ANNA BELLE FORTH,

Grievant,

v.

DOCKET NO. 98-DOH-433

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Anna Belle Forth, filed this grievance against her employer, the West Virginia Department of Transportation/Division of Highways ("DOH") on March 3, 1998:

> A position was posted on 12/16/97 for Secretary II, District Two Maintenance Division (0280),(Bulletin #434).
>
> Four applicants were interviewed for the job and one was selected from the four. A female employee in the District Two Bridge Department, who was not among the applicants, was transferred by a lateral move into the posted position. This was done after the selection had been made. I believe she was moved ahead of the selected employee because the selected employee would have been given a raise and she was transferred with no additional money involved. This is in violation of West Virginia Division of Personnel Policy on Posting of Job Openings as it disregards the purpose of the policy to ensure that merit principles are upheld when filling job openings. The Agency is in blatant disregard of its responsibility to adhere to merit principles and to apply these principles in the selection process. The Agency tainted the posting process by conducting interviews, recommending a selection from those interviews and then making a lateral move of another employee into the position.
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> References
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> A. WV Code, 29-6-24
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> B. WV Div. of Personnel Adm. Rule - Sections 3, 4.04, 4.06, 8.01-3 and 9.06

Relief Sought

Rescind the transfer and give the selected applicant the position. Request that the Agency adhere to its policy to ensure that the merit principles are upheld when filling job openings. Make the grievant whole.

Grievant's immediate supervisor was unable to grant the relief requested, and denied the grievance on March 5, 1998. A level two hearing was conducted on March 24, 1998, and a decision denying the grievance was issued on March 26, 1998, by J. Wilson Braley, District Engineer. A level three hearing was conducted on July 13, 1998, and the Level Three Grievance Evaluator, Brenda Craig Ellis, Esq., recommended the grievance be denied by decision dated October 19, 1998. Thomas F. Badgett, Assistant Commissioner, adopted the Level Three Grievance Evaluator's recommendation by letter dated October 19, 1998. Grievant appealed to level four on November 13, 1998, and, following several continuances for good cause, a level four hearing was conducted in this Board's Charleston, West Virginia, office on June 3, 1999. This matter became mature for decision on June 25, 1999, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by Jerry Blair, Esq., Robinson, Rice & Levy, L.C., and DOH was represented by Krista L. Duncan, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits

Ex. 1 -

Vacancy Authorization Request for Secretary II.

Ex. 2 -

Secretary II Job Position Description; Transaction Form for Anna Belle Forth's promotion and transfer.Ex. 3 -
Promotion Review Form for Anna Belle Forth.

Ex. 4 -

January 7, 1998 letter from J. Wilson Braley to Anna Belle Forth.

Ex. 5 -

February 18, 1998 letter from Jeff Black to Bonnie Farley.

Ex. 6 -

Transaction Form transferring Bonnie Farley.

Ex. 7 -

Notice of Disciplinary Action Form.

Ex. 8 -

Discrimination Complaint Procedure poster.

Ex. 9 -

Memorandum from Bonnie Farley to Samuel Beverage.

Ex. 10 -

Packet of information from Prestera Center for Mental Health Services to Bonnie Farley.

LIII Respondent's Exhibits

None.

LIV Grievant's Exhibits

Ex. 1 -

Vacancy Authorization Request for Secretary II.

Ex. 2 -

Secretary II Classification Specification.

Ex. 3 -

Division of Highways Transaction Form for Anna Belle Forth, dated January 13, 1998.

Ex. 4 -

Promotional Review Form for Anna Belle Forth.

Ex. 5 -

January 7,1998 letter from J. Wilson Braley to Anna Belle Forth.

Ex. 6 -

February 18, 1998 letter from Jeff Black to Ms. Bonnie L. Farley.

Ex. 7 -

Division of Highways Transaction Form for Bonnie L. Farley, dated March 1, 1998.

Respondent's Exhibits

Ex. 1 -

W. Va. Code § 29-6-24, Posting of Job Openings.

Ex. 2 -

Division of Personnel Administrative Rule, Job Posting Policy.

Ex. 3 -

Department of Highways Administrative Operating Procedures, Posting and Filling of Job Vacancies.

Ex. 4 -

Department of Transportation Weekly Vacancy Report, dated December 16, 1997.

Ex. 5 -

Division of Personnel Administrative Rule, Transfers.

Ex. 6 -

Department of Highways Administrative Operating Procedures, Transfers and Reassignments Ordered By Management.

Testimony

Grievant testified in her own behalf, and presented the testimony of J. Wilson Braley, Martha Courts, Dave Bevins, and Ella Watson. Respondent presented the testimony of J. Wilson Braley and

Jeff Black.

