WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CHARLES ANTHONY MARTIN,

Grievant,

v.

Docket No. 07-PEDTA-004

WEST VIRGINIA PARKWAYS ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

Grievant, Charles Anthony Martin, filed this grievance against his employer, Respondent West Virginia Parkways Economic Development and Tourism Authority ("Parkways") on May 24, 2006. Grievant's four-page statement of grievance essentially contends that he was employed as a "Paint and Body Shop Technician" performing the duties of a "Shop Manager". Relief requested includes being awarded the Shop Manager's position and back pay. The grievance was denied at Levels I and II, and Grievant made a timely appeal to Level III.

A Level III hearing was held July 7, 2006, and November 2, 2006. Grievant was represented by Paul Perdue, and Parkways was represented by A. David Abrams, Jr., Esq. of Abrams,

Byron & Hart. A Level III decision was issued December 27, 2006, denying the grievance. Grievant thereafter appealed to Level IV, and the parties agreed to submit the case on the record developed below. This matter became mature for decision on April 9, 2007, the deadline for filing of the parties' proposed findings of fact and conclusion of law. For administrative reasons, this grievance was reassigned to the undersigned Administrative Law Judge on September 7, 2007.

Synopsis

Grievant, employed as a Paint and Body Shop Technician with a classification exempt agency, filed a grievance contending he had been performing the duties of Shop Manager for approximately three years and was entitled to be awarded that position and back pay. Respondent maintains Grievant was never appointed Shop Manager, and that the duties Grievant performed were within the essential functions of the Paint and Body Shop Technician job description.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

I 1. At the time the grievance was filed, Grievant was employed as a "Paint and Body Shop Technician" with Respondent's Maintenance Department assigned to the Paint and Body Shop.

II 2. Parkways' Maintenance Department has various shops, including, but not limited to, Standard Maintenance, Heavy Equipment, Welding, Gas, and Paint and Body.

III 3. Grievant was hired by Respondent and assigned to the Paint and Body Shop in 1999. The only other full time employee in the Paint and Body Shop was Ronald Trzicak, who was also classified as a Paint and Body Shop Technician (brother of Supervisor Roger Trzicak).

IV 4. Parkways' job description for "Paint and Body Shop Technician" provides that the employee holding such a post shall be responsible for leading, guiding, and training of

apprentice technicians, and that such employee will "plan, layout and supervise the workof skilled and unskilled workers." It further provides that the employee shall also perform "other duties as assigned." Paint and Body Shop Technician Job Description, Respondent's Exhibit 1, Level III Hearing.

V 5. For a period of approximately seventeen years there was no Shop Manager appointed to the Paint and Body Shop. Mickey Miller, now the Deputy Fleet Manager, was the foreman in charge of the Paint and Body Shop and at least two other smaller shops from 1989 through 2006. Employees in those shops reported to him, and he reported to his supervisor, Roger Trcizak.

VI 6. "[A] 'Shop Manager' is a Mechanic, Welding Technician, or Paint and Body Shop Technician, who has been designated to coordinate the work of a shop or department within a shop, by obtaining parts, keeping and reviewing records, assigning and reviewing work of an Apprentice, Mechanic or Technician under his supervision." Shop Manager Job Description, Grievant's Exhibit 2, Level III Hearing. The job description also requires the occupant of the position to have a minimum of five years experience.

VII 7. Under Parkways' policy and procedure at the time this grievance arose, only Respondent's General Manager (Gregory Barr) could appoint an employee to the position of "Shop Manager" or "Shop Leader".

VIII 8. Grievant, over a period of years, began to perform more duties such as organizing and directing tasks of skilled and unskilled labor, handling and preparing reports and utilizing available man hours, generally seeing to it that the Paint and Body Shop functioned properly. He attended at least two regularly scheduled meetings of Shop Managers. Grievant's classification remained Paint and Body Shop Technician at a salary commensurate with the pay scale for that post.

IX 9. Prior to May 2006, Grievant had conversations with one or more of his superiors which led him to believe he had been appointed or would be appointed Shop Manager for the Paint and Body Shop.

X 10. While both Roger Adkins, Fleet Manager, and Ronald Hamilton, Maintenance Engineer, were superiors of Grievant, neither possessed the authority to appoint an employee to the position of Shop Manager.

XI 11. Ronald Hamilton, Roger Adkins, and perhaps others, discussed making Grievant the Shop Manager for the Paint and Body Shop, but no final decision was made.

XII 12. General Manger Barr never appointed Grievant to the position of Shop Manager for the Paint and Body Shop.

