CAROL JARRETT AND JUDY MAE THOMAS

v. Docket No. 95-DOP-130

WEST VIRGINIA DEPARTMENT OF

ADMINISTRATION/DIVISION OF PERSONNEL

D E C I S I O N

Grievants are employed as secretaries by Respondent Divi sion of Personnel (DOP), an agency within the Department of Administration (DOA). According to Grievants, they bring this action because they were discriminated against and other impro prieties, including harassment, occurred during an interview process for an Administrative Secretary position. Following adverse decisions at the lower grievance levels, Grievants advanced an appeal to level four and requested a decision based on the record below; the case became mature for decision on June 6, 1995, the cut-off day to file fact/law proposals or other written argument.1

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1This case was transferred to the undersigned for administrative reasons. The parties did not respond to an earlier deadline set by the initial Administrative Law Judge to file fact/law proposals.

Grievants' position in this matter is impossible to discern because they never articulated any legal theory in support of their case. They complain because they were not hired for, and/or promoted to, the position of Administrative Secretary, and that the person temporarily holding the job, a non-State employee, was employed instead. Grievants also allege they were "victims" of "pre-selection." Grievants do not ask as relief

that the job be reposted or that one or the other be instated to the job in question or a comparable job, rather they seek damages in the form of a ten percent raise and/or "comparable compensation."

DOA denied the grievance at level three due to "Lack of Subject-Matter Jurisdiction." Apparently, DOA's rationale in this regard is based on the fact that the job in question is no longer a covered civil service position within DOP or DOA. Additionally, citing Bonnell v. W.Va. Dept. of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990), the grievance evaluator also stated that monetary damages were not "awardable." DOA recognizes that the Grievance Board's authority to award damages is limited to actual damages shown and not some type of specula tive or punitive damages. See e.g., Bryant v. Fayette County Bd. of Educ., Docket No. 91-10-297 (Mar. 13, 1992) (relief not granted when relief is speculative and would have no true effect on the resolution of any controversy).

Certainly, in this case, the Grievance Board has jurisdic tion over the parties named in the grievance. The issue is whether the Board has the authority to grant the grievance in light of whether any relief is available or otherwise legally justifiable. The Grievants must prove all of the allegations constituting their grievance by a preponderance of the evidence. Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989). Here, in essence, Grievants com plain about a former DOA/DOP employee who purportedly conducted a job interview with which Grievants took issue. Grievants must actually prove wrongdoing on DOA's or DOP's part and also legally justify the relief sought. Simply put, Grievants have

failed to state a claim for which any relief is available.
It is not necessary to set forth all of the particulars in
this case because no factual or legal basis exists upon which to
grant the relief Grievants seek. In a word, Grievants believe
they were told negative aspects about the job during the inter
view, presumably, to induce them to withdraw their applica
tions.2 However, both the particular position in question and
the employee who conducted the interviews were transferred out
of DOA and DOP, and the job was no longer available within DOA
and DOP either at the point Grievants filed the grievance or
shortly thereafter.
The grievance procedure is designed to address problems
between employees and employers which occur in the work place

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2As was noted by DOP's counsel at level three, see T.109,
the interview process apparently did not have a chilling effect
upon Grievants because neither withdrew their applications after
the interview.
and to provide relief when warranted. See W.Va. Code 29-6A-1,
et seq. In this case, DOA and DOP had no control over the
situation about which Grievants complain. Relief is not avail
able from the Grievance Board when, among other things, the harm
done is due to circumstances beyond the employer's control.
Brightwell v. Div. of Corrections, Docket No. 89-CORR-019 (Sept.
29, 1989) (relief unavailable when an entity other than employer
had control over salary boost at the end of probationary peri
od).
Moreover, even if the job was available and under the
control of either DOA or DOP, Grievants failed to demonstrate

that, despite their status as full-time, regularly-hired State employees, they were, in fact, more qualified than the success ful applicant, or somehow better suited for the job in ques tion.3 Grievants also failed to provide any rational basis for an award of a salary increase. Ordinarily, a salary increase in State employment is based on merit principles. See DOP's Administrative Rule, Section 5.08.4 The Grievants have not advanced any theory supportin entitlement to a salary increase based on meritorious service.

