THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

BILLY PARSLEY,

Grievant,

v.

Docket No. 07-DOH-342

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Billy Parsley, filed this grievance on May 7, 2007, against his employer, the West Virginia Department of Transportation/Division of Highways ("DOH") in which he alleges:

> On 4-9-07 I recieved [sic] a letter from Jeff Black (Human Resources Div.) stating that as a result of WV Education & State Employee's Grievance Board's Decision in the matter of Joe Vance vs. WV DOH I would be demoted from TW3 at 10.70 to TW2 at 10.19 effective 5-1-07 I respectfully appeal this Decision.
>
> Relief sought: To be placed back in the TW3 position at 10.70 per hour and back paid for every day I was taken out. To be made whole in every way.

The grievance was denied at the lower levels of the grievance process, and a level four hearing was held in the Grievance Board's Charleston office on January 4, 2008. This matter became mature for decision on February 4, 2008, the deadline for the parties' submission of proposed findings of fact and conclusions of law. (See footnote 1) Grievant appeared pro se; DOH was represented by Barbara L. Baxter, Esq.

Synopsis

___Grievant has been employed as a Transportation Worker 2 with the DOH since August of 2000. In February of 2006, a Transportation Worker 3 _ Equipment Operator position was posted in Mingo County. Grievant made a successful application for that position over another applicant, Joseph Vance. Subsequently, Mr. Vance grieved his non- selection for that position. The Grievance Board ruled that the selection of Grievant for the position was arbitrary and capricious, and was clearly wrong. As a result of this Grievance Board decision, Grievant was demoted. Grievant asserts DOH had a duty to notify him of that proceeding in order that he could have intervened. Grievant now seeks to appeal the *Vance* decision through this grievance.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Facts.

Findings of Fact

1. Grievant has been employed as a Transportation Worker 2 with DOH since August of 2000.

2. In February of 2006, a Transportation Worker 3 _ Equipment Operator position was posted in Mingo County.

3. Grievant made a successful application for that position over another applicant, Joseph Vance. Subsequently, Mr. Vance grieved his non-selection for that position.

4. The Grievance Board ruled in *Vance v. W. Va. Div. of Highways*, Docket No. 06-DOH-418 (Jan. 24, 2007) ("*Vance*") that the selection of Grievant for the position was arbitrary and capricious, due to the consideration of improper factors, and clearly wrong.

5. By letter dated April 9, 2007, Grievant was notified that due to the GrievanceBoard ruling in *Vance*, and Section 11.4 of the West Virginia Division of Personnel's Administrative Rule, the Grievant was being demoted to Transportation Worker 2.

6. Grievant asserts that DOH had a mandatory responsibility to notify him of the grievance of Joseph Vance in order that he could have intervened. In addition, Grievant asserts he is more qualified than Mr. Vance for the position of Transportation Worker 3.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears 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 footnote 2) *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).

Because no legal arguments have been filed in this grievance at any level by Grievant, the exact nature of his argument is unclear. However, it is apparent that Grievant believes that, because the *Vance* ruling resulted in his demotion, he should have been puton notice of that grievance in order to intervene. DOH argues that no law, rule, or regulation provides that the agency had a duty or responsibility to notify Grievant that he might wish to intervene in the *Vance* grievance.

The Grievance Board's Procedural Rules, 156 C.S.R 1, effective December 4, 2004, at section 3.5 provides that:

> Upon 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 party to 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. Employers are encouraged to give notice to employees who could be substantially and adversely affected by the decision in a pending grievance that such employees may make a written request to intervene. An employee who intervenes in a grievance proceeding may make affirmative claims for relief in matters related to the grievance, as well as assert defensive claims, and may appeal to circuit court like any other party. (See footnote 3)

Employers are encouraged to give notice to employees who could be substantially and adversely affected by the decision in a pending grievance, but there is no mandatory requirement to do so. No timely request was made to intervene, and Grievant is now making a collateral attack on the *Vance* decision. (See footnote 4) If Grievant is permitted to challenge the *Vance* ruling in this proceeding, and he prevails, why should Mr. Vance, who likewise failed to intervene in this matter, not be allowed to make a collateral attack on this decision? Theobvious answer is that this would permit the parties to engage in endless rounds of litigation.

The case of *Epling v. Boone County Bd. of Educ.*, Docket No. 89-03-562 (Feb. 28, 1990), addressed legal issues in an education context which are similar to those of the instant grievance. The Grievant, Janet Epling, applied for, and was awarded a Secretary II position at Ashford - Rumble School. She was asked by the Boone County Board of Education to delay taking her post for a few months, which she did. Meanwhile, Carol Courtney, an unsuccessful candidate for the same job, filed

a grievance, challenging Epling's selection. Courtney was successful when it was determined that she was currently holding the position, that it was not vacant and should not have been posted. As a result of this grievance procedure, Epling was displaced by Courtney. Epling did not intervene in the Courtney grievance, and instead, filed her own grievance challenging the decision of the Grievance Board. The grievance was denied. The ALJ in *Epling* held that, “an employee who is selected for a position but whose appointment is rescinded due to a county board of education's ruling in a grievance to which he is not a party or intervenor, and to which he has not sought to become either, despite awareness of that grievance and its substance, has no remedy at a higher level of the education employee's grievance procedure.”

As this Grievance Board has previously ruled, a subsequent, collateral attack on a prior grievance decision will not be allowed, as it does not meet the need for finality in the law. *Webster v. Wayne County Bd. of Educ.*, Docket No. 96-50-119 (Nov. 27, 1996); *Epling*, *supra*. The Undersigned Administrative Law Judge has no authority to reconsider,or overrule a decision of another Administrative Law Judge at level four involving the same matter. *Clay v. Mingo County Bd. of Educ.*, Docket No. 95-29-208 (Aug. 30, 1995); *Dalton v. Mercer County Bd. of Educ.*, Docket No. 96-27-044 (July 29, 1996).

Consistent with the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears 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 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 subsequent, collateral attack on a prior grievance decision will not be allowed, as it does not meet the need for finality in the law. *Webster v. Wayne County Bd. of Educ.*, Docket No. 96-50-119 (Nov. 27, 1996); *Epling v. Boone County Bd. of Educ.*, Docket No. 89-03-562 (Feb. 28, 1990).

3. Grievant failed to timely request to intervene in the *Vance* grievance, and cannot collaterally attack that decision with the filing of the instant grievance.

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, *See Footnote 2, supra)*. Neither the West Public Employees Grievance Boardnor 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: March 14, 2008

_____

Ronald L. Reece

Administrative Law Judge

Footnote: 1

Grievant did not submit these proposals.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, 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, which continue to control the proceedings in this case.

Footnote: 3

The Grievance Board adopted new Procedural Rules effective December 27, 2007. § 156-1-4.5 of the new rules provides the same language for the intervention procedure.

Footnote: 4

At level four, Grievant attempted to prove that he possessed more experience then Mr. Vance in running the three pieces of equipment which are used in Mingo County, which include a backhoe, tracker excavator, and grader. By doing so, Grievant attempted to re- litigate the central issues concerning selection factors discussed in the Vance grievance.