THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

FRANK DICKEY and CHARLES LOCKHART,
Grievants,

v. **Docket No. 2008-1820-CONS**

DIVISION OF LABOR,
Respondent.

DECISION

Grievants Dickey and Lockhart filed this grievance on May 14, 2008, in which they allege a functional demotion. As relief, they seek to be returned to full classification. Grievant Lockhart's grievance was denied at level one on June 6, 2008. Grievant Dickey's grievance was denied on June 16, 2008. The grievances were consolidated by Order entered on July 1, 2008, and an unsuccessful level two mediation session was conducted on July 8, 2008. The grievance was then appealed to level three on July 11, 2008. The Division of Labor ("DOL") filed a Motion to Dismiss on September 8, 2008, which was taken under advisement by the undersigned at the level three hearing conducted at the Board's Charleston office on September 10, 2008. Grievants appeared by Gordon Simmons, Steward, UE Local 170. Respondent appeared by Elizabeth G. Farber, Assistant Attorney General. This matter became mature for consideration following the receipt of the last of the parties' proposed findings of fact and conclusions of law on October 31, 2008.

Synopsis

Grievants are employed as Labor Inspectors 2 in the DOL's Wage and Hour Section. In April 2007, Commissioner David W. Mullins proposed a restructuring plan that

reduced the assigned areas of responsibilities for all Labor Inspectors. The reason for the change in assigned responsibilities was the DOL's need to better manage staff resources to fully implement the undocumented worker program, to conduct more contractor licensing investigations, and to reduce the amount of time it took to respond to and investigate requests for assistance. Grievants assert this reduction of duties and responsibility without a salary reduction, which may impact their ability to obtain future job advancement, amounts to a functional demotion. DOL argues that Grievants have not demonstrated that they were functionally demoted. In addition, DOL argues this grievance was not timely filed at level one. For reasons more fully set out below, this grievance is denied.

After a thorough review of the entire record, the undersigned Administrative Law Judge makes the following findings of fact:

Findings of Fact

1. The Grievants are employed as Labor Inspectors 2 (also known as compliance officers) in the DOL's Wage and Hour Section.

2. Prior to September 1, 2007, the areas of responsibility of all 16 employees employed as Labor Inspectors in the Wage and Hour Section included wage payment and collection field investigations, prevailing wage field investigations, wage bond field investigations, undocumented worker field investigations, child labor field investigations, crane field investigations, Jobs Act field investigations, minimum wage/maximum hour field investigations, and contractor licensing field investigations.

3. Due to the increasing number of statutory responsibilities assigned to compliance officers, and a decrease in the number of compliance officers, there was a substantial backlog in the number of open cases. Cases frequently took several years to

complete, there was a substantial drop in the number of contractor licensing investigations, and there was a substantial drop in the number of wage bond investigations and updates.

4. In April 2007, Commissioner Mullins and Deputy Commissioner Fran Cook proposed a plan to restructure staff responsibilities to Department of Commerce Secretary Kelley Goes. Secretary Goes approved the plan as written.

5. The plan separated the assigned areas of responsibility so that some compliance officers would be primarily conducting wage payment and collection, prevailing wage, wage bond, child labor, crane certification, Jobs Act, undocumented worker and minimum wage/maximum hour field investigations and some would be primarily conducting contractor licensing field investigations.

6. On August 21, 2007, Commissioner Mullins met with all wage and hour compliance officers to inform them of the plan to restructure the compliance officers' areas of assigned responsibilities beginning September 1, 2007.

7. The restructuring plan affected all 16 compliance officers.

8. Grievants were among the compliance officers that were assigned primarily to conduct wage payment and collection, prevailing wage, wage bond, child labor, crane certification, Jobs Act, undocumented worker and minimum wage/maximum hour field investigations.

9. The reasons for the changes in assigned responsibilities were the Division's need to better manage staff resources in order to respond to the Governor's emphasis on fully implementing the undocumented worker program, to conduct more contractor licensing investigations, and to reduce the amount of time it took to respond to and investigate requests for assistance.

10. Grievants' primary responsibilities as compliance officers continue to include wage payment and collection, prevailing wage, wage bond, child labor, crane certification, Jobs Act, undocumented worker and minimum wage/maximum hour field investigations. Grievants also conduct contractor licensing field investigations and sweeps as assigned or when encountered in the course of their workday.

11. The only difference in Grievants' assigned responsibilities after September 1, 2007, was that they would no longer be primarily responsible for conducting contractor licensing field investigations. All of Grievants' other assigned responsibilities remained the same as those before September 1, 2007.

12. Although no longer primarily responsible for conducting contractor licensing field investigations, Grievant Dickey reported that during the fiscal year July 1, 2007 through June 30, 2008, he conducted 81 contractor licensing field investigations, in addition to 12 prevailing wage investigations, 23 undocumented worker field investigations, 34 wage payment and collection field investigations, 69 wage bond field investigations, and 1 crane field investigation. These numbers resulted in 36% of all field investigations reported by Grievant Dickey being contractor licensing field investigations.

13. The same can be said for Grievant Lockhart. He reported that during the fiscal year July 1, 2007 through June 30, 2008, he conducted 71 contractor licensing field investigations, in addition to 17 prevailing wage field investigations, 96 undocumented worker field investigations, 25 wage payment and collection field investigations, 96 undocumented worker field investigations, 25 wage payment and collection field investigations, and 53 wage bond field investigations. These numbers resulted in 27% of

all field investigations reported by Grievant Lockhart being contractor licensing field investigations.

