LESLIE STAGGERS,

Grievant,

v. **Docket No. 98-DOH-505**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Leslie Staggers (Grievant) challenges the decision of the Division of Highways (DOH) not to promote her to the position of Transportation Realty Trainee. This grievance was initiated at level one on January 8, 1998, and was denied by her immediate supervisor on January 13, 1998. Grievant appealed to level two, where the grievance was again denied by decision dated June 5, 1998. (See footnote 1) After appeal to level three, a hearing was held on December 1, 1998, before Brenda Craig Ellis, and the grievance was denied by decision dated December 8, 1998. Grievant appealed to level four on December 11, 1998. A level four hearing was held in this Grievance Board's office in Morgantown, West Virginia, on March 8, 1999. Grievant was represented by her husband, Harley O. Staggers, Jr., Esquire, and DOH was represented by Timbera C. Wilcox, Esquire. This matter became mature for consideration on April 5, 1999, upon receipt of the parties' fact/law proposals. The following findings of fact are made from a preponderance of the credible testimonial and documentary evidence of record.

Findings of Fact

1. Grievant is employed as a Personnel Specialist Associate in District Five of DOH.

2. Grievant applied for the position of Transportation Realty Trainee, which was posted on August 25, 1997.

3. Although Grievant was minimally qualified, DOH selected another candidate, Sheila Kesner, to fill the position.

4. A second Transportation Realty Trainee position was posted on October 14, 1997.

5. At the time of the posting of the second position, Zane Paitsel, District Five Right of Way Agent, encouraged Grievant to apply, stating he “would like to have her on board.”

6. Grievant applied for the second position and was interviewed by Mr. Paitsel. During the interview, Mr. Paitsel asked Grievant if she would accept the position with a 1.2% salary increase.

7. Grievant informed Mr. Paitsel during the interview that the Division of Personnel's (DOP) rules require that promoted employees receive a pay increase equal to 5% per pay grade advanced (15% in her case). When Mr. Paitsel still refused to offer Grievant more than a 1.2% increase, she told him she would not accept the position at that salary, and that, if he changed his mind, he should let her know. 8. Mr. Paitsel does not have the authority to offer employment or set salaries.

9. Respondent did not fill the second Transportation Realty Trainee position.

Discussion

In a non-disciplinary matter, a grievant must prove the allegations in her complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). Grievant has raised the following arguments in this case:

1. DOH violated its own rules when it offered her a position with less than a 15% salary increase.

2. DOH was required to fill the second Transportation Realty Trainee position.

3. She did not “reject” Mr. Paitsel's offer by telling him she would not accept the position without a 15% salary increase.

4. She did not file a grievance concerning her non-selection for the first position, because she construed Mr. Paitsel's statement that he “wanted her on board” and his encouragement that she apply for the second position as an offer of employment.

5. She should have been placed in the second position for which she applied,

because she did not reject Mr. Paitsel's offer, which was illegal.

6. She has been harassed and suffered retaliation since filing this grievance, and should be allowed to amend the grievance at level four to assert these allegations.

The amendment of this grievance at level four will be addressed before proceeding to the merits of the case.

Amendment of Grievance Grievant admits that she did not raise the allegations of harassment and retaliation at the lower levels of the grievance procedure, because the alleged harassment and retaliation did not begin until the grievance process was underway. Interestingly enough, Grievant has not provided any specific evidence of who has harassed her or retaliated against her or in what way. Because these allegations were not raised until the level four hearing, the undersigned reserved ruling on the issue until all of the level four evidence could be heard.

When new allegations are raised at level four, the following statute applies:

> Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw it, the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitation for filing the new grievance is measured from the date of such ruling.

W. Va. Code § 29-6A-3(j). The West Virginia Supreme Court of Appeals and this Grievance Board have consistently held that a grievance may not be granted at level four unless the theory upon which relief was awarded was developed at the lower levels. Hess v. W. Va. Dept. of Health and Human Resources, 189 W. Va. 357, 432 S.E.2d 27 (1993); Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995); Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995).

