WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KEITH BURDETTE, JR., et al.,

Grievants,

v. **Docket No. 2012-0709-CONS**

GENERAL SERVICES DIVISION,

Respondent.

DECISION

Grievants, Keith Burdette, James DeBolt, Jeff Harbour, Terry Parsons, and Leonard Spence, each filed separate grievances against their employer, Respondent, General Services Division, on January 4, 2012, stating as follows: "[f]ailure to follow established bidding procedures, set up and agreed upon grievance procedures." As relief sought, Grievants seek only "[t]o be made whole."

The grievances were consolidated at level one by Order entered January 11, 2012. A level one hearing was conducted on April 18, 2012.[1] The decision denying the grievance at level one was issued on April 30, 2012, by Director, David M. Oliverio. Grievants appealed to level two on April 30, 2012. A level two mediation was conducted on August 29, 2012. Grievants perfected their appeal to level three on September 5, 2012. A level three hearing was conducted by the undersigned administrative law judge on January 11, 2013, at the Grievance Board's Charleston, West Virginia, office. Grievant Terry Parsons appeared in person, and with Grievants' representatives, Gordon Simmons, UE Local 170, West Virginia Public Workers Union

[1] The hearing at level one was cut short by Director David Oliverio, who was serving as the grievance evaluator. Director Oliverio and Charles Adkins, Grievants' representative, became involved in a verbal dispute which ended with Director Oliverio removing Mr. Adkins from the room and stopping the hearing. *See,* level one transcript. As such, little of the record was developed at level one.

and Charles Adkins.[2] Respondent appeared by counsel, Stacy L. Nowicki, Esquire, Assistant Attorney General. This decision became mature upon receipt of the last of the parties' proposed Findings and Fact and Conclusions of Law on February 22, 2013.

Synopsis

Grievants are employed by General Services Division. In 2007, the Director of General Services instituted a policy allowing employees to bid on the shifts they wished to work. The Director amended the policy in 2010 and then rescinded it in December 2011. Grievants filed this grievance contesting the rescission of the policy, asserting that the Director had no authority to rescind the policy, and that a 2010 settlement agreement also prohibited its rescission. Respondent denies Grievants' claims and contends that the Director had the authority to rescind the policy and that he violated no rules, laws, or policies in doing so. Grievants failed to prove their claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievants are each employed by Respondent, General Services Division, as Facilities Equipment Maintenance Technicians ("FEMT"). Grievants are assigned to work at the Capitol Complex in Charleston, West Virginia.

2. At the times relevant herein, David Oliverio was the Director of General Services.

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[2] Grievant Parsons was the only one of the Grievants to appear at the level three hearing. The other Grievants remain in the case. It is noted that Grievant Parsons appeared as the spokesperson for the Grievants at level one.

3. On January 4, 2007, Director Oliverio instituted a shift bid policy that allowed employees to bid on which shifts they wanted to work based upon seniority. Director Oliverio modified this policy on January 29, 2010.

4. Following the January 2010 modification of the policy, Grievant Parsons and others filed grievances on February 2, 2010, alleging that Respondent had failed to rebid the shifts as the policy required.

5. On September 9, 2010, those Grievants and Respondent, by Director Oliverio, entered into a settlement agreement to resolve that grievance which stated that Respondent "shall conduct the 'shift bid' process for all Facilities Equipment Maintenance Technician bid positions so that the implementation date for all awarded positions will be the first Saturday in March of each year."[3]

6. By memorandum dated December 20, 2011, Director Oliverio discontinued the shift bid policy effective January 14, 2012. *See,* Joint Exhibit 4.

Discussion

As this is not a disciplinary matter, Grievants bear the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89 DHS-72 (Nov. 29, 1990). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. Of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact

[3] *See,* Joint Exhibit 3.

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 supports both sides equally, the Grievant has not met his burden. *Id.*

Grievants argue that Director Oliverio had no authority, from either the Division of Personnel or the Secretary of the Department of Administration, to discontinue the shift bid policy. Grievants also assert that a September 9, 2010, settlement agreement prohibited Director Oliverio from discontinuing the policy because such required the Respondent to ". . .conduct the 'shift bid' process for all Facilities Equipment Maintenance Technician bid positions so that the implementation date for all awarded positions will be the first Saturday in March of *each year*." (Emphasis added). Respondent asserts that Director Oliverio had the authority to discontinue the policy, just as he had the authority to institute it, and that the language of the settlement agreement did not prohibit its discontinuance.