XIII 13. After a reorganization of the Maintenance Department and the retirement of Roger Trcizak, the supervisor to whom the Paint and Body Shop and its foreman reported, the management structure of the Maintenance Department was reorganized (In 2006 more authority and responsibility was allotted to the shop level).

XIV 14. On July 2, 2006, Parkways issued "Guidelines for Crew Leader and Shop Leader Program." These guidelines outlined the duties for the two positions and provided that those appointed to them would receive a thirty-five cents per hour increase in salary during the first year of service, and a sixty cents per hour increase for each subsequent year they retained the position. The guidelines made it clear that these posts would be created and abolished at the discretion of Shop Managers or the head of the Maintenance Department. XV 15. The difference between the Shop Manager positions and Shop Leader positions is that Shop Manager is a permanent position held by the appointee, while the position of shop leader may be changed at the discretion of Respondent.

XVI 16. In July of 2006, Grievant applied for and was appointed "Shop Leader" for the Paint and Body Shop and received a thirty-five cents per hour increase in wages. This pay increase is the same amount Grievant would have received if appointed Shop Manager.

17. The full job description for the positions of "Paint and Body Shop Technician" and "Shop Manager" have been reviewed and are a part of the record of the instant matter. Pertinent sections for the job positions are excerpted below:

PAINT AND BODY SHOP TECHNICIAN

<u>ESSENTIAL FUNCTIONS OF THE JOB</u>

An employee in this classification performs at the first proficiency level in the field of paint and body shop work.

Thorough knowledge of the skills involved, methods, materials, and equipment used in the field. He is responsible for leading, guiding, and training of Apprentice Technicians. He will

plan, layout, and supervise the work of skilled and unskilled workers. He shall perform all the duties of an Apprentice Technician.

The employee in this classification must also have some background experience in Automotive Mechanics equal to those of an Apprentice Mechanic as he will be expected to perform as one during periods of snow and ice or when cold weather prevents painting or body work.
Other duties as assigned.

Skills and Abilities

1. **Ability to follow oral and written instructions.**
2. **Ability to accept supervision.**
3. **Ability to do masking, body filler (fiberglass or bondo), mixing primer and paint.**
4. **Ability to spray paint using primer, acrylic enamel, and basecoat-clearcoat.** 5. **Ability to change spark plugs, set timing.**
6. **Ability to change oil and filter; brake jobs.**
7. **Ability to change tires.**
8. **General mechanical ability which will allow the person to learn how to use basic devices and hand tools.**
9. **Thorough knowledge of sectional equipment operations.**
10. **Thorough knowledge of all area of the paint and body shop trade.**
11. **Ability to organize and direct a crew of skilled and unskilled labor.**
12. **Skill in handling and preparing reports.**
13. **Ability to utilize all available man hours, both his and those of any men for whom he is responsible.**
14. **Ability to recognize potential hazards in the work place and facilities location.**
15. **Ability to advise the foreman or supervisor on inventory supplies, parts, and tools needed for day to day operations.**
16. **Ability to withstand and work in adverse weather conditions.**

EDUCATION/EXPERIENCE

Must possess High School Diploma or equivalent (GED).

Completion of a formal or informal apprenticeship course, and 5 years as an Apprentice Paint and Body Shop Technician or 5 years equal experience in this field of work.

SHOP MANAGER

ESSENTIAL FUNCTIONS OF THE JOB

1. The Shop Manager is a Mechanic, Welding Technician, or Paint and Body Shop Technician, who has been designated to coordinate the work of a shop or department within a shop, by obtaining parts, keeping and reviewing records, assigning and reviewing work of an Apprentice, Mechanic or Technician under his supervision.

2. He will work with the various Section Supervisor's, as well as the Equipment Supervisor and Foremen to determine equipment repair priorities.

3. He shall meet the qualification and do the work of either a Mechanic, Welding Technician, or Paint and Body Shop Technician, as stated in the job description of those positions.

4. Other duties as assigned.

Skills and Abilities

1. Ability to follow oral and written instructions.
2. Ability to accept supervision.
3. Ability to work without supervision.
4. Ability to plan, direct, and coordinate the work of the Apprentices and other Maintenance Technicians.
5. Ability to communicate.
6. Ability to withstand and work adverse weather conditions.

Education

Must possess a High School Diploma or Equivalent (GED)

Experience

Must have five years experience as a Mechanic or appropriate Technician job description

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 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. 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993). (See footnote 1) A preponderanceof the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probably than not." Black's Law Dictionary (6th ed. 1991). The evidence submitted by Grievant does not meet this standard.

