THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ANTHONY MARASCIO, JR.,

Grievant,

v. **DOCKET NO. 06-DOH-111**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant Anthony F. Marascio, Jr. filed this grievance on March 27, 2006, stating:

> A clear pattern and history is established whereby I have been denied advancement in employment. The most recent is denial of appointment as Highway Administrator IV within the District Maintenance Section. The state has failed to comply with its Equal Employment Opportunity Policy Statement concerning Disabled Veterans and Vietnam Era Veterans Policy dated July 1, 1999.

His stated relief sought is, “To be advanced in pay grade to the position of Highway Administrator IV, back pay to August 1, 2002 and assigned duties and responsibilities as such for the position.”

A level four hearing was held in the Grievance Board's Charleston office on June 22, 2006. The matter became mature for decision on August 31, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Appearing for Grievant: S. Benjamin Bryant, Esq.

Carey, Scott & Douglas, PLLC

Appearing for Respondent: Barbara Baxter, Esq.

Synopsis

Grievant advanced a number of arguments all related to a demotion that has already been grieved, and to his applications for several positions. He claimed Respondent had failed to properly implement its affirmative action policy for Viet Nam-era veterans. Respondent asserted that hischallenge to his prior demotion was *res judicata*, and he was untimely in his challenge to subsequent postings. Although Respondent did not assert he was untimely until level three, the claim was allowed because Grievant had not made a clear statement of his grievance until then.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as an Inspector 3. Grievant had originally been hired as a District Assistant Administrator in 1998, but due to a reduction in force, that position waseliminated and Grievant was reallocated to a vacant Inspector 2 position. (See footnote 1) He was subsequently promoted to his current position of Inspector 3 in 2001.

2. Grievant is a Viet Nam-era (See footnote 2) veteran of the United States Army, having served on active duty from September 1970 to November, 1998.

3. Grievant applied for a posted Highway Equipment Supervisor position in February 2002, and was not selected. Grievant did not meet the minimum qualifications.

4. Grievant applied for a posted Highway Administrator 4 position in November 2002, and was considered for the position, but was not found to be the most qualified.

5. Respondent took no affirmative action on Grievant's application for the position based on Grievant's status as a Viet Nam-era veteran.

6. Respondent did not assert that Grievant's selection-related claims were untimely until the level three hearing.

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. (See footnote 3) The Statement of Grievance in this matter is fairly broad and unspecific. At level two, Grievant identified

fourpositions he believed he was improperly denied promotion to, subsequent to the reduction in force that was the subject of his prior grievance.

Discrimination and Preference in Hiring

Part of Grievant's claim is that he is entitled to a preference in selection decisions based on his status as a Viet Nam-era veteran. Grievant's status as a veteran was taken into consideration when he was initially hired by Respondent, but it has never been considered after that. Grievant cites to a 1999 policy statement prohibiting discrimination based on veteran status, but produced no evidence of discrimination, and the policy he relied on has been superceded. There is no evidence that Grievant's veteran status should entitle him to any sort of preference other than at his initial hiring, and he was given that preference at that time. Grievant provided no evidence that the relevant experience he gained while employed by the military was not considered when evaluating his qualifications.

Even if there were facts in evidence to support this claim, discrimination based on a protected class is not a subject that may be addressed by the Grievance Board. (See footnote 4) Discrimination is defined for purposes of Grievance claims as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” (See footnote 5) In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]he crux of such claims is that the complainant was treateddifferently than similarly situated employees[.]” (See footnote 6) Grievant has not identified any similarly situated employee against which a comparison may be made, so he has not stated a claim of discrimination.

Respondent has an affirmative action policy that applied to disabled and Viet Nam-era veterans. (See footnote 7) In March 2001, Highways Commissioner Fred Vankirk issued a Policy Statement reiterating its policy as,

> It is the policy of the West Virginia Department of Transportation to take affirmative action to employ and advance in employment, qualified disabled veterans and veterans of the Vietnam era at all levels of employment. This policy applies to all employment practices including recruitment, selection, compensation and benefits, promotion, demotion, transfer, layoff, termination, training and other terms, conditions and privileges of employment.

“Affirmative action” means positive steps taken to increase the representation of a particular group of people in areas of employment from which they have been historically excluded. (See footnote 8) This

generally means an employer will, before making an employment decision, identify members of the class of persons affected by the affirmative action policy, then grant those persons some level of preference over other persons to be affected by the decision who would normally be selected on meritocratic principles.

Here, Respondent's policy does not specify what type of preference should be applied. However, there are two similar policies with which to compare this one. First is the Division of Personnel's Administrative Rule, 143 C.S.R. 1 § 3.100, which explains "Veteran's PreferencePoints as "an additional 5 points added to the final passing score on an open competitive examination of any veteran[.] . . . Veteran's preference points are not added to final passing scores on promotional examination." In addition, another type of affirmative action, recognizing seniority as a factor in promotion, is required by West Virginia Code § 29-6-10(4):

> [w]hen any benefit such as a promotion, wage increase or transfer is to be awarded . . . and a choice is required between two or more employees in the classified service as to who will receive the benefit . . . and if some or all of the 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[.]

However, in that case, when a particular applicant is more qualified than the most senior applicant, seniority need not be considered. (See footnote 9)

Absent evidence that Respondent took any action related to Grievant's military service beyond simply considering it work experience, it is clear Respondent took no *affirmative* action as its own policy requires it to. However, Grievant has not proven that the failure caused him any harm. There is insufficient evidence as to the effect of any veteran's preference would have had on the selection process, but there is substantial evidence Grievant likely would not have been selected even with a preference. Even so, as is discussed below, any challenge to the selection decisions is untimely.

