THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TERRY LOGSDON,
Grievant,

v. **DOCKET NO. 2008-1159-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

Terry Logsdon ("Grievant") initiated this proceeding on February 1, 2008, challenging a new reallocation policy adopted by the West Virginia Division of Personnel ("DOP").[1] The parties waived the lower levels of the grievance procedure, as allowed by West Virginia Code § 6C-2-4(a)(4). A level three hearing was held at the Grievance Board's office in Westover, West Virginia, on October 23, 2008, before Administrative Law Judge Brenda L. Gould. Grievant represented himself, and Respondent was represented by counsel, Robert Miller. Fact/law proposals were to be filed by December 5, 2008.[2] In order to expedite the level three decision in this matter, this grievance was reassigned to the undersigned administrative law judge on February 9, 2009.

---

[1]It would appear that, because it was a DOP policy that was challenged, DOP should likely have been joined in this grievance as a necessary party. However, due to the finding that this grievance is premature, the relief is speculative, and the same policy was challenged in a similar grievance in which DOP participated, the undersigned finds that the error does not affect the outcome of the grievance.

[2]Grievant did not file a submission, and Respondent submitted what would have to be characterized as a poorly-timed Motion to Dismiss, in lieu of proposed findings of fact and conclusions of law.

Synopsis

Grievant challenges a new reallocation procedure adopted by the Division of Personnel in 2007, whereby, instead of additional job duties being assigned to an employee who applies for reallocation, the new job duties have to first be posted. He contends that this will only delay the process for reallocation of employees who advance from one level to the next in his job series, the Transportation Engineering Technician classifications.

Grievant will not be eligible for reallocation to the next level in the series until he obtains more years of experience and more training hours, so this grievance is premature. Moreover, Grievant's request to have the technician series of job classes exempted from the new reallocation procedure had no basis, and the new procedure does not violate any law, policy, rule or agreement. The grievance is denied.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") in the construction division of District 6 in the resurfacing section. His primary job is to serve as a resurfacing inspector, and his current classification title is Transportation Engineering Technician – Associate.

2. The Transportation Engineering Technician job series is divided into several classifications, and employees become eligible to advance to each of the higher levels as they complete certification programs and gain experience, receiving a higher salary at each level. Employees serving in these positions begin as a Transportation Engineering Technician Trainee ("Trainee"), obtaining development training hours while working, along

with being required to enroll in a certification program offered at Fairmont State University. After gaining sufficient work experience and completing the Fairmont State program, employees can be reallocated to the Transportation Engineering Technician – Associate ("Associate" or "level 2") classification and perform intermediate level duties under general supervision, while still obtaining training hours. The highest level in the series is Transportation Engineering Technician ("level 3"), and these employees have completed all training and experience requirements and supervise projects and the lower classifications of technicians.

3. Prior to July of 2007, employees in the technician series who completed the qualifications for the next higher level classification would submit a position description form ("PDF"), along with a "green form" application to DOP with a request for reallocation. This process normally took approximately three months, and, if all requirements had been met, the employee was reallocated and assigned job duties encompassed by the new classification.

4. Effective July 1, 2007, DOP amended its Administrative Rule, 143 CSR 1, to require that any new duties to be assigned to an employee must be posted as a new position, along with a PDF for the new duties, and the posting must be placed in the work location where the duties will be performed. Therefore, employees could no longer be reallocated until after their proposed new duties had been posted. Once posted for ten days and an employee has been selected, a PDF would be submitted to DOP, which would determine if reallocation was appropriate. This information was explained in a document entitled "Posting Procedure for New Duties or Positions to Be Filled by Reallocation," dated October 25, 2007.

5. On January 22, 2008, Jeff Black, DOH Director of Human Resources, sent a memorandum to all administrators, explaining the new process whereby, prior to reallocation of an employee, proposed new duties would have to be posted.

6. The DOP document explaining the new process also included an additional sheet which listed classifications exempt from the reallocation posting requirement. In the technician series, the only exemption was for reallocation from Trainee to level 2 (Associate).

7. Grievant will not be eligible to apply for reallocation to become a level 3 technician until he has acquired two more years of experience and 60 more hours of training.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

Grievant believes that, because of the newly-added posting requirement prior to reallocation, the process for moving into the next higher technician classification will be

unnecessarily delayed. Although he is not even eligible to apply for reallocation at this time, because he has not completed the experience and training requirements to become a level 3, he argues that employees who were already enrolled in the program should be "grandfathered" and exempted from DOP's posting requirement. Respondent argues, in its motion to dismiss, that this grievance is premature.

Grievant is essentially challenging an administrative regulation that DOP has adopted, which all state agencies in the classified service are required to implement. The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by State Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Moore v. W. Va. Dep't of Health and HumanRes./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). *See Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980). The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of DOP. *Moore, supra*. Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. *See Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989).

The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*,

210 W. Va. 105; 556 S.E.2d 72 (2001)*(citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Grievant has cited no specific authority for the premise that his job series should be exempted from the posting requirement adopted by DOP. The new reallocation process was recently challenged by other DOH employees in *Vanderlaan v. Department of Transportation*, Docket No. 2008-0868-CONS (Feb. 13, 2009), where it was held that the new reallocation process did not constitute "a violation, a misapplication or a misinterpretation of any statute, rule, policy or written agreement, which would constitute a grievable event under W. VA. CODE § 6C-2-2(I)(1)." In addition, it was determined that the additional delay in the reallocation process was not arbitrary and capricious.

Although it is somewhat perplexing that Respondent filed a motion to dismiss after this case had been heard on the merits, the point made in that motion is well taken. Grievant will not be eligible for reallocation to level 3 for approximately two more years, so he has not actually suffered any harm as a result of the reallocation process at this time. It is necessary for a grievant to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe*

v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, Grievant is without standing to pursue this grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990). In addition, "[w]hen the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Lyons, supra*; *See Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (April 30, 1998). Accordingly, Grievant has failed to establish any entitlement to the relief requested in this case.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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. The rules promulgated by State Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Moore v. W. Va. Dep't of Health and HumanRes./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). *See Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980).

3. The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute

its judgment in place of DOP. *Moore, supra*. Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. *See Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989).

4. "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

5. Grievant has failed to prove that the new reallocation process adopted by DOP constituted a violation, a misapplication or a misinterpretation of any statute, rule, policy or written agreement, which would constitute a grievable event under W. VA. CODE § 6C-2-2(l)(1).

6. The reallocation process for new job duties adopted by DOP was not arbitrary and capricious or an abuse of that agency's discretion.

7. Without some allegation of personal injury, Grievant is without standing to pursue this grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990).

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 W. Va. 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: February 23, 2009

DENISE M. SPATAFORE
Administrative Law Judge