JEFFERY JOHNSON and JEFFREY WHIPKEY,

Grievants,

v. Docket No. 02-DOH-310

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievants, Jeffery Johnson and Jeffrey Whipkey, employed by the Division of Highways (DOH or Respondent) as Equipment Operator II's, filed individual level one grievances on October 3, 2001, in which they alleged a violation of Administrative Operation Procedures, Section II, Chapter 8, "Transfers and Reassignments," which resulted in a functional demotion in violation of seniority laws when they were transferred to the Cameron substation. For relief, they requested to be returned to their prior locations, with no additional transfers. The grievances were denied at level one on October 3, 2001, and at level two on October 23, 2001. The grievances were consolidated at level three. An evidentiary hearing was conducted on April 5, 2002, and a decision denying the grievance was dated September 16, 2002. Appeal was made to level four on September 26, 2002, and a hearing was conducted in the Grievance Board's Wheeling office on March 3, 2003. (See footnote 1) Grievants appeared pro se, and Respondent was represented by Barbara Baxter, Esq. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, and the matter became mature for decision at the close of the hearing. The following facts are derived from the record in its entirety, including the level two transcript and exhibits.

Findings of Fact

1. Grievants have been employed by DOH in District Six **,** Marshall County, at all times pertinent to this grievance. Prior to October 1, 2001, Grievant Whipkey, with fourteen years of seniority, was assigned to the Sand Hill substation, and Grievant Johnson, with thirteen years of seniority, was assigned to the Lynn Camp substation.

2. By memorandum dated September 26, 2001, County Administrator Ron Faulk notified Grievants that they would be transferred to the Cameron substation effective October 1, 2001. The

reason given for the action was that a number of employees had been lost to retirement or for medical reasons from that substation, and it was imperative that it be staffed by experienced operators during Snow Removal Ice Control (SRIC) season, since it services a large portion of U.S. 250, and county roads 891, and 89.

3. Grievant Whipkey is certified to operate the roller, dump truck, endloader, and backhoe. Grievant Johnson operates the roller, dump truck and endloader.

4. Employees with less seniority were not transferred to the Cameron substation.

5. DOH has recently amended its guidelines regarding the number of Equipment Operator III's to be employed. The change has allowed a significant increase of Operator III's, providing fewer opportunity for Equipment Operator II's to work as crew leaders with an upgrade in salary.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving this grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Grievants argue that less senior employees should have been transferred under the provisions of W. Va. Code § 29-6-10(4), which provides in part:

When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit or have the benefit withdrawn, as the case may be.

Grievants further argue that the change in assignment was a functional demotion. Respondent denies that Grievants were transferred or demoted.

The West Virginia Division of Personnel (DOP) Administrative Rule, Section 3.96 defines transfer as"[t]the movement of an employee to a different subdivision or geographic location of the same or a different agency." However, DOH did not violate any rules,regulations or policies in the reassignment. A state agency is permitted to transfer an employee from one geographic location to another, within the same agency, at any time. DOP Administrative Rule, Section 11.06(a) states:
(a) Except as otherwise provided in subsection 10.4 of this rule, appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time.

The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees geographically where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. Childers v. Civil Serv. Comm'n, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971). It has also been previously held by this Grievance Board that state agencies have the authority to transfer an employee from one official headquarters to another. Bever v. Dep't of Health & Human Resources, Docket No. 96-HHR-258 (Dec. 31, 1996); Goodnight v. W. Va. Div. of Human
Serv., Docket No. 91-DHS-111 (May 31, 1991). No particular justification for such a transfer is required under DOP's rule. However, DOH has provided a legitimate reason for Grievants' reassignment, i.e., experienced personnel were needed at the Cameron station. Therefore, pursuant to the provisions of this rule, DOH had no obligation to reassign these employees based upon seniority, nor was it required to allow the employees to have any voice in the decisions as to where they would be stationed.

Grievants next argue that the reassignment was a functional demotion since it has caused them personal inconvenience and has caused Grievant Whipkey lost opportunities to work as backup crew leader. West Virginia DOP Administrative Rule Section 3 (27) defines demotion as: "a change in the status from a position in one class to a position in another class of lower rank as measured by salary range, minimal qualifications, or duties, or a reduction in an employee's pay to a lower rate in the pay range assigned to the classification." Although additional inconvenience is personally frustrating, there is no evidence that Grievants were placed in positions in a class of lower rank, or

were subject to a loss of their base salary. Mr. Adams explained that it was the increase of Equipment Operator III's, not the reassignment, which eliminated the opportunities for upgrades previously received by Mr. Whipkey.

While it is clear that Grievants are unhappy with the change in their headquarters, Grievants have not incurred any loss of rank or salary, and have failed to prove that the action was in violation of any rule or policy, or was a demotion. Respondent has demonstrated a legitimate businees need for the action. (See footnote 2)

In addition to the foregoing it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving this grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990).See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. State agencies have the right to transfer employees geographically where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. West Virginia Division of Personnel (DOP) Administrative Rule, Section 11.06(a); Childers v. Civil Serv. Comm'n, 155 W. Va. 69, 181 S.E.2d 22 (1971). It has also been previously held by this Grievance Board that state agencies have the authority to transfer an employee from one official headquarters to another. Bever v. Dep't of Health & Human Resources, Docket No. 96-HHR-258 (Dec. 31, 1996); Goodnight v. W. Va. Div. of Human Serv., Docket No. 91-DHS-111 (May 31, 1991).

3. Respondent did not violate W. Va. Code § 29-6-10 (4) since all of the employees eligible for transfer to the Cameron substation did not have substantially equal or similar qualifications.

4. Grievants have failed to prove they were demoted, defined by Division of Personnel Administrative Rule, Section 3(27) as, "a change in the status from a position in one class to a position in another class of lower rank as measured by salary range, minimal qualifications, or duties, or a reduction in an employee's pay to a lower rate in the pay range assigned to the classification."

Accordingly, the grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county

in which the grievance arose, or the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

DATE: MARCH 24, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The reason for the delay at level two is not clear from the record. A level four hearing scheduled November 6, 2002, was continued due to severe weather conditions, and a hearing scheduled for February 13, 2003, was continued for administrative reasons, with Grievants' consent.

Footnote: 2

Although Grievants alleged a violation of the DOH Administrative Operation Procedures, Section II, Chapter 8, on their grievance form, that document was not made part of the record at any level, and was not addressed at level four. Accordingly, it is determined that this claim has been abandoned.