JIMMY WRISTON,
Grievant,

v. **Docket No. 04-DOH-302**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Jimmy Wriston ("Grievant"), employed by the Division of Highways ("DOH") as a Highway Engineer 3 ("HE3"), filed a level one grievance on February 5, 2004, in which he alleged numerous irregularities in the posting and filling of a HE3 position. For relief, Grievant requested the position be vacant before it is advertised, that the posting be vacated and reevaluated applying the proper procedure, that the successful applicant be considered for an entry-level position, and that an independent audit be conducted of all District 9 personnel actions over the past several years. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. After the grievance was denied at level two and level three, appeal was made to level four on August 6, 2004. Grievant, representing himself, and DOH counsel Barbara Baxter, agreed to submit the grievance for decision based upon the lower-level record. DOH filed proposed findings of fact and conclusions of law on December 17, 2004, and the grievance became mature for decision when it was assigned to the undersigned on December 24, 2004.

The following findings of fact are derived from a preponderance of the evidence submitted at the level three hearing.

Findings of Fact

1. Grievant has been employed by DOH since September 1996. He graduated from Marshall University with a Bachelor of Science degree in Civil Engineering, and has completed nine graduate hours in that field. Grievant has held the classification title of HE3 in DOH District 9 Bridge section at all times pertinent to this grievance.

2. On September 24, 2004, DOH posted a vacancy for an HE3 in the Construction Department. The posting included a general description for the classification:

> Performs advanced level professional engineering work. Will make or aid in making broad decisions in setting objectives and goals, the development of which may require the supervision of subordinates or other support staff personnel. Performs related work as required.

3. The posting did not state that the successful applicant was to function as Assistant District Engineer, a supervisory position.

4. Grievant was one of two internal applicants for the position.

5. Interviews were conducted by Greg Hylton, the Acting Construction Engineer, and Donnie Beals, Administrative Services Manager in District 9. At the time the interviews were conducted, Mr. Hylton did not understand that the position was to include supervisory duties, and did not ask the supervisory questions from the list of prepared questions. A second interview was conducted for the internal applicants for the limited purpose of posing the supervisory questions.

6. DOH requested that the Division of Personnel provide a register of qualified applicants for the position of HE3.

7. Matthew Lilly, a former regular (temporary) and student (summer) employee of DOH, was selected from the register, interviewed, and subsequently appointed to the position. Mr. Lilly earned a Bachelor of Science degree in Civil Engineering from West Virginia Institute

of Technology in 1993, and a Master of Science in Engineering from Marshall University in 2001. Mr. Lilly worked for DOH during the summer of 1992, and worked in the private sector until May 2003, when he returned to DOH as a temporary employee, until October 2003.

Discussion

Grievant does not allege a violation of any statute, rule, regulation, or policy. Grievant states a number of errors he believes DOH committed in posting and filling the position. While he asserts that he was the most qualified applicant for HE3, he acknowledges that DOH has no legal obligation to award him the assignment, and does not ask for instatement. Instead, Grievant requests very broad relief, including an audit of all District 9 personnel appointments over the past several years to assure compliance with hiring procedures. He additionally requests the present position be reposted, and the two internal candidates be given preference.

It is the position of DOH that a vacancy did exist, and the defect in the posting which required follow-up interviews did not harm any of the applicants, or affect the selection process. DOH asserts that it was entirely proper to request a register of qualified applicants from DOP, and there was no evidence that Mr. Lilly had been pre-selected.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 CSR 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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 ten points comprising Grievant's complaint shall be addressed individually.

1. Irregularities existed in the stated job description, misleading not only the applicant, but the Acting Department Head and the District Personnel employee, in that the actual position and job title were unknown at the time of the initial interviews.

DOH concedes that the posting did not accurately reflect the supervisory duties of the position; however, the oversight was corrected when District Engineer Jim Lagos advised the interviewors of the fact, and directed them to conduct follow-up sessions with the internal applicants to address the questions relating to supervision. Grievant was not dissuaded from applying for the position by the failure to disclose the supervisory duties, and was given the opportunity to answer the supervision-related questions prior to the position being filled. While positions should always be posted with a correct description, Grievant was not harmed by the error in this case.

2. An unusual procedure was followed during the interview process. The two internal candidates were recalled a second time to complete the interview and at that time the position was clarified. The external candidate had one and only one interview where the position was stated clearly for him at that time.

The procedure was unusual, but corrected the posting oversight, and afforded Grievant the opportunity to fully respond to all questions relating to supervision. The fact that his interview was completed in two sessions rather than one caused him no harm.

3. The external candidate was given preference over both internal candidates. The vacancy posting was requested for the sole purpose of providing the external candidate with a position.

Other than the fact that Mr. Lilly was selected for the position, there is no evidence to support this allegation.

4. The external candidate was assured of employment at the time of his interview and was treated to a tour

> of the facility and operations by the Acting Department Supervisor at that time in anticipation of his being hired. The internal candidates were given no such consideration.

Giving an external candidate a tour of the facility does not establish that he was assured of employment at the time of the interview. The fact that the internal candidates were not given such a tour may have been due to a misperception that they were familiar with the facility.

> 5. The position as stated during the interview process is in fact not a vacant position. The individual currently serving as Acting District Engineer-Construction holds the position that was posted and performs in that capacity.

As previously noted, Mr. Lagos testified that he has been authorized to fill three Assistant positions. At the time of the interview, Greg Hylton was Acting Engineer, and if not selected for that position on a permanent basis, would return to an Assistant position. The position awarded to Mr. Lilly was the second Assistant position, with another yet to be filled.

> 6. Two qualified, internal employees bid for the position; however, the register was requested and an individual with lesser experience was given preference for the position.

While Grievant met the minimum qualifications for the position, DOH is not required to award the position to an internal candidate, and is always permitted to request a register when filling a position. While Mr. Lilly had less experience with DOH, his application establishes that he has more construction experience than Grievant.

> 7. The District has a history of appointing personnel to acting positions of a permanent and semi-permanent basis without the benefit of the actual written qualifications.

This claim is too broad and too vague to address. Grievant does not allege that Mr. Lilly is lacking any qualification.

8. The District regularly circumvents the hiring practices and procedures.

Again, this claim is too vague to address, and does not appear to relate directly to Grievant.

9. The external candidate was in effect chosen for the position prior to requesting the register.

Testimony indicates that DOH administrators knew that Mr. Lilly was interested in returning to work for the agency, and were familiar with his work as a temporary employee. The evidence does not support a finding that he had been selected prior to the register being requested. In fact, he could not have been selected if he was not on the register.

10. Proper consideration of the two internal candidates' qualifications and experience was not granted.

Although Grievant was not selected for this position, the evidence establishes that he was interviewed and considered. The decision not to award the position based on years of experience with DOH does not render the process invalid.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 CSR 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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. Grievant did not allege a violation of any statute, rule, regulation, or policy, in his complaint.

3. Grievant failed to prove that DOH acted improperly in the posting and filling of the HE3 position.

Accordingly, the 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. 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.

DATE: JANUARY 24, 2005

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SUE KELLER
SENIOR ADMINISTRATIVE LAW JUDGE