standard. Mills v. W. Va.Dept. of Transp., Docket No. 92-DOH-053 (Apr. 24, 1992). See Weaver v. Mason County Bd. of Educ., Docket No. 94-26-128 (Oct. 25, 1994); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994).

Nonetheless, Grievant's theory in this case effectively alleges a pattern and practice of misapplying, or selectively applying, Policy 1-1, to reach a result adverse to Grievant. To that limited extent, this issue is properly before this Grievance Board under circumstances which do not call for a merely advisory opinion. See W. Va. Educ. & State Employees Grievance Bd. Procedural Rules § 4.18; Peters v. Raleigh County Bd. of Educ., Docket No. 94-DOE-043 (Sept. 27, 1994); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994).

Policy 1-1 is an administrative regulation which PEDTA management is obligated to follow. See Powell v. Brown, 238 S.E.2d 220 (W. Va. 1977); Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988). However, Grievant failed to demonstrate that Policy 1-1 compels the result he is seeking. The policy essentially contains a simple "merit system" for hiring new personnel. While the policy refers to "vacancy" in the singular, it does not prohibit hiring to fill multiple vacancies, particularly when the vacancy is in the same classification at the same location. Moreover, the two individuals were hired at Standard following competition through the established Selection Board procedure, and there is no evidence to suggest that PEDTA did not hire the two best qualified applicants.

If Grievant's argument is accepted, the posting should have read: "Highway Technician(s) needed at Standard, one of whom may be transferred to Ghent if and when an employee retires at that worksite, provided that an employee on extended sick leave from Standard returns to duty in the meantime." The record does not indicate PEDTA management knew in advance what was going to happen. Likewise, there is insufficient persuasive evidence that PEDTA management abused its discretion in hiring two permanent employees at Standard.

Grievant also alleged that the vacancy at Ghent resulting from Mr. Smith's retirement should have been posted for competitive fill. However, under the facts and circumstances present here, no violation of Policy 1-1 has been shown. PEDTA had previously hired Mr. Miller and Mr. Cottle in

accordance with the competitive procedures set forth in Policy 1-1. The decision to transfer one of those employees to alleviate a shortage of personnel at Ghent was properly within management's discretion. Ms. Roache participated in revising Policy 1-1 and testified that the policy does not prohibit transfer of a maintenance employee from one worksite to another as was done here. Likewise, she interprets Policy 1-1 as not requiring a posting under such circumstances.

PEDTA's interpretation of Policy 1-1, as testified to by Ms. Roache, is consistent with the plain meaning and purpose of the policy. See Miller v. Bd. of Educ., 190 W. Va. 153, 158, 437 S.E.2d 591 (1993). Likewise, PEDTA's interpretation and application of Policy 1-1, in the circumstances present here, is not soclearly erroneous as to be arbitrary and capricious. See Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982).

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

FINDINGS OF FACT

1. Grievant is employed by PEDTA as a Daywatchman assigned to a maintenance worksite in Section 1 of the West Virginia Turnpike at Ghent.

2. Sometime around September 1993 a vacancy was posted for a Highway Technician position at a maintenance worksite in Section 3 at Standard.

3. The posting described in Finding of Fact Number Two resulted from a management decision to fund a position that had not previously been filled due to budget limitations.

4. Grievant did not apply for the posted vacancy at Standard.

5. PEDTA convened a Selection Board and selected Mark Miller to fill the posted vacancy at Standard.

6. Thereafter, PEDTA's General Manager, William Gavan, elected to hire the second-ranking candidate, as determined by the Selection Board described in Finding of Fact Number Five, Michael Cottle, to alleviate a shortage of available personnel resulting from the extended absence of Larry Wills, a Highway Technician who had been on workers' compensation for over two years.

7. Vincent Smith, a Highway Technician assigned to Section 1 at Ghent, retired in or around December 1993. No immediate decision was made on filling that position, as the General Managerhad "frozen" all hiring to evaluate all vacant positions for possible elimination.

8. In April 1994 Mr. Wills returned to limited duty at Standard. Once Mr. Wills' work limitations were understood, PEDTA's General Manager elected to transfer Mr. Miller to Ghent to alleviate an

"imbalance" in the number of personnel assigned to the two worksites.

CONCLUSIONS OF LAW

1. In order to prevail, Grievant must prove the allegations in his complaint by a preponderance of the evidence. Parker v. W. Va. Dept. of Health & Human Resources, Docket No. 91-HHR-282 (Apr. 22, 1992); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. "An 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). See Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994); Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988).

3. Grievant has not demonstrated that PEDTA Personnel Policy 1-1 was violated when Mark Miller and Michael Cottle were hired from a posting for a single Highway Technician vacancy at Standard. 4. Grievant has not demonstrated that PEDTA Personnel Policy 1-1 was violated when Mark Miller was transferred from Standard to Ghent to fill a vacancy resulting from the retirement of VincentSmith. See Miller v. Bd. of Educ., 190 W. Va. 153, 158, 437 S.E.2d 591, (1993).

Accordingly, this grievance is **DENIED**.

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 State Employees 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.

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LEWIS G. BREWER

Administrative Law Judge

Dated: March 31, 1995

Footnote: 1Section numbers designate geographic areas of maintenance responsibility between certain milepost markers along the West Virginia Turnpike. PEDTA has certain maintenance equipment stationed at worksites at Princeton and Ghent in Section 1, Beckley in Section 2, and Standard and Chelyan in Section 3.

Footnote: 2Although the position in question had been "authorized" for planning purposes, it had not previously been funded or staffed and was, therefore, a newly-created position within the meaning of PEDTA Personnel Policy 1-1. Neither party offered a copy of the posting at issue as evidence.

Footnote: 3Although the cases cited arose under the education grievance procedure, W. Va. Code §§ 18-29-1, et seq., provisions in the education employee grievance procedure generally parallel those in the state employee grievance procedure. See Hays v. W. Va. Div. of Employment Sec., Docket Nos. 91-ES-505 & 92-ES-003 (Dec. 31, 1992).