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3In addition, there was no compelling evidence that Grievants were ever "denied the opportunity to compete" or "denied due consideration" for the Administrative Secretary position, as they assert. See T.112.

4Section 5.08 states, "All salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance." Promotional increases must be based upon the employee's assumption of higher-level duties. In the matter at hand, Grievants meet neither of these criteria.
In summary, even when a grievant demonstrates a job-related problem has occurred, relief which is speculative, unavailable, or otherwise unwarranted because it is not reasonably related to the harm done will not and cannot be granted by the Grievance Board. See Glasscock v. W.Va. Div. of Corrections, Docket No. 93-CORR-529 (Nov. 30, 1994) (relief of money damages not war ranted even though promised vacation days given to other employ ees); Ferrell/Nichols v. W.Va. Regional Jail Auth., Docket No. 93-CORR-529 (Oct. 17, 1994) (relief not granted because violated policy subsequently repealed); Brown v. Hancock County Bd. of

Educ., Docket No. 94-15-207 (Aug. 24, 1994) (relief not avail able on demonstrated posting violation because grievant did not request any specific job or demonstrate she was the most quali fied applicant); Daugherty v. West Liberty State Coll., Docket No. 93-BOD-295 (Apr. 27, 1994) (relief unavailable where grievant sought punishment of fellow employee thought to be engaged in unprofessional conduct); Brewer v. Mercer County Bd. of Educ., Docket No. 91-27-152 (Apr. 28, 1992) (relief unavail able when principal who allegedly harassed grievant resigned and grievant instead sought sanctions against employer); Pascoli/Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229 (Nov. 27, 1991) (relief unavailable when relief is unrelated to past or present work situations); Bell v. W.Va. Div. of Correc tions, Docket No. 89-CORR-670 (Oct. 31, 1990) (relief not granted when requested relief not reasonably related to harm done).

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate.5

Findings of Fact

1. Grievants are each employed by DOP and classified as a Secretary II, with seven years' and twenty-one years' respective tenure in State employment.

2. In February 1994, Grievants applied for a covered civil service position as Administrative Secretary within DOA but were not selected for the position.

3. A temporary employee for the State was selected for the position of Administrative Secretary. Subsequently, the Administrative Secretary position, as well as the individual who conducted the position interviews and selected the successful applicant, were transferred from the DOA and DOP on or before

April 15, 1994.

Conclusions of Law

1. Grievants must prove all of the elements constituting their grievance, including a legal basis for the relief sought, by a preponderance of the evidence. See Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989).

5The within findings of fact are based largely upon findings set forth in the May 6, 1994, level two decision issued by DOP Director Robert L. Stephens, Jr., the grievance evaluator at that level, primarily because Grievants did not refute those fact findings at level three. The level three grievance evaluator did not issue any fact findings or formal conclusions of law in the level three decision.

2. Grievants have not established they are entitled to the relief they seek as a matter of law. See Glasscock v. W.Va. Div. of Corrections, Docket No. 93-CORR-529 (Nov. 30, 1994); Ferrell/Nichols v. W.Va. Regional Jail Auth., Docket No. 93-CORR-529 (Oct. 17, 1994); Brown v. Hancock County Bd. of Educ., Docket No. 94-15-207 (Aug. 24, 1994); Daugherty v. West Liberty State Coll., Docket No. 93-BOD-295 (Apr. 27, 1994); Brewer v. Mercer County Bd. of Educ., Docket No. 91-27-152 (Apr. 28, 1992); Bryant v. Fayette County Bd. of Educ., Docket No. 91-10-297 (Mar. 13, 1992); Pascoli/Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229 (Nov. 27, 1991); Bell v. W.Va. Div. of Corrections, Docket No. 89-CORR-670 (Oct. 31, 1990); Brightwell v. Div. of Corrections, Docket No. 89-CORR-019 (Sept. 29, 1989).

Accordingly, this grievance is DENIED.

Any party or the West Virginia Division of Personnel 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 Employ ees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appeal ing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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NEDRA KOVAL

Administrative Law Judge

Date: June 15, 1995