RONALD ROBINETTE, JR.,

Grievant,

v.

DOCKET NO. 02-ADMN-078

DEPARTMENT OF ADMINISTRATION/

GENERAL SERVICES DIVISION,

Respondent.

D E C I S I O N

This grievance was filed by Grievant Ronald Robinette, Jr., against Respondent, Department of Administration/General Services Division, on or about March 4, 2002. The statement of grievance reads:

> I am grieving that David Pentz promised me a maintenance worke[r] job and I did not get the job.
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> David Pentz talked to Keith Burdette and me about a plan that he was working on to upgrade everybody but he would have to work on his plan for a little while to see what happened. A couple days or maybe a week or two later (I don't remember exactly) but Dave came to me and ask[ed] me if we would do a job up at Joe Manchin's house. Carles Farley and me were there. He asked Carles and me at the same time. He told me I was over the job and to get a couple more people to help out. So I went and got Keith Burdette, Roger Paxton, Jr., and Drew Mitchell. Carles Farley was already asked to work by David. So me and Keith Burdette was told by David that if we took care of this that he would do us a favor if we did this favor for him. The promise was suppose[d] to have been that I was a maintenance worker and Keith was a maintenance worker. So we did the job and completed it.
>
> I never got my maintenance worker title but the same day he gave the people the job he called me into his office and told me he was sorry that it didn't work out how he had planned. I just want to know why all the other people got what they wanted and I did

> not get my job. Carles Farley got the supervisor's job; Drew Mitchell got put back out on grounds, Roger Paxton Jr. was hired fulltime, Keith Burdette got his maintenance worker job, but I didn't get what I was promised. He also promised me Bob Otey's job when he died.
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> David Pentz gave me the information on the employee salaries. One day when Keith Burdette and me were in David's office and I asked him about the salaries he was checking to see how much they made. He said where [sic] here's the sheet we will just look at it. Keith Burdette and me were both shown the sheet that listed people's salaries. He said where's their name at, we will look them up; because I am the director and I can do anything I want.
>
> When I had my surgery - I had to go off the payroll for six hours, he let me make it up. He said I don't care who gets mad; I can do anything I want. He said I let JC do it once so I have to let you do it. He also let Violet Burns make up her time. He let Drew go off the payroll and did not let him make it up.

As relief Grievant seeks "[t]ermination o[r] transfer of David Pentz. Upgraded to a maint[en]ance worker and my 15% raise." At the Level III hearing, Grievant's representative stated Grievant was also seeking back pay. (See footnote 1)

It is not entirely clear what Grievant is arguing, as neither he nor his representative made an opening or closing statement at Level III, and no written argument was presented at either Level III or Level IV. In addition to his argument that he should be promoted because Mr. Pentz promised him a promotion, Grievant apparently is arguing that Mr. Pentz's actions of letting him see employee salaries, and letting employees who have no leave make up the time they have had to take off for illness, are wrong, and that Mr. Pentz should be punished for these actions. Grievant's request that Mr. Pentz be disciplined is not relief that is available to Grievant through the grievance procedure. “[T]his Board is without authority, statutory or otherwise, to order that disciplinary action be taken againstanother employee. Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994). See Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992).” Coster v. W. Va. Div. of Corrections, Docket No. 98-CORR-506 (Feb. 24, 1999). See also, Love v. Dep't of Health and Human Resources, Docket No. 01-HHR-108 (July 11, 2001). Grievant has not indicated that he has been harmed in any way by being shown the payroll by Mr. Pentz, or by being allowed to make up time rather than go off the payroll. Grievant is simply attempting to use the grievance procedure to get Mr. Pentz in trouble, because he did not keep what Grievant perceived as a promise to promote

him. As the relief sought by Grievant is not available through the grievance procedure, these issues will not be addressed.

The following Findings of Fact are made based upon the record developed at Level III.

Findings of Fact

1. Grievant has been employed by the Department of Administration in the General Services Division ("GSD") as a laborer for three years.