There has been no evidence presented to suggest that the Division of Personnel ("DOP") is required to approve all agency policies, such as the one at issue, before they are enacted. However, in support of their position that Director Oliverio had no authority to modify or rescind the shift bid policy without the approval of DOP, Grievants cite the language of DOP-P8, stating that "[d]eviations from published policies are generally prohibited. Exceptions, as specifically provided within certain policies, must have prior written approval of the Director of Personnel." Grievants also cite *Bailey, et al., v. West Virginia Department of Health and Human Resources*, Docket No. 2011-0342-CONS, for this position. It is noted that pursuant to the Division of Personnel's website, DOP-

P8 was rescinded on March 15, 2012, and the policy was not offered into evidence at the level three hearing in this matter.

The issue in this matter differs from that of the *Bailey* grievance. In *Bailey*, the employer sought to enact stricter smoking restrictions than those already set by a DOP policy. As explained in the *Bailey* decision, DOP-P8 required that the employer receive approval from the Director of Personnel before enacting such. However, the employer failed to do so. This is not the situation presented in the instant grievance. It has not been asserted by either party that there is an established, separate DOP shift bid policy. Therefore, DOP-P8 does not apply in this situation, and Director Oliverio was not required to receive the approval of DOP before rescinding the shift bid policy.

Grievants next argue that Director Oliverio had no authority as "Director" to rescind the policy. WEST VIRGINIA CODE § 5F-2-2 empowers the secretary of each department of state government to "cause the various agencies and boards to be operated effectively, efficiently and economically and develop goals, objectives, policies and plans that are necessary or desirable for the effective, efficient and economical operation of the department . . . ." W. VA. CODE § 5F-2-2(a)(2). Further, the secretary may "delegate, assign, transfer or combine responsibilities or duties to or among employees, other than administrators or board members. . . ." W. VA. CODE § 5F-2-2(a)(5). Respondent asserts that Director Oliverio was delegated the authority to institute, as well as rescind, the shift bid policy by former DOA Secretary Robert Ferguson.[4] Grievants argue that Respondent presented no evidence "corroborating" Oliverio's testimony that he was delegated such authority. However, Respondent is not required to present "corroborating" evidence. In this case, the burden of proof is on the

[4] *See,* testimony of David Oliverio.

Grievants, and they chose not to cross examine Director Oliverio at the level three hearing. Grievants offered no evidence to dispute Director Oliverio's claims that he was delegated such authority. It is noted that no one seems to dispute that Director Oliverio had the authority to institute the shift bid policy as Grievants are seeking to have it reinstituted. If Director Oliverio had the authority to institute the policy, it certainly stands to reason that he had the authority to rescind it.

Further, the 2010 settlement agreement does not prohibit Director Oliverio from rescinding the shift bid policy. Even though the agreement states that ". . . the implementation date for all awarded positions will be the first Saturday in March of each year," the settlement agreement in no way states or implies that the parties thereto were agreeing that the shift bid policy would remain in effect forever. Further, the undersigned doubts that the parties to the settlement agreement would have had the authority to so bind the State to such an agreement even if they had intended to do so. From a review of the evidence presented, it appears that the March timetable noted in the settlement agreement was intended to apply so long as the policy was in effect. None of the evidence presented suggests that this settlement agreement was intended to restrict, or override, the power or authority granted by WEST VIRGINIA CODE § 5F-2-2 to the Secretary, or his delegate.

Accordingly, Grievants have failed to prove by a preponderance of the evidence that Mr. Oliverio violated the applicable laws, rules, and procedures in discontinuing the shift bid policy.

The following Conclusions of Law support the decision reached:

Conclusions of Law

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

2. The secretary of each department of state government shall have the power and authority to "cause the various agencies and boards to be operated effectively, efficiently and economically and develop goals, objectives, policies and plans that are necessary or desirable for the effective, efficient and economical operation of the department . . . ." W. VA. CODE § 5F-2-2(a)(2).

3. A secretary may "delegate, assign, transfer or combine responsibilities or duties to or among employees, other than administrators or board members. . . ." W. VA. CODE § 5F-2-2(a)(5).

4. Grievants have failed to prove by a preponderance of the evidence that Mr. Oliverio violated the applicable laws, rules, and procedures in discontinuing the shift bid 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 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 (eff. July 7, 2008).

DATE: July 31, 2013.

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Carrie H. LeFevre
Administrative Law Judge