ANNA CAMPBELL,

Grievant,

v. DOCKET NO. 97-DOH-542

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS, and
DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This grievance was filed by Grievant Anna Campbell against Respondent Department of Transportation/Division of Highways, on or about August 4, 1997, when a less senior employee was selected to fill an Office Assistant III ("OA III") position. She sought as relief that she be placed in an OA III position, backpay to the date the position at issue was filled by the less senior employee, and interest. (See footnote 1)

Grievant's supervisor responded on August 5, 1997, denying the grievance, noting that Grievant did not apply for the OA III position at issue when it was posted, but had she applied, "she would have been given every consideration for the position." Appeal was made to Level II, where the grievance was denied on August 8, 1997, based upon a finding that the grievance was not timelyfiled, (See footnote 2) **and that because Grievant had not applied for the position at issue, she could not be selected to fill it. Grievant appealed to Level III, where a hearing was held on November 5, 1997. The grievance was denied on December 9, 1997, noting that Respondent is required to give due consideration to those employees who apply for a posted vacancy, and finding Grievant made no application.** (See footnote 3)

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") as an Office Assistant II ("OA II"), in the Public Affairs Division.

2. Sometime in 1996, Pat White, classified as an OA II, retired, creating a vacancy.

3. On August 30, 1996, DOH posted the position Ms. White had occupied as an Office Assistant III position, with a closing date for applications of September 13, 1996. The position vacancy notice was hung on the bulletin board in the office hallway, right outside Grievant's office, with a number of other such notices, by Grievant's supervisor, Nancy Samples. The hallway was used by all employees in Grievant's section everyday. Ms. Samples removed the posting from the bulletin board after the closing date for applications.

4. Grievant did not see the posting, and did not apply for the posted position. 5. Three DOH employees, as well as a number of other people, applied for the posted position. One of the DOH employee applicants was selected for the position sometime in 1996.

Discussion

Grievant bears the burden of proving her allegations by a preponderance of the evidence. Mowery v. W. Va. Dept. of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997). Grievant does not deny that she did not apply for the position at issue. The Division of Personnel's Administrative Rules, at § 9.07(d) provide:

> (d) The appointing authority shall give due consideration of those employees who apply and are eligible for the posted vacancy.

(Emphasis added.) An employee who does not apply for a posted position cannot grieve when she is not selected. See Sickles v. Monongalia County Bd. of Educ., Docket No. 96-30-207 (Oct. 30, 1996); Mills v. Doddridge County Bd. of Educ., Docket No. 90-09-402 (Nov. 26, 1990); See also, Delaney v. Harrison County Bd. of Educ., Docket No. 89-17-352 (Sept. 25, 1989).

> [I]t is the responsibility of a job applicant "to ensure that his interest in a given position is clearly made known and his application therefore adequately completed."

Sickles, supra, citing Mills, supra.

Grievant did not contest whether hanging the posting on the bulletin board in the hallway

met the posting requirements. (See footnote 4) Grievant argued the position was not posted on the bulletin board, butpresented no evidence to support this assertion. Ms. Samples gave testimony that she knew she had hung the posting on the bulletin board in the hallway. Grievant offered nothing to counter this, except that she had not seen the posting.

Grievant inferred that Ms. Samples had some duty to advise Grievant the position had been posted as an OA III, because she had asked Grievant if she was interested in the OA II position vacated by Ms. White, and Grievant told her she was not. Ms. Samples had no such duty.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dept. of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. An employee who does not apply for a posted position cannot grieve when she is not selected. Division of Personnel's Administrative Rules, at § 9.07(d). See Sickles v. Monongalia County Bd. of Educ., Docket No. 96-30-207 (Oct. 30, 1996); Mills v. Doddridge County Bd. of Educ., Docket No. 90-09-402 (Nov. 26, 1990); See also, Delaney v. Harrison County Bd. of Educ., Docket No. 89-17-352 (Sept. 25, 1989).

Accordingly, this grievance is DENIED.

Any party 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. 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: July 8, 1998

Footnote: 1

Although the discussion in lower level decisions raised a question as to whether Grievant was alleging she was misclassified, Grievant's representative stated she was not grieving her classification.

Footnote: 2

Respondent did not raise a timeliness defense at any level of the grievance procedure.

Footnote: 3

Grievant appealed to Level IV on December 12, 1997. The Division of Personnel was joined as a party, and a Level IV hearing was held on March 24, 1998. This matter became mature for decision at the conclusion of that hearing. Grievant was represented by Betty Dooley and the Department of Transportation/Division of Highways was represented by William T. Rice, Esquire. The Division of Personnel did not participate.

Footnote: 4

The Division of Personnel's Administrative Rules address the posting requirements, at § 9.07, as follows:

> ***Whenever a job opening occurs in the classified service, the appointing authority shall post a notice within the building, facility or work area and throughout the agency that candidates will be considered to fill the job opening. The notice shall be posted for at least ten (10) working days before making an appointment to fill the job opening. The notice shall state that a job opening has occurred, describe the duties to be performed, and the classification to be used to fill the job opening.No evidence was presented that the position was not properly posted.***