TIMOTHY HAYMOND

v. Docket No. 94-DOH-152

WEST VIRGINIA DIVISION OF HIGHWAYS

D E C I S I O N

Grievant Timothy Haymond is employed by Respondent West Virginia Division of Highways (DOH) as a Transportation Worker III (Craftsman) at the Equipment Division in Buckhannon, West Virginia. On or about November 19, 1993, he filed a level one grievance as follows: "On 11/16/93, Jimmy S. Lewis was awarded $6,015.82 for contributing an equipment modification suggestion, that I made an equal contribution to." Grievant seeks "[t]he same recognition and monitary [sic] gain in which Jimmy S. Lewis received." Upon receipt of adverse decisions at the lower grievance levels, Grievant advanced the complaint to level four and requested a record decision. (See footnote 1)

Based on the record as a whole, the following findings are made:

Findings of Fact

1. In 1987 DOH purchased a number of Bomag Rollers (roller/rollers), equipment necessary for its operations. Less than two years later, the rollers began to develop a specific, costly problem.

2. In 1989, the problem with the rollers was viewed, discussed and handled by Grievant, Jimmy Lewis, Grievant's co- worker, and David Lee, their supervisor.

3. According to Grievant, Mr. Lee mentioned at that time that a solution to the problem with the rollers might bring some money from the Employee Suggestion Award Board (ESAB). Mr. Lee stated he could not recall making that comment. T.15.

4. The three men, working cooperatively, eventually resolved the rollers' design problem. (See footnote 2) In March 1990, DOH directed that the modifications devised by the men be implement ed statewide on all of the affected rollers.

5. Grievant claims he considered submitting the idea for the modification and repair of the rollers, on behalf of himself and Mr. Lee and Mr. Lewis, to the ESAB as early as 1989. He said he discussed this idea with Mr. Lee and also with Fred Humphreys, the person whom he believed to be DOH's "idea coun selor" for potential ESAB submissions at that time. (See footnote 3) Grievantsaid Mr. Humphreys told him that submitting the idea would be useless because ESAB had not acted on an unrelated idea previ ously submitted by some other workers. T.3,5.

6. Dennis Sapp, a witness called by Grievant, recalled Grievant's mentioning that he might submit the roller repair suggestion to ESAB. However, Mr. Sapp did not recall Grievant's discussing this in terms of any other workers who might have been involved with developing the idea. (See footnote 4) T.3.

7. For whatever reason, including possibly the discour aging information he heard about the slowness and/or futility of the employee award process, Grievant never acted on his initial plan to submit the idea to ESAB for consideration. T.3-7.

8. At some point after 1990, Mr. Lewis mentioned to Mr. Lee that he might submit the idea for the modification and repair of the rollers to ESAB.

9. On or about June 21, 1991, Mr. Lewis submitted the suggestion to ESAB for the corrective modification of the rollers. He concluded in his data that DOH had saved an amount possibly in excess of $300,000 modifying the rollers.

10. Mr. Humphreys, who stated he was not DOH's designated ideas counselor at the present time or at the time in question, apparently interacted with Mr. Lewis in some capacity in con junction with Mr. Lewis's submission of the idea for the roll ers' repair. T.7. Mr. Humphreys said he could not recall whether anyone other than Mr. Lewis had talked with him aboutthe idea for the modification of the rollers. T.5-7.

11. When questioned by Grievant as to why he did not prevent Mr. Lewis from submitting the idea for modification of the rollers, Mr. Lee responded, in essence, that he neither told Grievant about Mr. Lewis's disclosure to him nor told Mr. Humphreys that Grievant had been involved in any way at all with the development of the modification because he understood it was the employee's responsibility to submit ideas to ESAB, and that he felt nothing would come of any submissions to ESAB, anyway. T.15-16.

12. According to Mr. Lewis, while Grievant had helped with the actual repair work on the rollers, the underlying idea for the corrective modification of the machinery was his. He testified that he had heard about the problem with the rollers and mentioned a possible solution to another party even before he and Grievant met with Mr. Lee about the situation. T.12-13.

