THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

ERNEST MIKLES,

Grievant,

v. **Docket No. 06-DEP-320**

Janis I. Reynolds

Senior Administrative Law Judge

DEPARTMENT OF ENVIRONMENTAL

PROTECTION,

Respondent.

D E C I S I O N

Grievant, Ernest Mikles, is employed by the Department of Environmental Protection ("DEP"). His Statement of Grievance reads:

> The duties of the assessment officer are being incorporated into an existing position and is not being posted as had been in previous practice. According to West Virginia Surface Coal Mining and Reclamation Act 22-3-3(f) the legislative act is not being followed.
>
> Relief Sought: I would like to be reinstated to the previous position that I held July 1993 to August 2002 which was originally as [an] Assessment Officer and then reclassed to an Environmental Resources Specialist III.

This grievance was filed on March 22, 2006, and denied at Levels I, II, and III. Grievant appealed

to Level IV on September 22, 2006, and a Level IV hearing was held on December 19, 2006. Grievant was represented by Fred Tucker from the UMWA/WVSEU, and DEP was represented by Heather Connelly, Esq. This case became mature for decision on February 9, 2007, after receipt of Grievant's proposed findings of fact and conclusions of law.

Synopsis

Grievant asserts the assessment officer's position should be posted because there is enough full-time work to justify filling the position. He also asserts the individual who is currently filling the position cannot do so because his placement violates W. Va. Code § 22-3-3(f).

Respondent asserts there was no violation of any statute, and there is no requirement to post a position if the needs of that position can be filled by adding those duties to another, current position.

Grievant did not meet his burden of proof and establish DEP is required to post the position, or that any alleged violation of a statute governing mining and reclamation matters is a grievable event.

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

Findings of Fact

1. Grievant is employed as an Environmental Resources Specialist 3. He has been employed by DEP since 1993, when he was initially hired as an assessment officer. At the time of his hiring, there were two assessment officers and one chief assessment officer. In 1996, the assessment officer position was reclassified to an Environmental Resources Specialist 3.

2. An assessment officer determines the appropriate civil penalty to impose on coal operators who have reported violations. If the coal operator wishes to challenge this penalty, the assessment officer conducts an informal conference to try and resolve the issue. If the coal operator is not satisfied, he may appeal the penalty to the Surface Mine Board for a formal hearing. 3. In 2001, the chief assessment officer retired, and he was not replaced.

4. In 2002, Grievant was transferred out of the assessment area for lack of need. He grieved this decision without success and abandoned his grievance after Level II.

5. Dwight Given remained as an assessment officer until 2006, when he was promoted.

6. When Grievant learned of Mr. Given's promotion, he asked about the possibility of returning to the assessment officer position.

7. While the parties agreed Grievant is qualified to hold the assessment officer position, DEP has decided to not fill this vacancy and has assigned these duties to a current employee.

8. It is DEP's practice to examine every vacancy as it occurs to assess whether it needs to be filled, or if a current employee who is "under-tasked" can assume the duties.

9. The assessment officer's duties were assigned to Pat Lewis, an Environmental Resources Specialist, whose working title is Inspection and Enforcement Coordinator. His duties prior to receiving the assessment officer's duties were as a training officer. He is expected to continue with those duties as well as serving as an assessment officer. He was and continues to be supervised by Jeff McCormick, who was also Dwight Given's supervisor.

10. There has been a steady decrease in the number of hearings held from approximately 695 in 2000 to 546 in 2006. (See footnote 1)

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 (2000); 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 and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the grievant has not met his or her burden. Id.

I. Violation of W. Va. Code 22-3-3(f)

W. Va. Code § 22-3-3(f) states an "'Assessment officer' means an employee of the division, other than a surface mining reclamation supervisor, inspector or inspector-in-training, appointed by the director to issue proposed penalty assessments and to conduct informal conferences to review notices, orders and proposed penalty assessments." Grievant asserts DEP has violated this Code Section by placing Mr. Lewis in this assessment officer position.

West Virginia Code § 29-6A-2(i) defines "grievance" as

> [A]ny claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or

> written agreements under which such employees work, including any violation, misapplication or misinterpretation regardingcompensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

"The grievance procedure was designed as a way to resolve problems that arise within the context of a grievant's employment . . . ." Nolan v. Dep't of Health and Human Res., Docket No. 04-HHR-191 (Oct 6, 2004). As described in the above Code Section, these types of issues revolve around compensation, conditions of employment, or any practice that interferes with an employee's effective job performance or health and safety. Grievant's concern that Mr. Lewis' placement into the assessment officer position creates a statutory violation is not a grievable matter within the meaning of W. Va. Code, 29-6A-2(i). The Grievance Board lacks subject matter jurisdiction over this claim. While Grievant could have a claim in another forum, the Grievance Board is not the correct place for this concern. See Sowa v. Dep't of Health and Human Res., Docket No. 92-HHR-159 (Sept. 14, 1992).

