BOYD LILLY, et al.,

Grievants,

v. Docket No. 97-PEDTA-308

WEST VIRGINIA PARKWAYS ECONOMIC DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

Boyd Lilly and 21 other employees (See footnote 1) (Grievants) filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., on December 27, 1996, alleging that Respondent West Virginia Parkways Economic Development and Tourism Authority (Parkways) had filled two positions in Landscaping and Beautification contrary to Parkways Personnel Policy and Procedure Number I-1. Following denial of their grievance at Levels I and II, Grievants appealed to Level III on January 15, 1997. A hearing was conducted on May 1, 1997, (See footnote 2) and a Level III decision was issued by Grievance Evaluator D.L. Lake on June 13, 1997. Grievants appealed to Level IV on June 24, 1997. A Level IV hearing scheduled for August 21, 1997, in Oak Hill, West Virginia, was continued for good cause shown. Thereafter, this grievance was reassigned to the undersigned administrative law judge for administrative reasons, and a Level IV hearing was held in this Board's office in Charleston, West Virginia, on December 15, 1997. The parties agreed to a briefing schedule at the close of the hearing, and this matter became mature for decision upon receipt of the parties' written submissions on March 10, 1998. (See footnote 3)

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level III hearing, the testimony of the witnesses who appeared at Level IV, and

documentary and photographic evidence admitted at Levels III and IV.

FINDINGS OF FACT

1. Grievants are employees of the West Virginia Parkways Economic Development and Tourism Authority (Parkways).

2. Parkways has adopted Personnel Policy I-1, effective May 17, 1993, governing "employment procedures."

3. Section B3 of Policy I-1 provides, in pertinent part, as follows:

> 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.

G Ex C at L III.

4. Policy I-1 does not define "newly created positions."

5. In December 1996, Parkways hired Charles Garrett and Tim Kirk as Landscape Technicians. See G Ex B at L III. These vacancies were not posted, and these employees were appointed without being interviewed by a selection board.

6. Messrs. Garrett & Kirk had previously worked for Parkways as temporary employees.

7. The two Landscape Technicians are assigned to Parkways' Facilities Division under the supervision of Rick Deeds, Facilities Manager. The Facilities Division has primary responsibility for maintenance of the rest areas, travel plazas and a tourist information center on the West Virginia Turnpike.

8. Over the past several years the number of facilities and the dimensions of the areas for which the Facilities Division is responsible for maintaining the grounds and landscaping has increased. In addition, Parkways has elected to place greater emphasis on the esthetic appearance of facilities visited by travelers.

9. For at least two years prior to December 1996, James Rose, Phillip Conley and Roger Bragg, Parkways employees assigned to various highway maintenance sections in Parkways' Maintenance Department, performed landscaping duties during the summer and parts of the spring and fall. During those portions of the year that these employeeswere assigned to work

with the Facilities Division, their duties were substantially similar to the duties being performed by the newly-hired Landscape Technicians.

10. Prior to December 1996, Crew Leader Robert Kirk was the only Parkways employee assigned to the Facilities Department with year round responsibility for landscaping.

11. Prior to December 1996, virtually no landscaping duties were performed during the winter months by those Maintenance Department employees who worked on landscaping and grounds during the summer months. During the winter months, these employees were responsible for snow and ice removal at Parkways' facilities maintained by the Facilities Division. See G Ex A at L III.

12. Before and after December 1996, Parkways employed temporary employees as Landscape Technicians during the spring and summer months.

13. Parkways has established a greenhouse which is being operated by the newly-hired Landscape Technicians throughout the year. The newly-hired Landscape Technicians are normally relieved from performing snow and ice removal duties, except as it relates to trees and shrubbery at facilities maintained by the Facilities Division.

14. By the time of the Level IV hearing, James Rose, Phillip Conley, and Roger Bragg were assigned to other positions at Parkways. The positions which these employees previously held had not been posted and filled, nor had the positions been formally eliminated.

15. Because Messrs. Rose, Conley and Bragg primarily worked for the Highway Maintenance Division at a particular Section, there was some confusion over their properchain of supervision while they were assigned duties within the primary responsibility of the Facilities Division.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6.

Policy I-1 is an administrative regulation which Parkways is obligated to follow. Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995).

See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Edwards v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-426 (May 7, 1998); Parsons v. W. Va. Dept. of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994). Grievants contend that two Landscape Technician positions should have been posted and filled by following the selection board procedures contained in Policy I-1. Parkways submits that Policy I-1 does not require following the posting and selection board procedure in the case of newly created positions. The undersigned agrees that the language in Policy I-1 is clear and unambiguous: "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." G Ex C at L III. This language clearly provides authority for Parkways' management to hire employees for new positions without following the posting and selection process required for vacancies in established positions. See Watts v. W. Va. Dept. of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 877 (1995); Edwards, supra.

Grievants presented testimony and evidence suggesting that Parkways should have posted these positions and filled them through standard competitive procedures, even if Policy I-1 did not require them to do so. However, there is no legal precedent which compels Parkways to limit its discretion in such matters. Because Parkways is a “classified-exempt” agency, it is not subject to the rules and procedures established by the West Virginia Division of Personnel for other state agencies. See Simmons v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 96-PEDTA-091 (July 31, 1996); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). See also Perry v. Miller, 181 W. Va. 192, 382 S.E.2d 29 (1989). Grievants have not cited any law, rule, regulation, policy or written agreement applicable to Parkways, except for Policy I-1, which would compel such a result. Therefore, the only issue remaining to be decided in this grievance is whether the positions filled by Parkways in December 1996, were "newly created positions," or "vacancies in existing positions," within the meaning of Parkways' Policy I-1.