FINDINGS OF FACT

1. Grievant is and was at all pertinent times an employee of DOH, pay grade seven, working out of section 0279 (construction).

2. Grievant's job site is the District II headquarters in Huntington, West Virginia.

3. On September 30, 1997, Assistant District Engineer Earl David Bevins submitted a Vacancy Authorization Request for the position of Secretary II in the Maintenance Section to J. Wilson Braley, District Engineer, who approved the posting of that position on October 3, 1997. LIV G. Ex. 1. The vacancy had been created by the retirement of an employee.

4. Four applicants, including Grievant, went through the entire application process which included the following: submission of an application, submission of an application for testing, performance of a clerical test of composing a letter in response to a citizen complaint, and attending a personal interview with Mr. Bevins.

5. Grievant was qualified for the Secretary II position, and was recommended for the position by Mr. Bevins.

6. District Engineer Braley accepted the recommendation of Mr. Bevins and recommended Grievant for the position by completing and forwarding a GL5 form of January 13, 1998, to Department headquarters in Charleston. LIV G. Ex. 3.

7. Grievant was notified by letter dated January 7, 1998, from Mr. Braley, that she did not receive the promotion to Secretary II. LIV G. Ex. 5.

8. Grievant had previously reviewed her personnel file and had seen the GL5 form recommending her promotion. 9. None of the applicants for the posted position were selected for the position. Rather, Mr. Braley transferred Secretary II Bonnie Farley from the Bridge Section to the position in question in the Maintenance Section, effective March 1,1998. LIV G. Exs. 6, 7.

10. Ms. Farley did not apply for the position in question, and objected to the transfer and filed a grievance over this matter.

DISCUSSION

Grievant alleges that the failure to promote a qualified applicant from among the pool of applicants for the posted Secretary II position was an arbitrary and capricious decision, and that she should be awarded the position. DOH denies any wrongdoing in transferring Bonnie Farley into the posted Secretary II position, rather than hiring one of the applicants.

W. Va. Code § 29-6-24 governing the posting of job openings for state government employees, provides as follows:

> Whenever a job opening occurs within the classified service, the appointing authority shall, in addition to any other requirement of law or regulation for the posting of job opening notices, at least ten working days before making an appointment to fill the job opening, post a notice within the building or facility where the duties of the job will be performed and throughout the agency, which notice states that a job opening has occurred and describes the duties to be performed by a person employed in that position.

W. Va. Code § 29-6-1, provides that

> The general purpose of this article is to attract to the service of this State personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, removal,discipline, classification, compensation and welfare of its civil employees, and other incidents of State employment. All appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness . . . .”

In Mingo County Bd. of Educ. v. Jones, 1998 W. Va. LEXIS 232, the West Virginia Supreme Court, held, with regard to hiring statutes for state education employees, that

> Effect should be given to the spirit, purpose and intent of the lawmakers without limiting the interpretation in such a manner as to defeat the underlying purpose of the statute. Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language. Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.

In Jones, supra, Mr. Jones was the only applicant for a vacancy posting, with a stated deadline of November 30, 1995. The selection committee reported to the Superintendent of schools that Mr. Jones met the basic qualifications for the job, however, it also recommended that the position be re-posted, to enable it to evaluate other applicants for the job. The position was re-posted, and was identical to the first, but with a deadline of December 14, 1995. Jada Hunter submitted an application

during the second posting period. The selection committee evaluated Ms. Hunter's qualifications, and reported to the superintendent that both Mr. Jones and Ms. Hunter were qualified for the position. The superintendent recommended to the Board that Ms. Hunter be selected to fill the position.

Mr. Jones filed a grievance, and this Board granted the grievance, ordering the Mingo County Board of Education to place him in the subject position. The Circuit Court reversed this Board's decision, and Ms. Hunter appealed to the West Virginia Supreme Court. In acknowledging that boards of education have substantial discretion in matters relating to the hiring of school personnel, the Court nonetheless held that they must also comply with procedures prescribed in the relevant statutes, in that case, W. Va. Code § 18A-4-7a. That Code Section provides that "if one or more applicants meets the qualifications listed in the job posting, the successful applicant . . . shall be selected by the board. . . ." (Emphasis added). The Court found that the Legislature, in its use of the words "the posting" recognized that there would be situations where there would be only one qualified applicant, and in such a case, the statute uses the word "shall" to mandate that the position be filled by the qualified applicant. Thus, the Court held that "when a school board posts a notice of vacancy pursuant to W. Va. Code § 18A-4-7a . . ., and one or more qualified applicants apply for the position within the posting period, the school board must select a qualified applicant from those who applied during the posting period." Id.