Res Judicata:

Insofar as Grievant's claim is that his demotion to Inspector 2 was improper, thereby forming a basis for a general claim of discrimination, that issue has been resolved and will not be further considered. The preclusion doctrine of *res judicata* may be applied by an administrative law judgeto prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." (See footnote 10) As Respondent pointed out, Grievant already pursued that claim to the Supreme Court of Appeals of West Virginia, and the demotion was

found to be lawful. Much of Grievant's evidence and his proposed Findings and Conclusions are dedicated to this dead topic. The undersigned takes judicial notice of these prior decisions, and their determinations that the demotion was lawful. Grievant is precluded from asserting that Respondent did anything else improper in that case.

Timeliness:

Respondent asserted at level three, for the first time, that this grievance was untimely insofar as it related the selection for a particular position. The level three grievance evaluator denied the assertion because it had not been made at or before the level two hearing. West Virginia Code § 29- 6A-3(a)(2) provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing." However, the level three hearing was the first time Grievant had made anything more than a general claim of unfairness. “In cases involving state employees where there is no Level II hearing, the timeliness defense must be raised at or before the Level III hearing.” (See footnote 11)

The level two decision notes “Grievant stated that he has applied for four posted positions but was not selected for any.” The decision does not mention the topic of timeliness, but it does describe Grievant's claim that “this grievance concerns events from the departmental reorganization on June 1, 2001 and his reclassification on August 1, 2001. Grievant claims that there are a 'wideavenue of positions' available with higher pay than the one he was placed in.” Further, the level two decisions describes Grievant's claim that the July 1, 1995 equal employment opportunity statement concerning veterans requires Grievant to be placed into the highest available position.”

Grievant applied for a Highway Equipment Supervisor position in February 2002, and was not selected. He applied for a Highway Administrator 4 position in November 2002, and was not selected. There is no evidence that Grievant, at any time in the progression of this grievance, asserted that he was the most qualified applicant for any of these positions. Here, there was no level two hearing on the comparative selection process for the particular positions Grievant claims he should have been selected for, so there was no opportunity to assert any affirmative defenses on those claims. Respondent simply did not have information needed to identify when timeliness would apply. Insofar as Grievant claims he was the most qualified applicant for one of these positions, this grievance is untimely.

One of the positions Grievant claims he should have been awarded, the Administrative Services

Manager position awarded to Shelley Gorby, was not awarded until after this Grievance was filed. There is no way this grievance could be construed to challenge a decision that had not yet been made, so that position has been given no consideration in this decision.

The following conclusions of law support this discussion:

Conclusions of Law

1. Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95- DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

4. The preclusion doctrine of *res judicata* may be applied by an administrative law judge to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." *Vance v. Jefferson County Bd. of Educ.,* Docket No. 03-19-018 (May 27, 2003); *Liller v. W. Va. Human Rights Comm'n,* 376 S.E.2d 639, 646 (W. Va. 1988); *Hunting v. Lincoln County Brd. of Educ.*, Docket No. 01-22-629 (Apr. 16, 2002). *See Boyer v. Wood County Bd. of Educ.*, Docket No. 95-54-309 (Sept. 29, 1995); *Peters v. Raleigh County Bd. of Educ.*, Docket No. 95-41-035 (Mar. 15, 1995).

3. Grievant's claims related to his demotion to Inspector 2 have been fully litigated and their assertion now is precluded by *res judicata*.

4. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d).

5. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

6. Grievant has not met his burden of proving he has been the victim of discrimination.

7. West Virginia Code § 29-6A-3(a)(2) provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing." In cases involving state employees where there is no Level II hearing, the timeliness defense must be raised at or before the Level III hearing." *Wade v. Div. of Labor*, Docket No. 00-DOL-164 (Feb. 2, 2001) (citing *Greathouse v. Dep't of Transp*., Docket No. 99-DOH-413 (Aug. 21, 2000)).

8. Grievant's claims he should have been selected for various positions are precluded because they were untimely, despite the fact that Respondent first asserted untimeliness at level three, because he had not clearly stated those claims before that time.

For the foregoing reasons, this grievance is hereby **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, and such appeal must be filed within thirty 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.

February 16, 2007

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

See Reese v. W. Va. DOT, Div. of Highways, 217 W. Va. 428, 618 S.E.2d 437 (2005), affirming the Grievance Board's decision in Antolini, et al., v. Dep't of Transp., Docket No. 01-DOH-471 (Aug. 20, 2002), holding the demotions of Grievant and others were legal.

Footnote: 2

38 U.S.C. 4212.

Footnote: 3

See Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

Footnote: 4

The Board of Education of the County of Tyler v. White, 216 W. Va. 242 , 605 S.E.2d 814 (2004).

Footnote: 5

W. Va. Code § 29-6A-2(d).

Footnote: 6

White, supra.

Footnote: 7

See Fine v. Dep't of Transp./Div. of Highways, Docket No. 99-DOH-259 (Feb. 1, 2000). Interestingly, the level three decision denies Grievant's affirmative action claim on the basis that he could not provide authority defining "affirmative action," using language lifted verbatim from dicta in Fine.

Footnote: 8

See The Stanford Encyclopedia of Philosophy, Affirmative Action, Mar 4, 2005. Accessed online at http://plato.stanford.edu/entries/affirmative-action/.

Footnote: 9

Mann v Dep't. of Highways Docket No. 04-DOH-297 (Dec. 21, 2004).

Footnote: 10

Vance v. Jefferson County Bd. of Educ., Docket No. 03-19-018 (May 27, 2003).

Footnote: 11

Wade v. Div. of Labor, Docket No. 00-DOL-164 (Feb. 2, 2001).