II. Management Decision

In essence, this grievance boils down to Grievant's disagreement with DEP's decision not to post the assessment officer's position. This issue is a management decision, and this type of decision is judged by the arbitrary and capricious standard.

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v.Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable

action and disregard of known facts.

Additionally, the West Virginia Supreme Court of Appeals has noted this Grievance Board's jurisdiction to resolve grievances, as defined in W. Va. Code § 29-6A-2(i), does not provide authority for an Administrative Law Judge to substitute her management philosophy for that of the employer. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997); See Settle v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 00- PEDTA-031 (May 23, 2000); Bennett v. Dep't of Health and Human Res., Docket No. 99- HHR-517 (Apr. 26, 2000); Terry v. Dep't of Transp./Div. of Personnel, Docket No. 99-DOH- 207 (Mar. 17, 2000). "A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. See Olson v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-513 (Apr. 5, 2000)(citing Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997))." Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-030R (Nov. 20, 2002).

This Grievance Board has frequently ruled that, "[a] [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless thesedecisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997). See W. Va. Code § 29-6A-2(i); Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997).

At this point in time, many state agencies do not automatically post a position when an employee retires, resigns, or is promoted. See Smith v. Parkways Economic Dev. and Tourism Auth., Docket No. 00-PEDTA-133 (July 7, 2000); Staggers v. Div, of Highways, Docket No. 98-DOH-505 (Apr. 30, 1999); Law/Bragg v. W. Va. Dep't of Health and Human Res., Docket No. 95-HHR-452 (July 17, 1997). Frequently, the agency examines whether the specific position needs to be filled, whether the assigned duties can be assumed by a current employee, and whether other areas have more pressing needs that require the shifting of the position to another section. Here, DEP assessed the situation and decided the duties of the assessment officer could be assigned to Mr. Lewis. While Grievant disagrees with this decision, it is up to the administration of DEP to make these decisions. Additionally, it must be noted DEP stipulated that if the position were posted Grievant would certainly be qualified. Grievant did not demonstrate DEP's decision to add the duties to another employee was arbitrary and capricious.

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. 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).

2. West Virginia Code § 29-6A-2(i) defines “grievance” as

> [A]ny claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

3. "The grievance procedure was designed as a way to resolve problems that arise within the context of a grievant's employment . . . ." Nolan v. Dep't of Health and Human Res., Docket No. 04-HHR-191 (Oct 6, 2004).

4. Grievant's concerns that Mr. Lewis' placement into the assessment officer position creates a statutory violation is not a grievable matter within the meaning of W. Va. Code, 29-6A-2(i). See Sowa v. Dep't of Health and Human Res., Docket No. 92-HHR-159 (Sept. 14, 1992).

5. An Administrative Law Judge may not substitute her management philosophy for that of the employer. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997); See Settle v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 00-PEDTA-031(May 23, 2000); Bennett v. Dep't of Health and Human Res., Docket No. 99-HHR-517 (Apr. 26, 2000); Terry v. Dep't of Transp./Div. of Personnel, Docket No. 99-DOH-207 (Mar. 17, 2000).

6. "A general claim of unfairness or an employee's philosophical disagreement with a policy

does not, in and of itself, constitute an injury sufficient to grant standing to grieve. See Olson v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-513 (Apr. 5, 2000)(citing Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997))." Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-030R (Nov. 20, 2002).

7. This Grievance Board has frequently ruled that, "[a] [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997). See W. Va. Code § 29-6A-2(i); Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997).

8. Management decisions are judged by the arbitrary and capricious standard.

9. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

10. Grievant did not meet his burden of proof and establish DEP's decision not to post the assessment officer's position was arbitrary and capricious.

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. 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.

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Janis I. Reynolds

Senior Administrative Law Judge

Date: March 30, 2007

Footnote: 1

The undersigned Administrative Law Judge notes the way DEP reports data makes it difficult to be certain these numbers are perfectly correct. Additionally, some of the documents submitted were not explained by Grievant. This lack of explanation did noteffect the outcome of this Decision because the basic issue is whether DEP's management decision was arbitrary and capricious.