

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SUSAN WHEELER,
Grievant,

v.

Docket No. 2018-1122-DEP

**DEPARTMENT OF ENVIRONMENTAL
PROTECTION and DIVISION OF PERSONNEL,**
Respondents.

DECISION

Grievant, Susan Wheeler, is presently employed by Respondent, Department of Environmental Protection (“DEP”), in the Division of Mining and Reclamation (“DMR”). Her position is classified as an Environmental Resources Specialist 2 (“ERS 2”). Prior to taking her present position, Grievant was employed in the DEP REAP¹ program. Her position with that program was in the ERS 1 classification. Ms. Wheeler filed a Level One grievance form dated April 25, 2018, alleging that she was “Denied back pay by DOP.” As relief she listed, “to be made whole in every way including back pay with interest.”

Respondent DEP waived the grievance to Level Two and moved to join the Division of Personnel (“DOP”) on May 3, 2018. The Motion to Join was granted by an order dated May 14, 2018. Respondent DOP filed a Motion to Dismiss or In the Alternative a Motion for More Definite Statement of Grievance on June 18, 2018. A level Two mediation was held on July 10, 2018. Prior to holding the mediation, the administrative law judge held a telephone conference with the parties to discuss DOP’s motion, but no ruling was made. Grievant appealed to Level Three on July 10, 2018. Respondent DOP

¹ Rehabilitation Environmental Action Plan.

filed a second Motion to Dismiss dated, October 15, 2018. By Order dated November 8, 2018, both the Motions to Dismiss were denied, and it was noted the Grievant had provided a more detailed statement of the grievance.

A Level Three hearing was conducted on November 29, 2018, at the Charleston office of the West Virginia Public Employees Grievance Board. Grievant Wheeler appeared personally and was represented by Gordon Simmons, UE Local 170, WVPWU.² Respondent DEP was represented by Anthony D. Eates II, Deputy Attorney General and Respondent DOP was represented by Karen O'Sullivan Thornton, Senior Assistant Attorney General. This matter became mature for decision on January 16, 2019, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant challenged the DOP decision that she was not entitled to back pay when the position she previously held was reallocated from an ERS 1 to an ERS 2. Grievant did not have standing to file a grievance regarding the reallocation of the ERS 1 position because she was not in that position when the reallocation decision was made. Additionally, Grievant did not prove specific facts related to when the ERS 1 might have been reallocated rendering any award of backpay as too speculative to grant.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

² West Virginia Public Workers Union.

Findings of Fact

1. Grievant, Susan Wheeler, is presently employed by Respondent, Department of Environmental Protection (“DEP”), in the Division of Mining and Reclamation (“DMR”) as an Environmental Resources Specialist 2 (“ERS 2”). Grievant started her present position on January 20, 2018.

2. Immediately prior to starting her new position, Grievant was employed in the DEP REAP program as an ERS 1. The personnel transaction effectuating her promotion to the ERS 2 position with the DEP DMR was dated December 11, 2017.

3. Grievant began her employment in the DEP REAP program on September 1, 2015. Her immediate supervisor was Niki Davis, ERS Supervisor.

4. Shortly after Grievant started working for REAP, Pat Hickman became the new director for the program. Director Hickman made significant changes to the program organization. Over time, some of those changes included additional duties being assigned to Grievant’s position. There was no testimony to pinpoint when any particular duty was added to Grievant’s position or when any significant change occurred except that the changes occurred during Director Hickman’s tenure.

5. Grievant completed the employee section of a position description form (PDF) and turned it in to her supervisor on or around August 18, 2017. (Grievant Exhibit 3).³ The PDF is “the document which describes the officially assigned duties, responsibilities, supervisory relationships and other pertinent information relative to a position. This document is the basic source of official information in position allocation.”

³ Grievant Exhibit 3 is an e-mail exchange between Supervisor, Niki Davis, Ms. Davis’ supervisor Sandra Rogers and Grievant regarding the PDF.

W. VA. CODE ST. R. § 143-1-3.68. Grievant was submitting the PDF to apply for a reallocation of her position to the ERS 2 classification due to the addition of duties.

6. No action was taken regarding the PDF by her supervisors until December 11, 2017. Sandra Rogers explained to Grievant the reasons why no earlier action had been taken as follows:

At the time that you submitted your reclass PD, I do not believe you had your two-years' experience in to qualify.⁴ Furthermore, I do not believe we had the support under the recent former management and the situations that were occurring. Compared to now, under our current management, which we have only been since November, your reclass stands a much better chance. . .

