CHARLES J. KNUREK,

Grievant,

v.

DOCKET NO. 02-PSC-184

WEST VIRGINIA PUBLIC SERVICE COMMISSION and

WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Charles J. Knurek, filed this grievance against his employer, the West Virginia Public Service Commission ("PSC") on or about February 28, 2002:

> STATEMENT OF GRIEVANCE: On February 13, 2002, the West Virginia Public Service Commission and the Water and Wastewater Division Director continued a pattern of discrimination against me by failing to properly advertise management positions in the Division and by reclassifying and/or promoting three (3) individuals within the Division to supervisory and/or managerial positions.
>
> RELIEF SOUGHT: To be reclassified to a managerial or supervisory position and to receive appropriate compensation for work and work experience in the field and/or be promoted to a managerial or supervisory position and to receive appropriate compensation for work and work experience in the field.

The grievance was denied at level one by Grievant's immediate supervisor, William A. Nelson, and at level two by Amy L. Swann, Director. A level three hearing was held on May 9 and 29, 2002, where the West Virginia Division of Personnel ("DOP") was made a party to the grievance, and a decision was rendered by Grievance Evaluator Franklin G. Crabtree, Esq., on June 10, 2002. Grievant appealed to level four on June 14, 2002, anda level four hearing was held at the PSC on September 17, 2002. This matter became mature for decision on October 31, 2002, the deadline for

the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Spiro I. Mitias, PSC was represented by Richard E. Hitt, Esq., General Counsel, and DOP was represented by Robert D. Williams, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

February 13, 2002 memorandum from Amy L. Swann to Water and Wastewater Division Staff.

Ex. 2 -

Position Description Form of William A. Nelson.

Ex. 3 -

Position Description Form of Geert F. Bakker.

Ex. 4 -

Position Description Form of David L. Acord.

Level Three PSC (“Swann”) Exhibits

Ex. 1 -

Grievance Form.

Ex. 2 -

Grievance Form with Level One Response.

Ex. 3 -

Level Two Grievance Response, dated March 19, 2002.

Ex. 4 -

February 11, 2002, memoranda from Elizabeth A. Sharp to David Acord, William Nelson, and Geert Bakker with WV-11s.

Ex. 5 -

Classification Specifications for Utilities Analyst I, Utilities Analyst II, Utilities Analyst III, Utilities Analyst Supervisor, and Utility Analyst Manager.

Level Four Grievant's Exhibits

Ex. 1 -

Portion of Level Three Transcript, pp. 24-25.

Ex. 2 -

Salary Histories of Charles Knurek, William Nelson, David Acord, Geert Bakker, and Randy Lengyel.

Ex. 3 -

Statement of Karen L. Buckley, dated September 16, 2002.

Ex. 4 -

Statement of Conrad W. Bramlee, dated September 16, 2002.

Ex. 5 -

Series of emails between Charles Knurek and Sean Ireland, David Wagner, Geert Bakker, and William Nelson.

Level Four PSC Exhibits

None.

Testimony

Grievant testified in his own behalf, and presented the testimony of Amy L. Swann, Victoria Hensley, Deborah L. Anderson, Elizabeth A. Sharp, William A. Nelson, Geert Bakker, David Acord, James Williams, Caryn Short, Joseph A. Marakovits, Jack Miller, and Sean Patrick Ireland. DOP presented the testimony of Lowell D. Basford, and PSC presented the testimony of Amy L. Swann.

Based upon a review of the record in its entirety, I find the following facts have been established

by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is currently employed by the PSC as a Utility Analyst III in the Water and Wastewater Division ("Division").

2. On February 13, 2002, Division Director Amy Swann issued a memorandum to all staff announcing a "minor" reorganization of the Division. This minor reorganization included the "promotions" of three Division personnel: Geert Bakker, from Utilities Analyst Supervisor to Chief Utilities Manager; David Acord, from Utilities Analyst III to Utilities Analyst Supervisor; and William Nelson, from Utilities Analyst III to Utilities Analyst Supervisor. LIII G. Ex. 1.