I. *Ultra Vires* Promises

Under all the circumstances in this case, it appears Grievant over a period of years began to perform more duties in the area of organizing and directing labor, handling and preparing reports, and utilizing available man hours, with the blessing and support of his immediate superiors. Grievant did this with the expectation and/or good faith belief he would be appointed Shop Manager.

Grievant testified he was led to believe that he had been appointed, or was going to be appointed, to the position of Shop Manager for the Paint and Body Shop, but on or about May 17, 2006, (See footnote 2) he discovered this was not the case. While Mr. Adkins and Mr. Hamilton, both superiors of Grievant, indicated that they would like to see Grievant receive the promotion, neither had the authority to appoint Grievant to the position, and their opinion is not controlling.

Even if Mr. Adkins and Mr. Hamilton made promises to Grievant about being appointed as Shop Manager, which Respondent disputes, these individuals had no authority to carry them

out. Such promises are not enforceable. It is well settled that a supervisor's promises cannot be binding against an agency when the supervisor does notpossess the authority to actually make the determination. Ollar v. W. Va. Dep't. of Health and Human Serv., Docket No. 92-HHR-186 (Jan. 22, 1993); Sealing v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 01-PEDTA-507 (Mar. 21, 2002).

To the extent anything any agency employee said could be construed by Grievant as a promise, it was unauthorized and of no legal effect. Unauthorized or *ultra vires* promises to an employee do not confer any enforceable rights on that employee. See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991); Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985). In this case, the authority to appoint an employee to the position of Shop Manager rested with Respondent's General Manager Barr, and no Shop Manager was duly appointed.

II. Classification

Grievant asserts he performed the duties of a Shop Manager, highlighting the numerous duties and tasks he performed, or assumed responsibility for completing, in the last three years. Those duties included, planning, responding to requests for work, and generally seeing that the Paint and Body Shop functioned properly. Grievant contends his performance of these duties entitles him to the position of Shop Manager. However, unrebutted evidence of record establishes that Parkways' management did not think that the Paint and Body Shop needed a Shop Manager. Grievant's shop had not had a Shop Manager for several years. Only after a reorganization impacted the Paint and Body Shop, between May 2005 and June 2006, did Respondent decide to establish the position of Shop Leader. The Paint and Body Shop is a small shop with only two permanent employees, and the relevant job description of a Paint and Body Shop Technician provides for such employees to perform certain assigned tasks. In this case it does appear thatParkways assigned duties to Grievant which could reasonably be described as functions of a Paint and Body Shop Technician.

Merely performing the duties of planning, laying out, and supervising the workload on a more regular basis after a predecessor left does not amount to performing the duties of that former employee, nor does it represent a showing that those duties were outside the requirements of his job. See, Simmons v. W. Va Parkways Economic Dev. and Tourism Auth.,

Docket No. 96-PEDTA-091 (July 31, 1996). Grievant failed to demonstrate that the duties he performed were outside the job description of a Paint and Body Shop Technician.

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. 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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't. of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. 3. Grievant failed to establish by a preponderance of the evidence that he was performing duties outside the specifications for his position. Parkways' job descriptions are guidelines designed to facilitate the agency's management of its workforce. *See, e.g.*, Simmons v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 96-PEDTA- 091 (July 31, 1996).

4. Grievant failed to establish by a preponderance of the evidence that he was performing duties outside the job description of a Paint and Body Shop Technician.

5. Ultra vires promises are not enforceable against a state entity. See Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985). The Supreme Court of Appeals has "recognized that unlawful or ultra vires promises are non-binding when made by public officials, their predecessors, or subordinates, when functioning in their governmental capacity." See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991), citing Freeman, supra.

6. It is well-settled that a supervisor's promises cannot be binding against an agency where the supervisor does not possess the authority to actually make that determination.

Ollar v. W. Va. Dep't. of Health and Human Serv., Docket No. 92-HHR-186 (Jan. 22, 1993); Sealing v. W. Va Parkways Economic Dev. and Tourism Auth., Docket No. 01-PEDTA-507 (Mar. 21, 2002).

7. Grievant has failed to establish by a preponderance of the evidence that he should be made the Shop Manager or that he is entitled to back pay.

Accordingly, this 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. See W. Va. Code § 29-6A-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). 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: November 5, 2007

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Landon R. Brown

Administrative Law Judge

Footnote: 1

In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 2

On May 17, 2006, there were several employees from the Sign Shop cross-training in the Paint and Body Shop. Grievant was asked for and gave permission for one of those employees to go to Charleston and discuss a personnel matter with Parkways' General Manger Barr. Subsequently, the employee was admonished for making

the trip. He was advised that Grievant was a Paint and Body Technician and as such did not have the authority to grant him permission to leave his job.