13. In August 1992, ESAB met and determined that Mr. Lewis's submission entitled him to an award pending the receipt of additional information about actual cost savings. The required data was then submitted to ESAB. See T.22, and Exhibit "A," received June 15, 1994. (See footnote 5)

14. On November 16, 1993, Mr. Lewis received an award of $6,015.82 from the ESAB for the suggestion.

15. Grievant filed this action when he learned of Mr. Lewis's award and additionally filed a protest letter with theESAB.

Discussion

DOH raises a jurisdictional issue in this matter. It argues that W.Va. Code §§5A-1A-1 et seq. has established ESAB within the Department of Administration to provide cash or honorary awards to state employees for suggestions that result in substantial savings or improvement in state operations. Under this legislation, ESAB, not DOH, establishes the criteria for making awards and approves each award made. It further relies upon W.Va. Code §29-6A-2(i) which states, in part, that "any. . .matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article." DOH asserts that ESAB, not the Grievance Board, is the proper party to which a claim (not a grievance) such as Grievant's must be made.

Grievant meets DOH's jurisdictional arguments by stating that ESAB merely "reviews suggestions" and "decides if said awards are worthy of cash or honorary awards." Thereafter, Grievant claims, ESAB charges the appropriate agency's spending unit. He claims that "passing the buck" to ESAB in this contro versy is not appropriate. He maintains that he was "not given proper compensation and/or recognition for an idea which [ESAB] has already found to merit such compensation." He continues:

The lack of compensation equal to Mr. Lewis['s] constitutes an act of favoritism. Mr. Lee allowed Mr. Lewis to submit the idea alone and did nothing to correct the situation from June, 1991 to October, 1993. Even if one accepts the supervisors' statements that their belief that no award would be forthcoming does not justify this situation, which in the end mustbe corrected/equalized by [DOH].

See Grievant's Brief. (See footnote 6) Grievant concludes by stating that "the issue remaining is [his] involvement in the development of the idea," and that "the grievance procedure is the avenue for an employee to resolve an act of favoritism or discrimination."

The Grievance Board has addressed the question of its jurisdiction on numerous occasions. See, e.g., Calvert v. W.Va. Dept. of Commerce, Labor and Environmental Protection, Docket No. 92-CLER-094 (Nov. 23, 1993) (employer had no authority to compel state auditor to reimburse employees for education expenses); Walz v. W.Va. Div. of Rehab. Srvcs., Docket No. 93- RS-028

(Mar. 19, 1993) (grievance already granted by employer, no appeal right); Chafin v. HHR/Boone County Health Dept., Docket No. 92-HHR-132 (May 8, 1992) (grievant employed by county health department, not state agency, thus no jurisdiction); Mitchell v. W.Va. University, Docket No. 30-86-139-2 (Nov. 24, 1986) (employee had pursued administrative remedy in another forum; foreclosed from seeking second remedy). In this case, the issue of whether Grievant deserves an award for his partici pation in a meritorious idea must be determined by ESAB, not the Grievance Board.

The Legislature has required ESAB to adopt rules governing its proceedings, to keep permanent and accurate records of its proceedings, to establish criteria for making awards and to approve each award made. Code §5A-1A-3. As such, DOH does nothave the final voice on the subject of employee awards under Code §§5A-1A-1 et seq. Moreover, the Grievance Board may not rule upon "any. . .matter in which [the] authority to act is not vested with the employer." Code §29-6A-2(i). Thus, the Griev ance Board does not have jurisdiction with respect to the specific issue of Grievant's worthiness for an ESAB award.

For the same reasons as cited above, the Grievance Board may not consider the specific question of whether DOH's refusal to pay Grievant $6000, an amount comparable to Mr. Lewis' ESAB award, is an act of favoritism. (See footnote 7) This is because Grievant's worthiness for the award is the central issue of that question. To the extent that Grievant's favoritism charge is directed at DOH for other perceived acts of favoritism, for example, that DOH may have somehow facilitated Mr. Lewis's submission of a suggestion and deterred Grievant's submission of the same, the record does not support a finding that DOH acted improperly.

Simply put, Grievant did not file an idea for ESAB's consideration at any time. While there is some dispute as to whether or not Grievant had been discouraged by some party or another, Grievant produced absolutely no evidence that he had been denied or refused the opportunity to file a suggestion with ESAB. (See footnote 8) It appears Grievant was perfectly content not to takethe necessary steps to submit an idea for a possible reward as long as no one else took those steps and got a reward. His disgruntlement only occurred when another employee who had taken the time and effort to file was granted a money award.