3. After consultation with Elizabeth Sharp, Human Resources Manager, the proposed reorganization of the management structure within the Division was approved by Chairman James Williams.

4. Position Description Forms ("PDFs") were completed for the three affected positions and submitted to the Division of Personnel for review and approval. In someinstances, the PDFs indicated both existing duties and proposed duties to be assumed once the transactions were approved. LIII G. Exs. 2, 3, 4.

5. The proposed personnel transactions were approved by the Division of Personnel. Although Ms. Swann characterized the changes as "promotions" in her February 13, 2002 memorandum, the personnel transactions actually involved the reallocation of existing positions to higher pay grades.

6. The reallocations of Messrs. Bakker, Acord, and Nelson became effective February 15, 2002. LIII PSC Exhibit 4.

7.

Grievant's employment history with the PSC is as follows:

04/01/87
Hired as Utility Analyst I

$19,920

01/16/90

Promoted from Utility Analyst I to II
26,856

10/16/93

Reclassified from Utility Analyst II to III
28,056 (See footnote 1)

05/29/02

Salary Adjustment
38,240

LIV G. Ex. 2.

8. Geert Bakker's employment history with the PSC is as follows:

09/01/82

Hired as Utility Analyst I
$15,420

12/16/86

Promoted from Utility Analyst I to II
21,516

09/01/90

Promoted from Utility Analyst II to III
28,056

12/01/98

Promoted from Utility Analyst III to Supervisor
38,904

02/15/02

Promoted from Utility Analyst Supervisor

to Manager

52, 008

LIV G. Ex. 2.

9.

David Acord's employment history with the PSC is as follows:

10/01/91

Hired as Utility Analyst I
$20,988

05/04/94

Promoted from Utility Analyst I to II
24,192

10/01/98

Promoted from Utility Analyst II to III
32,580

02/15/02

Promoted from Utility Analyst III to Supervisor
44,748

LIV G. Ex. 2.

10.

William Nelson's employment history with the PSC is as follows:

10/01/89

Hired as Utility Analyst I
$16,572

05/01/93

Promoted from Utility Analyst I to II
23,604

03/01/97

Promoted from Utility Analyst II to III
27,516

02/15/02

Promoted from Utility Analyst III to Supervisor
43,668

LIV G. Ex. 2.

DISCUSSION

In non-disciplinary matters, the grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant alleges he has been the victim of discrimination and favoritism, as evidenced by the employment histories of himself, Messrs. Bakker, Acord, and Nelson, and most recently by the "promotions" of those three gentlemen, without the benefit of posting. The PSC denies these allegations.

W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the grievant must show: (a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to

demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Favoritism is similarly defined by W. Va. Code § 29-6A-2(h), as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of favoritism, Grievants must establish the following:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and

(c)

that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Frantz v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999); Blake v. W. Va. Dept. of Transp., Docket No. 97-DOH-416 (May 1, 1998). See McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). Aswith discrimination, if Grievant establishes a prima facie case of favoritism, the respondent may rebut this showing by articulating a legitimate reason for its action. However, the Grievant can still prevail if he can demonstrate that the reason proffered by respondent was mere pretext. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Addressing Grievant's contention that the positions given to Messrs. Bakker, Acord, and Nelson as a result of the reorganization should have been posted, Rule 9.7 of the Division of Personnel's Administrative Rules provides as follows:

> 9.7. Posting of Job Openings - Whenever a job opening occurs in the classified service, the appointing authority shall post a notice within the building, facility or work area and throughout the agency that candidates will be considered to fill the job opening. The notice shall be posted for at least ten (10) working days before making an appointment to fill the job opening. The notice shall state that a job opening has occurred, describe the duties to be performed, and the classification to be used to fill the job opening.

> (a) The term job opening refers to any vacancy to be filled by original appointment, promotion, demotion, lateral class change, reinstatement, or transfer. . . . The term "vacancy" is defined as "[a]n unfilled budgetary position in the classified service to be filled by original appointment, promotion, demotion, lateral class change, transfer, or reinstatement."