2. David Pentz is Director of the GSD.

3. In September of 2001, Mr. Pentz met with Grievant and Carles Farley and asked them if they would be interested in doing some work at the home of Secretary of State Joe Manchin during off duty time on Saturdays and evenings. He told them Mr. Manchin would provide any equipment they needed, and would pay them. Grievant and Mr. Farley accepted the work, and also enlisted their co-workers, Keith Burdette, Jr., Roger Paxton, Jr., and Drew Mitchell, to help them. Mr. Pentz also told Grievant and Mr. Burdette that if they would do this favor for him, he would do a favor for them later. Mr. Burdette, who was also a laborer for the GSD, asked Mr. Pentz about moving to the Operation and Maintenance Section, and he said he would see what he could do. Grievant took this as a promise that Mr. Pentz would promote him to a maintenance worker position. 4. In January 2002, two maintenance worker positions in the Operation and Maintenance Section were posted. Grievant, Mr. Burdette, and Donald Jordan applied for the positions, and they were awarded to Mr. Burdette and Mr. Jordan.

Discussion

Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). Grievant stated during his testimony at the Level III hearing that he should have been placed in one of the posted maintenance worker positions, because he believes he was promised the job to return a favor, and "[t]hat's the way politics works." Grievant also placed into evidence at Level III a brochure on the Ethics Act, with the following area highlighted:

> . You may not use subordinates to work on your personal projects or activities during work hours or compel them to do so on their own time.

When a position in the classified service is posted, an agency is to select the most qualified applicant. An agency's decision as to who is the most qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994). Although some appointments in state government can be based upon political patronage, a maintenance worker position is not such a position. It would be improper for the GSD to give Grievant a promotion to a maintenance worker position as a political favor. Lowther v. Dep't of Transp., Docket No. 01-DOH-589 (Mar. 27, 2002).

The arbitrary and capricious standard of review of personnel decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the agency. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Thibault, supra. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Services, 769 F.2d 1017 (4th Cir. 1985). If a grievant can demonstrate that the selection process was so significantly flawed that he might reasonably have been the successful applicant if the process had been conducted in a proper fashion, the employer will be required to compare the qualifications of the grievant to the successful applicant. Thibault, supra.

No evidence was presented regarding the qualifications of the applicants for the posted maintenance worker positions. Grievant has not demonstrated he was the most qualified applicant, or that the selection was arbitrary and capricious.

Further, Grievant was not entitled to placement in the position as a favor. Had Mr. Pentz in fact promised Grievant that he would be placed in one of the maintenance worker positions in exchange for his work at Mr. Manchin's residence, Mr. Pentz had no authority to make a promise. Such a promise would be an ultra vires act, and would not be enforceable. Cook v. Mason County Bd. of Educ., Docket No. 96-26-105 (Aug. 19, 1996). “A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations

upon their power and authority. [Citations omitted.]" Syl. Pt. 2, W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc., 179 W. Va. 605, 328 S.E.2d 356 (1985). "'Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.'" Freeman v. Poling, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985), citing Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983). As to Grievant's reference to the Ethics Act, the undersigned finds Mr. Pentz's actions in asking his employees if they wanted to do some work for Mr. Manchin to be questionable. Many employees would be afraid to say no to this, whether they wanted the work or not. Nonetheless, it is the role of the Ethics Commission, not the Grievance Board, to evaluate whether W. Va. Code § 6B-2-5(b)(1) has been violated. Baker v. Lincoln County Bd. of Educ., Docket No. 01-22-528 (Mar. 1, 2002). Further, nothing in Grievant's testimony indicated that he did not want to perform the work, but felt obligated to do it. It appears that Grievant's reference to the Ethics Act would again relate to his request that Mr. Pentz be punished. Certainly, any such violation would not support a finding that Grievant would be entitled to a promotion to maintenance worker.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. An agency's decision as to who is the most qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994).

3. Grievant did not demonstrate he was the most qualified applicant for the posted maintenance worker positions, or that he otherwise was entitled to promotion to maintenance worker.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Anysuch 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: June 26, 2002

Footnote: 1

Grievant's supervisor responded on March 4, 2002, that he had no authority to grant the relief sought. Appeal was made to Level II on that date, and Grievant's second level supervisor, David Pentz, responded on March 12, 2002, that he was without authority to terminate or transfer himself, and the grievance was otherwise denied. Grievant appealed to Level III on March 13, 2002, where a hearing was held on March 19, 2002. The grievance was denied at Level III on March 26, 2002. Grievant appealed to Level IV on March 29, 2002. After a Level IV hearing was scheduled, the parties agreed to submit this grievance for decision based upon the Level III record. Grievant was represented by Timothy M. Lee, and Respondent was represented by Amy Haynie, Esquire. This matter became mature for decision on June 7, 2002, the deadline for submission of written argument, which neither party submitted.