Ms. Rogers also noted that she been carrying the duties of an employee who was fired in late August 2017, and she was dealing with the restructuring of the office since Ms. Hickman retired in mid-November. Additionally, she took a vacation and one of the supervisors was on maternity leave. (Grievant Exhibit 3)

7. As part of the e-mail string, Grievant informed her supervisors on December 15, 2017, "As of this week, I have been offered the job in DMR which I have accepted, my last day with REAP is January 19th." Grievant applied for the ERS 2 position in DMR Division on September 22, 2017.

⁴ A minimum qualification for the ERS 2 classification is, "Two years of full-time or equivalent part-time paid professional experience in the acquisition, preservation, protection and enhancement of environmental/natural resources, environmental protection or in an agency-specific area related to environmental impact." (Respondent DOP Exhibit 7, Classification Specifications for the ERS 2 classification.) Since Grievant did not start with the REAP program until September 1, 2015, it appears that Ms. Rogers had a legitimate concern about the two-year experience requirement in August 2017.

8. Grievant again filled out the employee portion of the REAP Program ERS position and signed it on December 21, 2017. Niki Davis filled out the supervisor portion of the PDF and signed it the same day as Grievant. (Respondent DOP Exhibit 1).

9. The PDF was processed through the human resource office of DEP and signed by Edward Maguire II, on behalf of the Appointing Authority on January 11, 2018. The completed PDF was received in the Classification and Compensation section of DOP on January 18, 2018.⁵ The PDF application indicated that it was for a “vacant” position. *Id.*

10. The only additional job duties identified by Grievant and Ms. Davis were: 1. Liaison for the AppXtender and, 2. Monitoring for compliance of the Covered Electronic Devices Recycling grant program and the manufacturer registration and takeback program. Grievant did not permanently assume the second duty until December 15, 2017, shortly before she left the program.

11. Wendy Campbell, DOP Assistant Director for Classification and Compensation approved the REAP Program ERS position for a reallocation to the ERS 2 classification on February 9, 2018. *Id.* The DEP Human Resources office was informed of the classification determination by email from the DOP dated February 12, 2018, with instructions to proceed with the process of posting the position. (Respondent DOP Exhibit 3).

12. Assistant Director Campbell based the reallocation to an EPA 2 position because it appeared that the position had emerged to a full performance role in terms of

⁵ Grievant assumed her duties in the DEP/DMR the next day. She had accepted the position in December 2017.

the duties and authority of the position from a more assist role when it was first filled. She specifically determined that the additional duties listed fell within the ERS 1 classification and would not have triggered a reallocation. There was no testimony regarding when this shift to the full performance took place.

13. Sometime after the reallocation of the REAP position was approved for reallocation on February 12, 2018, Grievant asked Niki Davis if she could get back pay for the time she served in the REAP position which was now reallocated to an ERS 2. Ms. Davis and Ed Maguire, Environmental Advocate, sent a memorandum dated March 8, 2018, to DEP HR Director, Chad Bailey requesting that Grievant be paid back pay for the time she held the ERS position until she left it to take the position in the DMR. (Grievant Exhibit 1).

14. By email dated April 25, 2018, HR Director Bailey informed Grievant that the DOP had denied the agency's request for back pay on her behalf. Ms. Wheeler filed a Level One grievance form dated the same day.

15. When an agency seeks to post a position, it must first receive a classification determination for the position by the DOP. This is usually accomplished by submitting a PDF for the position. It is not unusual for an agency to submit the PDF prior to the departure of the employee holding the position so the posting of the position is not unnecessarily delayed.⁶ DEP submitted a PDF for the "vacant" position which Grievant was leaving for the DEP/DMR position. (Respondent Exhibit 1).

⁶ Testimony of Assistant Director Campbell.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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.*

Grievant alleges that a position she occupied at one point was reallocated from an ERS 1 to an ERS 2. If Grievant was holding the position when the reallocation occurred, she would likely have been entitled to a salary increase due to the upgrade of her position. Grievant seeks back pay for a period of time which she held the position after the duties and responsibilities changed.

Respondent DOP argues that Grievant's claim was untimely because she did not challenge the allocation of her position while she was held it, nor did she raise the issue of back pay until roughly two months after she discovered that the position was reallocated. Respondent also argued that Grievant had no standing to file the grievance seeking back pay for the reallocation of a position which she no longer occupied. Respondent DOP argues that the Respondent's pre-hearing motion to dismiss the grievance should have been granted.