Positions which are not budgeted cannot be vacancies, and posting is not required; nor can the position be posted, as funds have not been allocated to bring new employees on staff. Workman v. W. Va. Div. of Corrections, Docket No. 97-CORR-153 (Sept. 11, 1997). A grievant challenging the reallocation of a position, arguing it should have been posted, has the burden of demonstrating that a "budgeted 'job opening' or 'vacancy' . . . existed." Gillum v. W. Va. Dept. of Transp., Docket No. 01-DOH-012 (May 30, 2001); Junkins v. W. Va. Div. of Labor, Docket No. 91-DOL-460 (May 29, 1992). Absent such ashowing, an agency is not required to post a position. Id. Grievant presented no evidence to demonstrate a “budgeted job opening” or “vacancy” existed. It is clear from the testimony and evidence of record that the positions occupied by Messrs. Bakker, Acord, and Nelson were reallocated, and thus no posting was required.

Ms. Swann admitted her use of the term “promotion” in her February 13, 2002 memorandum was incorrect. She acknowledged her error in her level two decision, stating the positions were reallocated. Furthermore, the WV-11s clearly indicate the positions were reallocated, and no promotion occurred as that term is defined in DOP's Administrative Rule. (See footnote 2)

Grievant contends he was unfairly passed over in the reallocation, and that this is just one more example of how he has been discriminated against by the PSC, while the others have been shown favoritism. Grievant has established a prima facie case of discrimination and favoritism with respect to Mr. Acord and Mr. Nelson. He was similarly situated to them in terms of assignment, classification, experience and performance, yet they received the benefits of reallocation to higher classifications and pay grades, while he did not. Grievant was not similarly situated to Mr. Bakker at the time of

reallocation; Mr.Bakker was a Utility Analyst Supervisor, already higher in the supervisory chain than Grievant.

Mr. Bakker was already a Utility Analyst Supervisor at the time of reallocation, and the reallocation of his position to Utility Analyst Manager was a natural step for him. Mr. Acord and Mr. Nelson were selected by Ms. Swann for reallocation to supervisory positions, one over Case Control and one over the Assistance Section of the Division, in effect creating another layer of management below the Manager classification. Her stated reason for this reorganization was “to provide an improved management structure for both the day to day operation of the division and for the long term planning needs of the Division.” LIII G. Ex. 1; LIV Test., Swann. As Director of her Division, Ms. Swann clearly has some discretion in her choices for supervisory positions. She chose Mr. Acord and Mr. Nelson.

Grievant testified at level four that he was not seeking the removal of the three gentlemen from their positions. Grievant also testified he understood the reallocations were not filling vacancies and therefore postings were not required. Grievant was not challenging the qualifications of the three gentlemen, nor the use of reallocation by PSC in this instance. Clearly, the only thing Grievant is seeking is an explanation why Ms. Swann chose the other gentlemen, as opposed to him. However, that question was never posed to Ms. Swann in any of the proceedings, and given her discretion in choosing supervisory personnel, Grievant has failed to demonstrate her actions resulted from discrimination or favoritism, as opposed to a legitimate business reason. Unfortunately for Grievant, not everyone can be a “chief.” Once employees reach a certain level of responsibility within an agency, the ranks of qualified individuals begin to thin. While thereis no dispute that Grievant is a well-qualified and well-respected employee in the Division, it simply became a matter of choosing between qualified employees for the reallocation. It is no doubt a hard choice for a manager, but that choice does not result in discrimination or favoritism as those terms are defined.

Finally, Grievant points to the employment histories of himself and the other three gentlemen as evidence of his discrimination. However, a review of those histories does not prove Grievant's claims. All four of these employees have followed the same career track at PSC, and any differences in their salaries are easily explained. The most important difference that occurred in their career paths was that Grievant was reclassified from a Utility Analyst II to III during the Statewide Reclassification Project, and as his salary fell within the range for Utility Analyst III, he did not receive any salary

increase. The other gentlemen did not receive their Utility Analyst III classifications as a result of the Statewide Reclassification Project, but through promotion, resulting in a salary increase.