The record lacks evidence of harassment or retaliation at the lower levels, and does not contain a ruling by any hearing examiner incorporating these claims into the originalgrievance. In addition, allowing Grievant to assert these claims at this time would require “blind siding” the employer. See Nebel v. Bd. of Trustees, Docket No. 97-BOT-422 (May 8, 1998). Accordingly, the undersigned finds

that Grievant should not be allowed to amend her grievance at level four. If Grievant wishes to pursue these claims, she may file a new grievance, with the statutory time lines for initiating a grievance to begin running as of the date of this Decision.

Merits of the Grievance

The first issue which will be addressed is Grievant's claim that she did not grieve the first position, because Mr. Paitsel allegedly assured her that the second position was hers. Mr. Paitsel testified at level three that, while he “encouraged” Grievant to apply for the second position, he did not indicate that she would definitely be hired. Even Grievant testified that Mr. Paitsel's statement was that he would like to “have her on board” and she should apply. Grievant has provided no evidence that a grievance regarding the first position was ever discussed. Accordingly, Grievant has not proven that she was discouraged from filing a grievance by anyone, only that she chose not to file one when she thought she was going to receive the second position.

Grievant has attempted to argue that she should have been selected for the first position, which she cannot do at this time, because she did not grieve it. The evidence does not prove that the second position was ever promised to Grievant, but that she was merely encouraged to apply. Moreover, as will be shown in the discussion below, even if Mr. Paitsel's alleged promise to her of the second position had actually discouraged her from filing a grievance, it was not even a valid offer, because Mr. Paitsel had no authorityto make it. Accordingly, Grievant's alleged entitlement to the first position is not properly before this Grievance Board, as that claim is untimely.

Grievant's chief complaint is that Mr. Paitsel's offer to her of only a 1.2% raise with the second position was illegal, (See footnote 2) and that, therefore, she should be placed in the position or given the appropriate raise. There are several problems with this argument. First, Grievant admitted at level four that, although she did not realize it at the time, she understands now that Mr. Paitsel had no authority to offer employment or salary. It is well settled that a supervisor's oral representation during an interview as to salary is not binding on an agency, where that supervisor does not possess authority to actually hire or set rates of pay. Ollar v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-186 (Jan. 22, 1993). Further, it has been held in subsequent cases that any salary representation which is contrary to the governing salary guidelines is not binding upon the agency. Chapman v. Dept. of Transp./Div. of Highways, Docket No. 97-DOH-261 (Nov. 24, 1997); Fraley v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-448 (Mar. 12, 1993). Although

most past cases have involved an oral promise of a higher salary than was authorized, the same reasoning applies to salary offers which are lower than what the applicable rules mandate. There is no dispute in this case that Mr. Paitsel did not have the authority to bind DOH regarding Grievant's salary.

The rule espoused in the cases cited above may seem harsh, but its basis isexplained as follows:

> In effect, potential state employees are charged with knowing that the persons who interview and offer them employment are typically not authorized to make final employment decisions. The prospective employee must not rely on statements made by such individuals as to salary or rates of pay. . . . While this rule is unquestionably burdensome in the extreme to prospective employees, any other rule would render the State powerless before the whims of individual supervisors, and would require strained interpretations of clear precedent set by this Board and the Courts of this State.

Chapman, supra. This rule has even been applied in cases where an employee turned down other job offers, based upon misrepresentations made during an interview regarding salary. See Berry v. Boone County Bd. of Educ., Docket No. 97-03-305 (Apr. 13, 1998).

In all of the above cases, the employee was denied any increase in pay based upon the misrepresentations of an unauthorized interviewer. Likewise, the fact that Mr. Paitsel made an improper salary offer does not automatically entitle Grievant to placement in the position, whether at the offered salary or at the appropriate one. In fact, since Mr. Paitsel did not have hiring authority, Grievant was actually never offered the position, so there was not a binding employment offer--at any salary--to which DOH must be held. Grievant has cited no legal basis which would entitle her to placement in a position simply because an individual without authority to do so made an offer at an improper salary. Nevertheless, this is a moot point, because the position was never filled, which is the pivotal issue in this case. (See footnote 3) Grievant argues that DOH was obligated to fill the position and that, if they did not, they were required to notify her and any other applicants. Again, there is no legal basis for this contention. The only regulation which addresses job postings is Section 9.07 of the Division of Personnel's Administrative Rule (6/95), (See footnote 4) which provides that notices of job openings must be posted for at least ten days throughout the agency; that all eligible applicants shall be given due consideration; and that, if the vacancy is not filled within six months, it must be re-posted prior to any appointment. There is nothing in the Rule or the posting provision which specifically that states that a position must be filled. Grievant has cited no authority for this alleged requirement. 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. In Law/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 added). Accordingly, Grievant has established no impropriety in DOH's decision not to fill the second Transportation Realty Trainee position.