14. Grievants have not alleged that they are working outside of their classification. Grievants' pay did not change after the restructuring.

15. As a result of the restructuring, 80% of the backlog of open cases have been closed; most new cases are resolved within 6 to 9 months; there has been a dramatic increase in the number of contractor licensing investigations; and there has been progress in updating businesses' wage bonds.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id*.

Grievants assert a functional demotion as related to a change in job duties. DOL counters that Grievants have not met their burden of proving a functional demotion. In addition, DOL asserted the defense of timeliness at level one. DOL continues to maintain at level three that the grievance was not timely filed. Commissioner Mullins denied Grievant Lockhart's grievance on the basis of it being untimely filed at level one. Likewise,

Commissioner Mullins denied Grievant Dickey's grievance on the basis of it being untimely filed at level one. Taking into consideration that Grievants raise only one allegation in this grievance, and in consideration of the level one ruling, the undersigned will first consider the merits of this grievance.

It has been recognized by this Grievance Board that a "functional demotion" may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. *Gillespie v. W. Va. Dep't of Corrections*, 89-CORR-105 (Aug. 29, 1989); *Dudley v. Bureau of Senior Services*, Docket No. 01-BSS-092 (July 16, 2001). Grievants contend that there has been an erosion of their responsibilities in conducting contractors' licensing investigations, citing the restructuring of the DOL's Wage and Hour Section.

As the above findings of fact demonstrate, DOL has provided reasonable explanations for all of the reassignments which have taken place. Overall, it is apparent that many of the changes have occurred because Commissioner Mullins wanted to address the substantial backlog in the number of open cases; the substantial drop in the number of contracting licensing investigations; and the substantial drop in the number of wage bond investigations. Grievants have failed to prove that these changes were directed at them personally, and it appears that Commissioner Mullins made changes throughout the agency, affecting many people.

Grievants' evidence consisted of vague hearsay from unnamed sources that their employment future had been adversely affected by the changes in work priorities which were made in September 2007. Grievants contend that they have been functionally

demoted because they allege that part of their job was taken away; that they have heard rumor that their positions were substantially funded through revenue generated by the contractor licensing program; and that since they were no longer primarily assigned to conduct contractor licensing investigations, they believe they could be laid off. With this in mind, it is understandable that Grievants are concerned and frustrated.

However, the evidence offered at level three and the reports Grievants submit to the DOL documenting their work activities, establishes that Grievants continue to perform the kinds of work contemplated by the Labor Inspector 2 classification. Rep. Ex. 3. Although their work priorities may have changed, their level of responsibility and salaries have remained the same. In fact, contrary to their assertions at level three, the evidence established that Grievants continue to spend up to 1/3 of their time conducting field investigations which were contractor licensing investigations.

The DOL presented reasonable explanations in support of its management decision to separate and prioritize the responsibilities of the wage and hour compliance officers. The Commissioner of the DOL is expressly provided "the power, duty, jurisdiction and authority to employ, promote and remove deputies, inspectors, clerks, and other assistants, as needed, and to fix their compensation, with regard to existing laws applicable to the employment and compensation of officers and employees of the State of West Virginia, and to assign to them their duties; to make or cause to be made all necessary inspections, to see that all laws and lawful orders which the department has the duty, power, and authority to enforce, are promptly and effectively carried out." W. VA. CODE § 21-1-3.

Grievants have not proven that a "functional demotion" has occurred. There is no evidence which would establish that Grievants' future, financially or advancement-related,

has been adversely impacted by the changes which have been made during the last year at the DOL. Grievants have not claimed they are working out of their assigned job classification or that their classification has been changed in any way.

The DOL has asserted since the beginning of this grievance that it was not filed in a timely manner because Grievants were informed of the restructuring of their job responsibilities on August 21, 2007, to take effect on September 1, 2007.[1] Grievants do not dispute these dates. Grievants contend that their grievances were timely filed because the restructuring is a continuing practice. The undersigned disagrees.

The current grievance involves a single act that occurred in September 2007. As discussed in *Blethen v. Dep't of Tax & Revenue*, Docket No. 03-T&R-416R (Sept. 6, 2005), "continuing 'damage' flowing from a past decision of the employer" is separate and distinct from a "continuing practice" as set forth in the grievance statute. In that case, this Grievance Board held that the employer's decision to place a particular job classification in a particular pay grade, while continuing to affect grievants' salaries, was "a salary determination that was made in the past, a discrete event with lasting effects," which did not constitute a continuing practice. In this grievance, DOL does not make a new decision every work day or on a continuing basis to restructure Grievants' work priorities. Grievants do not dispute that they were aware of the change in job priorities on September 1, 2007. That date is the grievable event that triggers the fifteen-day filing period. As noted above,

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[1]Employees must file a grievance "within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance." W. VA. CODE § 6C-2-4(a)(1).

Grievants did not file this grievance until May 14, 2008. Accordingly, this grievance was not timely filed at level one.

The following conclusions of law support the Decision reached:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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. It has been recognized by this Grievance Board that a "functional demotion" may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. *Gillespie v. W. Va. Dep't of Corrections*, 89-CORR-105 (Aug. 29, 1989); *Dudley v. Bureau of Senior Services*, Docket No. 01-BSS-092 (July 16, 2001).

3. Grievants have failed to prove by a preponderance of the evidence that they have been subjected to a functional demotion.

4. The evidence in this case does not show that the restructuring decisions made by the DOL were unreasonable, or contrary to law or policy.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA.

CODE § 6C-2-5. Neither the West Virginia Public 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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: January 21, 2009

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Ronald L. Reece
Administrative Law Judge