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WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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DANIEL VIRDEN

v. Docket No. 89-DOH-037

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

D E C I S I O N

Grievant Daniel Virden has been employed by respondent West Virginia Department of Highways for approximately three years. On January 26, 1989, he advanced this grievance to level four on the complaint that he bid on and accepted a position but did not receive the posted salary, which amounted to thirty-three cents per hour more than what he had been making. His grievance had been denied previously at levels one and two on November 17, and November 22, 1988, respectively. A level three hearing was conducted December 13, 1988, and the undated decision rendered by the three evaluators was adverse to grievant. A level four hearing was held April 11, 1989. Grievant filed proposed findings of fact and conclusions of law May 12, 1989, and respondent submitted proposals May 25, 1989.

Prior to November 1, 1988, grievant was employed as a Craftsworker I in respondent's Hancock County organization of District 6. On August 10, 1988, respondent posted a position for a Highway Equipment Operator I (operator). The posted salary ranged between $6.23 - $6.52 per hour. Grievant applied for the position. After the posting closed and interested parties were interviewed, but before a final determination was made, grievant was advised that if he was offered and accepted the bid, his salary of $5.90 per hour would remain unchanged inasmuch as the salary rate for the two positions was the same and he would be laterally transferred without wage adjustment.

At level two respondent went to some length to explain the history and implementation of its three-tier, eight-step salary scale for hourly employees and grievant did not challenge the rationale set forth. In essence, there are several of respondent's job classifications placed on the same wage rate-scale, e.g., Craftsworkers, Highway Equipment Operators and Mechanics. Each of the eight salary steps has three possible salary rates. At step one these three classifications could earn: lowest, E-entry rate, $5.61, for new hires; mid-level, P-permanent rate, $5.90, attained after the probationary period is satisfied; and highest, A-regular rate, $6.23, achieved when a promotion occurs. E level probationary employees are not permitted to bid on posted jobs; only P and A level employees may vie.

If a Laborer, a classification located at a lower wage rate-scale than craftsworker, operator and mechanic, who was earning A-regular rate wages at step one of $5.90 per hour, had

bid on and received the operator position in question, the laborer would be "promoted" to the equivalent A-regular salary rate for Operator I, $6.23. However, grievant, a craftsworker earning the P-permanent salary rate of $5.90 when he bid for the operator position, would have to laterally transfer to the operator classification at the equivalent P-permanent level rate of $5.90. Thus respondent must always consider both P and A salary ranges for position vacancies it posts. Therein lies the crux of the dispute in this matter.

In August 1988, respondent had chosen to post the higher A-regular rate rather than the lower P-permanent rate or both. The A level salary posting concept was so new that District Engineer Wayne Kaufman had to conduct a special meeting with his maintenance superintendents to explain the matter, according to Kaufman and Maintenance Superintendent Tony Orecchio, grievant's supervisor. It fell to Orecchio to explain salary matters to grievant prior to offering him the position. Orecchio stated that grievant understood the situation fully, i.e., that there would not be a pay raise, before he chose to accept the offer for the operator position.

In his level four proposals grievant seems to be making a "reliance" argument, i.e., that he relied on the posted salary and was not apprised before or during the posting period that there was the possibility of no salary enhancement should he be awarded the position. He proposes the following conclusions of law, based in part, on Civil Service Rules and Regulations:

- Section 12.01(a) states in part ". . . a vacancy will be filled by promotion . . ."

- Section 12.03(b) "If it is determined by the appointing authority to fill by non-competitive promotional examination, an employee proposed for promotion shall be examined by the Director in accordance with Section 12.02, and if found to qualify for the class will be so certified by him.

- Section 10.07(c) states in part "The posting notice shall include . . . the salary level or range that will be considered . . ."

and

- Policies and procedures are to be strictly construed in favor of the employee. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979).

- "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977), Kopp v. Harrison Co. Bd. of Educ., Docket No. 17-87-148-2 [December 11, 1987].

Respondent proposes that the following Civil Service Rules and Regulations are applicable:

1. Section 3 Definitions . . .

"Lateral class change: The movement of one employee from one class to another class in the same pay grade.

2. "Section 6.07. Pay On Lateral Class Change - Any employee who receives a lateral class change shall be paid the same salary received prior to the change. Where the rate of pay does not coincide with a step in the new range, the salary shall be adjusted to the next higher rate."

Among other things, respondent urges that it complied with Civil Service regulations in all respects in the matter of grievant's lateral class change and that it made no false representations on which grievant reasonably relied inasmuch as grievant was advised that he was not entitled to a pay raise before accepting the lateral class change.

Grievant's cited legal authority is not persuasive in this matter and does not establish his entitlement to the higher wages as a matter of law. Inasmuch as the circumstances of

lateral class change was fully explained to grievant prior to his acceptance of the Operator position, he is estopped from claiming that he relied on the posted salary and respondent cannot be held to accommodate him on the matter or consider him for "promotion" to a higher salary rate on a lateral transfer. The level three decision, while adverse to grievant, advances some pertinent and viable recommendations[1] and must be affirmed.

In addition to the foregoing narration, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievant, who earns $5.90 per hour at the permanent salary rate, bid on a position with a posted regular salary range starting at $6.23 which was applicable only for employee applicants who had attained a regular salary rate.

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[1]The "Opinion and Decision" rendered at level three, in part, is as follows:

> [T]he evaluators believe that the Department's past policy of using Level "A" for the starting salary on job postings is confusing and misleading. Apparently the Department has also realized this since the policy now reflects the use of Level "P" for job postings. The evaluators recommend continued study into further simplification of the wage schedule and more dissemination of this information to the employees.
>
> [T]he evaluators unanimously agreed that it appears [grievant] is a good employee and probably deserving of the salary increase. It also appears, however he may have had some misunderstanding of . . . Pay on Lateral Class change.

2. Respondent had varied the manner in which it posted salaries to accommodate changing Civil Service Regulations, to comply with governmental directives and to "avoid confusion" among possible applicants. The change caused more confusion.

3. Respondent explained to grievant prior to offering him the position that the position class was in the same pay grade class as he presently held and he would therefore be laterally transferred and maintain the same hourly wage he already held.

4. Grievant accepted the position with full knowledge that he would be laterally transferred with no wage enhancement and at a different salary than the posted amount.

CONCLUSIONS OF LAW

1. A grievant must prove each and every element of his grievance complaint by a preponderance of the evidence. Mann v. Div. of Voc. Rehab., Docket No. VR-88-066 (Feb. 8, 1989).

2. When respondent advised grievant that a posted salary, while not incorrect, was at least misleading, policy regulations requiring salary equivalency when an employee moves laterally from one class to another takes precedence over regulations that the salary ranges be set forth on the posting.

3. Grievant has failed to prove as a matter of law that he was entitled to a salary reconsideration when he laterally

transferred from one class to another notwithstanding the misunderstanding over salary amount.

Accordingly, this grievance is **DENIED.**

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Marshall County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: May 31, 1989

Nedra Koval

NEDRA KOVAL
Hearing Examiner