Further, Grievant has established no abuse of discretion in this decision, which DOHhas justified; after the position was posted, an Appraiser position became available, which subsumed the responsibilities of the Trainee position. Although Grievant has not specifically articulated a claim that DOH's decision was arbitrary and capricious, it appears that, since she has cited no law, policy or regulation to support her argument, that she is contending that this decision was contrary to the agency's authority. 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, which was never filled, nor any obligation of DOH to fill it. (See footnote 5) Similarly, since she did not receive a promotion, the undersigned is without authority to grant her the salary increase she has requested. She has not established an abuse of discretion or that DOH's action was arbitrary and capricious.

In accordance with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, a grievant must prove the allegations in her complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. A grievance may not be granted at level four unless the theory upon which relief was

awarded was developed at the lower levels. Hess v. W. Va. Dept. of Health and Human Resources, 189 W. Va. 357, 432 S.E.2d 27 (1993); Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995); Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995).

3. It is within the discretion of the hearing evaluator to determine whether new allegations asserted after a grievance has been filed constitute a different grievance. See W. Va. Code § 29-6A-3(j).

4. Grievant did not provide sufficient evidence that allegations of harassment or reprisal were addressed at the lower levels of the grievance procedure, so she will be allowed 10 days from the date of this Decision to file a new grievance alleging these claims.

5. A supervisor's oral representation during an interview as to salary is not binding on an agency, where that supervisor does not possess authority to actually hire or set rates of pay. Ollar v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR- 186 (Jan. 22, 1993).

6. Zane Paitsel did not have the authority to hire Grievant or to set her salary. 7. State agencies have the authority to withdraw postings and to decide not to fill posted positions. See Law/Bragg v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-452 (July 17, 1997).

8. 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).

10. DOH was not required to fill the second posted Transportation Realty Trainee position.

11. Grievant has established no entitlement to the posted position or a salary increase.

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, and 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 beprepared and properly transmitted to the appropriate circuit court.

Date: April 30, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant attempted to claim a default at level two, pursuant to the provisions of the newly amended grievance statute, W. Va. Code § 29-6A-3(a). This request was denied at levels two and three, and again at level four, because the new provisions apply only to grievances which were initiated after July 1, 1998, and this grievance was filed in January of 1998. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998).

Footnote: 2

DOH does not dispute that the Division of Personnel's Administrative Rule, Section 5.05(a), requires that promoted employees receive a pay increase of one 5% increment per pay grade advanced, and that Grievant was entitled to a 15% raise if she had received the position.

Footnote: 3

Grievant has also argued that her application for the second position was never sent to the appropriate officials in Charleston. However, under cross examination at level four, Grievant admitted that she did not actually verify whether or not her application reached the proper office, and that she only assumed it did not get there. She has notproven any foul play occurred or that her application was not considered by the proper officials.

Footnote: 4

The Administrative Rule was revised in July of 1998; however, all events giving rise to this grievance occurred under the provisions of the previous version of the Rule.

Footnote: 5

In her level four submission, Grievant argued that DOH is estopped from denying her relief, because "a state agency cannot refuse to grant relief until such time that the specific relief cannot be obtained and then assert that no relief can be granted." She contends that the position was still available and posted during the lower levels of the grievance process, so she could have been placed in it, and contends that DOH cannot now argue that the position was never filled, so she cannot be placed in a position that does not exist. Grievant still has not established entitlement to the position for all of the reasons discussed in this Decision, and DOH was not required to fill the position with Grievant or any other applicant, even during the time this grievance was at the lower levels.