SHAWN HUFFMAN,

Grievant,

v. Docket No. 04-DOH-350

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Shawn Huffman ("Grievant"), employed by the Division of Highways ("DOH"), filed a level one grievance on April 8, 2002, in which he alleged that he was denied due process when he was not allowed to intervene in another grievance which resulted in his demotion. For relief, Grievant request reinstatement as Transportation Crew Chief, Maintenance, attorney fees and costs. The grievance evaluators at levels one and two lacked authority to grant the requested relief. An evidentiary hearing was conducted at level three on January 7 and 8, 2003. A decision denying the grievance at level three was issued on September 13, 2004. The grievance was appealed to level four on September 21, 2004, at which time counsel, James M. Casey for Grievant, and Barbara L. Baxter for Respondent, agreed to submit the grievance for decision based upon the lower-level record. The grievance became mature for decision upon receipt of Respondent's proposed findings of fact and conclusions of law on January 20, 2005. Grievant elected not to file proposals at level four.

The following facts are derived from a preponderance of the evidence admitted at level three.

Findings of Fact

1. Grievant was first employed by DOH as a Transportation Worker 2- Equipment Operator, in 1984. He left DOH in 1997, but was rehired as a TransportationCrew Chief-Maintenance (TCCMAIN) in Mason County (District 1), pursuant to a posting in 2001.

2. Many DOH employees filed a grievance complaining that the selection process applied to Grievant and another employee had not been in accordance with agency rules. Although Grievant was aware of the grievance, he did not attempt to intervene until the level

two conference had been convened. Hearing evaluator Dennis King did not allow Grievant to intervene at level two, and Grievant took no further action to preserve his rights.

3. Prior to the level three hearing, DOH entered into a settlement agreement to resolve the grievance due to concerns that the selection of Grievant would be found improper because the decision was made by someone other than those who interviewed the applicants, and was imposed upon the District.

4. As a result of the settlement, the position was reposted and independent interviewers were secured from outside the District to make a selection "based solely on the qualifications of the applicants as reflected by their application and experience, as well at the actual interview."

5. Grievant applied for the position, and was interviewed along with a number of other applicants.

6. Kendal Ashworth was selected for the position based upon his 17-18 years of relevant service to DOH which made him "very knowledgeable with the work. . . ." The interviewers also determined that he appeared to be a good team player, had good interpersonal skills, and was very respectful to supervisors and other employees.

7. Grievant had been employed by DOH as a Transportation Crew Chief- Maintenance in Mason County from 1994-1997, when he left to work in the Sheriff's Department. The interviewers reported that Grievant used "offensive, inappropriate curse words during the interview." Although the cursing was not directed to the gentlemen, DOH has a policy prohibiting such language, and they found it to be offensive and disrespectful of other individuals.

8. Following the appointment of Mr. Ashworth, Grievant continues to be employed by DOH as an Equipment Operator.

Discussion

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).

Grievant asserts that he should have been permitted to intervene in the grievance which led to the TCCMain position being reposted. DOH argues that at the time the grievance was pending, there was no law, rule, or regulation permitting intervention at level two. (See footnote 1) Grievant does not argue that the settlement was improper, or that the subsequentselection of Mr. Ashworth was in violation of any rule, regulation, statute, or policy, and there is no evidence that DOH acted improperly regarding the settlement or the reposting. "'The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.' Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968)." Syl. Pt. 1, McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994).

The Grievance Board has "long recognized the principle that grievance settlements can only be challenged in later grievances when it is proven by a preponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy." Myers v. Harrison County Bd. of Educ., Docket No. 01-13-013 (Nov. 21, 2001). See Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). The decision to settle a grievance is within the discretion of the agency, and this determination is based on each grievance's facts and circumstances. Collins v. Dep't of Transp./Div. of Highways, Docket No. 03-DOH-053 (July 17, 2003). Grievant has not demonstrated the settlement of the prior grievance contravened any applicable laws or public policy.

The above-discussion will be supplemented by the following 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 C.S.R. 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.

2. Although not addressed in W. Va. Code §§ 29-6A-1, et seq., the Grievance Board has

recognized the right of state employees to intervene in matters in which they have an interest. See Bailey v. W. Va. Dep't of Transp./Div. of Highways and Christine West, Docket No. 02-DOH-350 (Mar. 31, 2003); Roush and Forbes v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 01-DOH-573/561 (Feb. 28, 2003); Woodruff v. W. Va. Div. of Highways and John Corio, Docket No. 99-DOH-477 (May 24, 2000).

3. "'The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.' Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968)." Syl. Pt. 1, McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994).

4. Grievant failed to prove that a settlement in a related matter was unfairly made or in contravention of some law or public policy.

5. Grievant was not, in the circumstances of this case, denied due process by the settlement of a prior grievance.

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. DATE: FEBRUARY 7, 2005

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

. This oversight has since been remedied by the Grievance Board's Procedural Rules, 156 C.S.R. 1, effective December 4, 2004. Section 3.5 provides that

[u]pon timely request in a grievance filed by a state or higher education employee under W. Va. Code §§ 29-6A-1, et seq., an employee shall be allowed to intervene and become a partyto a grievance at any level, when that employee claims the ruling in a grievance may substantially and adversely affect his or her rights or property and his or her interest is not adequately represented by the existing parties.