Policy I-1 does not define "newly created." However, this same phrase is employed in W. Va. Code §§ 18-5-39, 18A-4-7a, 18A-4-8b, and 18A-4-15, to govern employment of school personnel. Accordingly, decisions determining when professional or service personnel

positions are "newly created" in the context of school personnel law may be instructive.

This Grievance Board has concluded that simply changing the location of the work being performed does not result in a newly created position. Lilly v. Fayette County Bd.of Educ., Docket No. 96-10-481 (Sept. 15, 1997); Miller v. Kanawha County Bd. of Educ., Docket No. 20-86-351-1 (Dec. 18, 1986). Likewise, assigning additional duties to an employee, consistent with their classification, and with the employee's consent, does not result in a newly created position. Childs v. Berkeley County Bd. of Educ., Docket No. 96- 02-025 (Oct. 29, 1996). See Napier v. Logan County Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995).

However, in Bays v. Fayette County Board of Education, Docket No. 93-10-439 (Aug. 23, 1994), the "newly created position" phrase was interpreted in the context of W. Va. Code § 18-5-39, which controls employment of school service personnel in summer positions. During a previous summer, the school board employed service personnel in the classification of Bus Driver/Crew Leader, working with the Governor's Summer Youth Program. These employees transported students to various bus shelters around the county where they supervised the students in repairing and repainting bus shelters. In a subsequent summer, the school board elected to repair the bus shelters without any involvement by students, who were prohibited from using power tools, including saws and lawn mowers, by safety considerations. The board proceeded to hire service employees in the classification of Carpenter/Painter to repair bus shelters, giving preference under W. Va. Code § 18-5-39 to those employees who previously worked on the bus shelters as Bus Driver/Crew Leaders.

This Grievance Board determined in Bays that, although the school board was trying to accomplish the same ultimate objective in both situations, the method employed in accomplishing the task of repairing bus shelters in the prior summer was substantially different from the method employed in the subsequent summer. Therefore, the positionsin question should have been posted and filled competitively as newly created positions in accordance with W. Va. Code § 18A-4-8b. Bays, supra.

Likewise, in the context of W. Va. Code § 18A-4-8b, this Grievance Board has concluded that expanding an existing bus route from a part-time position to a more desirable full-time position resulted in a newly created position. Zirkle v. Hancock County Bd. of Educ., Docket No. 95-15-585A (July 18, 1996). On the other hand, where a number of bus routes were

reconfigured, but the total number of bus routes and employees remained the same, no new positions were created. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

The undersigned administrative law judge is persuaded that the positions at issue here constitute legitimate, newly created positions. Notwithstanding that Parkways could have reassigned year-round landscaping duties to maintenance employees who previously performed such duties only during the fair weather months, it chose to accomplish this task through employment of full-time Landscape Technicians. Landscape Technicians do not perform the full range of duties performed by those employees who previously performed many of these same duties. Moreover, Parkways simultaneously elected to assign these tasks a higher priority by assigning the employees performing landscaping work to the Facilities Manager, Mr. Deeds. Thus, the positions at issue represent a significantly different approach to accomplishing the work of maintaining and beautifying Parkways' facilities, analogous to the different method for repairing school bus shelters held to result in "newly created" positions in Bays. Because the Landscape Technician vacancies were newly created positions, Parkways was not required by Policy I-1 to post them to be filledunder the selection board procedure applicable to vacancies in previously existing positions. (See footnote 4)

In addition to the foregoing, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Parkways is a “classified-exempt” agency which is not subject to the rules and procedures established by the West Virginia Division of Personnel for other state agencies. See Simmons v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 96-PEDTA-225 (July 31, 1996); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

3. "An administrative body must abide by the remedies and procedures it properly

establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See Parsons v. W. Va. Dept. of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Edwards v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No.97-PEDTA-426 (May 7, 1998); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995); Bailey v. W. Va. Dept. of Transp., Div. of Highways, Docket No. 94-DOH-389 (Dec. 20, 1994).

4. A case by case, fact-specific analysis is necessary to determine whether a particular position is newly created. See Billups v. W. Va. Dept. of Transp., Docket Nos. 94-DOH-168/177/169/170/212 (May 4, 1995).

5. The Landscape Technician positions at issue in this grievance were “newly created positions” within the meaning of Parkways' Policy I-1. See Bays v. Fayette County Bd. of Educ., Docket No. 93-10-439 (Aug. 23, 1994). Therefore, Parkways was not required to post the vacancies or fill them in accordance with its internal selection board procedures.

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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 14, 1998

Footnote: 1

Larry Treadway, Frederick M. Elmore, Jr., Randy Redden, Scott Stewart, Shirley Johnson, Jerry Lilly, Luther Bennett, Ed Graham, Tommy Lee Graley, Roy L. Phillips, Richard Patterson, Danny Craddock, Robin Weddle, David Compton, Jack Graham, Tommie D. Cochran, Donald E. Smith, William Meadows, Steve Pugh, Kenny Cottle, and Steve Shanklin.

Footnote: 2

The record does not indicate why so much time elapsed between Grievants' appeal and the Level III hearing.

Footnote: 3

Grievants were represented by Lynn Belcher of the American Federation of State, County, and Municipal Employees, Council 77. Respondent was represented by its General Counsel, A. David Abrams, Jr.

Footnote: 4

Grievants do not contend that the incumbent employees who had been performing similar duties should have been transferred to the Facilities Division. Grievants simply contend that the positions should have been posted and submitted to the selection board process to identify the best-qualified applicants. Moreover, those employees who had been performing landscaping duties previously did not sign on to this grievance. Accordingly, that issue will not be examined in this decision.