The Administrative Law Judge's (ALJ) role in the grievance procedure is to control the processing of each grievance assigned to such judge and take any action considered appropriate consistent with the provisions of W. Va. Code §6C-2-1, *et seq.* W. VA. CODE

ST. R. § 156-1-6.2. Part of that statutory duty is resolving grievances in a fair, efficient, cost-effective and consistent manner, ensuring that the process does not become a procedural quagmire where the merits of the case are forgotten.” *Spahr v. Preston County Bd. of Educ.*, 199 W. Va. 387, 391 S.E. 2d 739 (1990). Pre-hearing motions are often based upon factual allegations and affidavits which was the case herein. Respondent made their allegations and Grievant responded with allegations to support her point of view. No facts or testimony are presented in the motions. In this matter, there were enough disputes regarding material facts to make it prudent to proceed to hearing and allow the parties to develop the factual record regarding the issue of timeliness at the hearing. Holding a separate hearing on the pre-trial motions would have been inefficient by unnecessarily delaying the process. No final decision was reached upon the issue of timeliness as was clearly indicated by the use of the phrase “As the facts are presented at this time” in the Order. Giving the parties the opportunity to present facts and testimony to support their position on the issue of timeliness before making the ultimate decision on the case is consistent with the WV Supreme Court’s admonition that the ALJs control the grievance process fairly and expeditiously keeping in mind that the litigants are often non-lawyers appearing *pro se*.

Grievant did not contest the reallocation of her position while she was holding it. The reallocation determination was made on February 12, 2018. By that time, she had already begun her work as an ERS 2 with the DEP/DMR on January 19, 2018. She turned in a PDF in August 2017 but took no action when it became apparent that management was not going to forward it to the DOP at that time. Once she found out about the

reallocation, she again did not file a grievance until April 25, 2018, two months after the reallocation was made and known to her.

Respondent argues that Grievant lacked standing to contest the reallocation of the REAP position. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996). When Grievant found out that the position was reallocated, she no longer held the position. Consequently, at that time she had no legal interest in the position that she was not holding. It has been consistently held that a grievant must have some personal stake in the outcome of a controversy in order to have standing to challenge the employer's action. See *Farley, et al., v. Wayne County Bd. of Educ.*, Docket No. 96-50-272 (Feb. 28, 1997); *Mullins v. Kanawha County Bd. of Educ.*, Docket No. 94-20-364 (Dec. 29, 1994); *Wiley v. Raleigh County Bd. of Educ.*, Docket No. 01-41-531 (Apr. 3, 2002); *McClung v. Nicholas county Bd. of Educ.*, Docket No. 02-34-223 (Sept. 16, 2002). Grievant a does not have a personal stake or recognizable interest in the reallocation a position he or she does not hold. See *Brisendine and Propps v. Office of the Insurance Commissioner*, Docket No. 2018-0294-CONS (Mar. 30, 2018).

With regard to meeting the statutory time periods, Grievant argues that the grievance was timely because she was not unequivocally notified that she was not going to receive backpay until April 25, 2018. That was the date the DEP HR Director told her that the DOP would not grant her back pay. She filed her grievance the same day. Respondent argues that the grievable event must be the reallocation and Grievant did not file her claim within fifteen days of discovering that the position was reallocated. There

are valid arguments for each position, but it is not necessary to reach the timeliness issue since Grievant had no standing to raise the claim.

Finally, Grievant did not present any specific evidence regarding when she received the additional duties which she argued required her position to be reallocated. In fact, one of the identified duties was not added on a permanent basis until shortly before Grievant left the position. Moreover, the additional duties were not the cause for the reallocation. Rather it was the emergence of the position from an assist role to a full performance role. There was not evidence as to when this shift took place, or if it indeed took place while Grievant was holding the position. Even if Grievant had standing, without this information any grant of relief would be based upon speculation. The Grievance Board has routinely held that speculation is not sufficient to meet the proof burden. See, *Coleman v. Dep't of Health & Human Res.*, Docket No. 03-HHR-318 (Jan. 27, 2004).

Accordingly, the grievance must be DENIED Grievant had no standing to contest the classification allocation of a position she no longer held.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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.*

2. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996). A grievant must have some personal stake in the outcome of a controversy in order to have standing to challenge the employer's action. See *Farley, et al., v. Wayne County Bd. of Educ.*, Docket No. 96-50-272 (Feb. 28, 1997); *Mullins v. Kanawha County Bd. of Educ.*, Docket No. 94-20-364 (Dec. 29, 1994); *Wiley v. Raleigh County Bd. of Educ.*, Docket No. 01-41-531 (Apr. 3, 2002); *McClung v. Nicholas county Bd. of Educ.*, Docket No. 02-34-223 (Sept. 16, 2002).

3. Grievant does not have a personal stake or recognizable interest in reallocation of a position he or she does not hold. See *Brisendine and Propps v. Office of the Insurance Commissioner*, Docket No. 2018-0294-CONS (Mar. 30, 2018).

4. Grievant did not have standing to challenge the reallocation of the REAP ERS position because she was no longer holding that position when the allocation determination was made.

5. The Grievance Board has routinely held that speculation is not sufficient to meet the proof burden. See, *Coleman v. Dep't of Health & Human Res.*, Docket No. 03-HHR-318 (Jan. 27, 2004).

Accordingly, the 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 27, 2019

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**