As far as Mr. Lee's actions in this matter are concerned, there was no evidence of record that he committed any wrongdo ing. The record suggests that Mr. Lee had been informed by both Grievant and Mr. Lewis at separate times that they might submit a suggestion to ESAB. That Mr. Lee had

been anything but noncommittal on each occasion has not been shown. (See footnote 9) It is accepted that Mr. Lee believed employees had a right to file a suggestion on their own with ESAB.

Grievant has submitted no policy or regulation which establishes that Mr. Lee had a duty or obligation to assist an employee with a ESAB submission or that Mr. Lee could interfere with an employee's decision to file or not to file with ESAB. In the instant case, one employee decided to follow through with a submission to ESAB while another decided not to file. (See footnote 10) In addition to the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. W.Va. Code §29-6A-2(i) states, in part, that "any... matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article."

2. Code §§5A-1A-1 et seq. establishes the Employee Suggestion Award Board within the Department of Administration to provide for cash or honorary awards to state employees for suggestions that result in substantial savings or improvement in state operation.

3. The Employee Suggestion Award Board must adopt rules governing its proceedings, keep permanent and accurate records of its proceedings, establish criteria for making awards and approve each award made. Code §5A-1A-3.

4. Respondent Division of Highways has no authority to make or approve employee suggestion awards for employees nor does it have the authority to modify awards made by ESAB; therefore, the issue of whether Grievant is deserving of an award is not the proper subject of a grievance as defined by W.Va. Code §29-6A-2(i). See Calvert v. W.Va. Dept. of Commerce, Labor and Environmental Protection, Docket No. 92-CLER-094 (Nov. 23, 1993).

5. Grievant failed to establish that DOH engaged infavoritism with respect to the submission by another employee of an idea to ESAB for the Bomag roller modification.

6. Grievant failed to prove that DOH impeded his ability or right to file an idea or suggestion of his own to ESAB for the Bomag roller modification.

Based on the above conclusions, this grievance is **DISMISSED** as to any determinations pertaining to Grievant's worthiness for an ESAB award and **DENIED** as to any claims relating to alleged inproprieties on DOH's part prior to the date Mr. Lewis was granted an ESAB award.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court

of the county in which the grievance occurred," 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 Employ ees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appeal ing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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NEDRA KOVAL

Administrative Law Judge

Date: July 28, 1994

Footnote: 1 The record consists of the pleadings, the lower level decisions, and the transcript and exhibits of the March 30, 1994 level three hearing. The case was transferred from the Elkins' docket to the undersigned for administrative reasons. Thereafter, the parties filed fact/law proposals and some agreed-upon additional exhibits by the designated time of June 15, 1994.

Footnote: 2 At some point, a Bomag representative was called in for a consultation.

Footnote: 3 The nature of Mr. Humphreys' employment with DOH was not made part of the record.

Footnote: 4 Mr. Sapp's position with DOH was not identified.

Footnote: 5 Four exhibits were tendered at level four on June 15, 1994. The undersigned designated them Exhibits "A" through "D."

Footnote: 6 This passage appears in the third page of Grievant's unnumbered Brief.

Footnote: 7 Favoritism is defined in Code §29-6A-2(h) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

Footnote: 8 While Grievant insists that he told people in 1989 or 1990 that he was thinking of filing a suggestion to ESAB about the repair of the rollers in his name and Mr. Lewis' name, it seems quite odd that he would not have also gone directly to Mr. Lewis todiscuss this matter.

Footnote: 9 According to Code §5A-1A-3, ESAB "may exclude certain levels of positions from participation" in the employee suggestion cash award program. Excluded levels of management "within the spending unit where the adopted suggestion will result in substantial savings" include the "Assistant to director or division chief, section chief or head of

major departmental function or their equivalent[.]" Code §5A-1A-3(1)(d).

Apparently, Mr. Lee, as a DOH administrator, is ineligible to receive an ESAB cash award. There was some suggestion in the record that Mr. Lee was not interested in any submission to ESAB because he had nothing to gain.

Footnote: 10 Grievant has been told by DOH at the lower levels that he might have redress against Mr. Lewis in civil court. It is also noted that DOH has declared its intention to modify the manner in which awards are submitted and processed at the initial levelwithin DOH.