More than anything else, that was just the result of timing in their respective careers. Grievant was at a point in his career development at the time of the reclassification to warrant a reclassification to Utility Analyst III. The others had either achieved that classification prior to the reclassification (Bakker), or well after that period (Acord, Nelson). Other than that major difference, the other differences are minor in comparison, and do not show a pattern of discrimination or favoritism against Grievant.

CONCLUSIONS OF LAW

1. In non-disciplinary matters, the grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). 2. Rule 9.7 of the Division of Personnel's Administrative Rules provides as follows:

> 9.7. Posting of Job Openings - Whenever a job opening occurs in the classified service, the appointing authority shall post a notice within the building, facility or work area and throughout the agency that candidates will be considered to fill the job opening. The notice shall be posted for at least ten (10) working days before making an appointment to fill the job opening. The notice shall state that a job opening has occurred, describe the duties to be performed, and the classification to be used to fill the job opening.

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3. Positions which are not budgeted cannot be vacancies, and posting is not required; nor can the position be posted, as funds have not been allocated to bring new employees on staff. Workman v. W. Va. Div. of Corrections, Docket No. 97-CORR-153 (Sept. 11, 1997).

4. A grievant challenging the reallocation of a position, arguing it should have been posted, has the burden of demonstrating that a "budgeted 'job opening' or 'vacancy' . . . existed." Gillum v. W. Va.

Dept. of Transp., Docket No. 01-DOH-012 (May 30, 2001); Junkins v. W. Va. Div. of Labor, Docket No. 91-DOL-460 (May 29, 1992). Absent such a showing, an agency is not required to post a position. Id.

5. W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case ofdiscrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

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that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

6. Favoritism is similarly defined by W. Va. Code § 29-6A-2(h), as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of favoritism, Grievants must establish the following:

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(c)

that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Frantz v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999); Blake v. W. Va. Dept. of Transp., 2Docket No. 97-DOH-416 (May 1, 1998). See McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). As with discrimination, if Grievant establishes a prima facie case of favoritism, the respondent may rebut this showing by articulating a legitimate reason for its action. However, the Grievant can still prevail if he can demonstrate that the reason proffered by respondent was mere pretext. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

7. Grievant established a prima facie case of discrimination and favoritism as to Mr. Acord and Mr. Nelson, as he was similarly situated to them at the time of reallocation. Grievant was not similarly situated to Mr. Bakker.

8. The PSC established a legitimate business reason for its decision to reallocate positions to establish a new supervisory level below the Utility Analyst Manager positions in both the Case Control and Assistance Sections.

9. All of the individuals concerned in this grievance were qualified, with virtually equal experience and lengths of service. At a certain higher level of responsibility within any agency, the ranks of qualified employees begin to thin, and the decision to promote or, in this case, reallocate one employee over another is simply left to managerial discretion, and does not result in a showing of discrimination or favoritism. To put it simply, not everyone can be a “chief.” 10. Grievant has

failed to prove by a preponderance of the evidence that the decision to reallocate Mr. Acord, Mr. Nelson, and Mr. Bakker was the result of discrimination or favoritism.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: December 20, 2002

Footnote: 1

In 1993, the Division of Personnel implemented a Statewide Reclassification Project. As a result of this project, Grievant was reclassified to a Utility Analyst III; however, as his salary fell within the pay range for that classification, he did not receive any pay increase in accordance with DOP Administrative Rules.

Footnote: 2

Other than Ms. Swann's decision, it appears little else occurred at the level two conference. Grievant's representative complained that when he tried to ask Ms. Swann a question, she replied that Grievant had the burden of proof, and questioning her was not going to help him meet that burden. Grievant and his representative then left the meeting. Level two of the grievance procedure for state employees is a conference, not a hearing. It is at this stage that the parties have the best chance of resolving the conflict, but only if they respect each other's right to present their case in an informal setting. A conference by definition is a meeting of individuals to talk. It is not meant to be an adversarial proceeding, and the undersigned cautions Ms. Swann and others in supervisory positions to refrain from making it so.