Grievant argues that the same hiring principles dictated by Jones, supra, should apply to the hiring of state classified service employees. However, the statutory protections afforded education employees are far greater than those offered state classified service employees, and Grievant has presented no authority to support her contention that the strict hiring policy dictated by W. Va. Code § 18A-4-7a should apply to state employees.

With regard to posting of state classified service positions, all job postings should be accomplished ten (10) working days before the date of filing. The posting shall include a description of duties, job classification, and job location. Supervisors are to make jobspecifications available to employees so they can determine the minimum qualifications for the job. See W. Va. Code § 29-6-24; LIV R. Exs. 2, 3. DOH complied with all applicable job posting requirements set forth by statute, as well as by the Division of Personnel Administrative Rules, in posting the Secretary II position.

Further, with regard to transferring Ms. Farley into the position, an agency has the right to transfer employees geographically when there is a need, and, unless the transfer was made in an arbitrary

and capricious manner, the transfer is valid. See Mitias v. W. Va. Public Serv. Comm'n, Docket No. 95-PSC-029 (July 17, 1997). When making transfers within the same district, the District Engineer must approve the transfer. LIV R. Ex. 6. Mr. Braley, the District Engineer of District II, approved the transfer of Ms. Farley. A transfer of a permanent employee within the same agency can be made at any time. All transfers should be reported on appropriate forms and approved by the Director, making sure that the employee meets all minimum qualifications. LIV R. Ex. 5. The transfer of Ms. Farley was made within the Department of Highways, the appropriate forms were filed, and Jeff Black, Director of Human Resources, approved the transfer rendering the transfer valid.

Grievant further argues that the decision of DOH to make a lateral transfer into a classified position some five months following the posting of that classified job opening when qualified applicants timely applied and submitted themselves to a full application process, creates the inference that the transfer and the failure to promote a qualified applicant is arbitrary and capricious.

This Grievance Board has previously held that it is permissible for an agency to withdraw a posting and re-post it, prior to the extension of any employment offer. InLaw/Bragg v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-452 (July 17, 1997), the administrative law judge noted that “it is not uncommon for agencies to withdraw recommendations of employment for a variety of reasons, including loss of funds, abolishment of the position, a failure to draw a sufficient field of applicants, and errors in the posting.” (Emphasis in original). See also Staggers v. W. Va. Dept. of Transp., Docket No. 98-DOH-505 (Apr. 30, 1999). Accordingly, Grievant has established no impropriety in DOH's decision fill the Secretary II position by transferring Ms. Farley rather than selecting one of the applicants.

Generally an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). Grievant has proven no entitlement to this position, nor any obligation of DOH to fill it with the original four applicants. DOH explained that it ultimately determined that transferring an already- existing Secretary II into the Maintenance Division was a more efficient and sound fiscal policy, than promoting another employee with the subsequent pay raise attached to that promotion.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the Grievant must prove her grievance by a preponderance of the evidence. W. Va. Code § 29-6A-6(5); Tucci v. W. Va. Dept. of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995). 2. All job postings should be accomplished ten (10) working days before the date of filling. The posting shall include a description of duties, job classification, and job location. Supervisors are to make job specifications available to employees so that they can determine the minimum qualifications for the job. W. Va. Code § 29-6-24; West Virginia Division of Highways Administrative Operating Procedures, Vol. IX, Chap. 23, Sec. G; West Virginia Division of Personnel Administrative Rule, Job Postings.

3. All the requirements for job posting were met by the Division of Highways in posting the Secretary II position.

4. When making transfers within the same district, the District Engineer must approve the transfer. West Virginia Division of Highways Administrative Operating Procedures, Vol. IX, Chap. 14, Sec. D.

5. A transfer of a permanent employee within the same agency can be made at any time. All transfers should be reported on appropriate forms and approved by the Director, making sure that the employee meets all minimum qualifications. Further, an agency has the right to transfer employees geographically when there is a need, and, unless the transfer was made in an arbitrary and capricious manner, the transfer is valid. Mitias v. Public Serv. Comm'n, Docket No. 95-PSC-029 (July 17, 1997).

6. The transfer of Ms. Farley into the Secretary II position was made to utilize human resources efficiently and to fill the need created by a retirement at the District II Maintenance Division, and thus, was valid, and not arbitrary and capricious. 7. It is permissible for an agency to withdraw a posting and re-post it, prior to the extension of any employment offer. Law/Bragg v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-452 (July 17, 1997).

8. Grievant has failed to prove by a preponderance of the evidence that the transfer of Bonnie Farley into the posted Secretary II position was in violation of any statute, rule, or regulation, or arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: July 22, 1999