HAROLD LOWTHER, et al.,

Grievants,

v.

DOCKET NO. 01-DOH-589

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

This grievance was filed by Grievants, Harold Lowther, Jimmy Collins, Frederick Allen, and Ronald Tenney, against Respondent, Department of Transportation/Division of Highways ("DOH"), on or about September 4, 2001, when none of the Grievants was selected for the Braxton County Maintenance Supervisor position. The relief sought by the Grievants varied. Grievant Collins sought as relief that he be placed in the position, effective August 27, 2001,

> with appropriate pay raise, without these increases affecting allocations of merits for my organization, and that the decision making process for this position be looked into and a decision based on real qualification and positional experience be made. Niether (sic) shall there be backlash nor mistreatment from any department representative or its political affiliation due to this grievance or its finding.

Grievant Lowther requested as relief “that the decision making process be looked into and an appointment be made based on merit and experience.” Grievants Allen and Tenney requested as relief,

> Increase of salary by 30% beginning Aug. 27, 2001 to compensate for difference of salary gain that I would have received as Braxton County Administrator; without this adjustment affecting future increases nor the allocations of merits within my organization, and that the decision making process for this position be looked into and

a decision based on real qualification and positional experience be made. Neither shall there be backlash nor mistreatment from any Department representative or any of its political affiliations due to this grievance or its findings." (See footnote 1)

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

Findings of Fact

1. Grievant Collins has been employed by DOH since 1989, as the Webster County Maintenance Supervisor.

2. Grievant Allen has been employed by DOH as an interstate supervisor at Coon Knob for 16 years, and he has been employed by DOH for 28 years.

3. Grievant Tenney has been employed by DOH for 25 years, and has been an interstate supervisor at Burnsville, in Braxton County, since 1998. Prior to that, he was a crew leader for approximately seven years, and before that he was an Equipment Operator. 4. Grievant Lowther has been employed by DOH for 28 years, and currently serves as a technician assigned to the maintenance staff. He served as Webster County Maintenance Supervisor for four years in the late 1980's, and has 25 years of supervisory experience. He has also worked as a highway inspector.

5. Frank Belknap was employed by DOH as the Braxton County Maintenance Supervisor until his retirement on March 30, 2001. Lanty Ware was placed in the position on April 2, 2001, and was replaced by Greg Phillips, who was placed in this position on a temporary basis on April 4, 2001.

6. On June 11, 2001, DOH posted the position of Highway Administrator III, or Braxton County Maintenance Supervisor. The class specification for the position describes the work of this position as "full performance level work administering highway maintenance operations in a county or area. . .." Some examples of the work performed by this position are "directs and implements a scheduled highway maintenance program within operating annual budget, including security of materials and equipment," schedules crews and equipment, and ensures compliance with DOH policies and procedures, and federal regulations. There were 11 applicants for the position, including the Grievants.

7. Ronald C. Smith, Jr., Assistant District Engineer in charge of Maintenance, and Mr. Ware, Mr. Smith's assistant, were asked by the District 7 Engineer, Mr. Davis, to interview the applicants. They reviewed the applications and conducted interviews of the applicants on July 10, 11, and 13,

2001. The questions they asked of the applicants were standard questions which are generally used in District 7 for all supervisory positions. They did not review the applicants' evaluations, or any information from their personnel files; however, Mr. Ware had completed performance evaluations of the Grievants.

8. All four Grievants had completed supervisory training, and all four met the minimum requirements of the position. 9. Mr. Smith and Mr. Ware each ranked the applicants after the interviews, with the applicant they believed was most qualified for the position receiving a ranking of one. Mr. Smith ranked Grievant Collins first, David Blake second, Grievant Allen third, Greg Phillips fourth, Grievant Lowther fifth, Grievant Tenney sixth, Steve Hull seventh, Don McLaughlin eighth, Jack Belknap ninth, Steve Hughes tenth, and George Long eleventh. Mr. Ware also ranked Grievant Collins first. He ranked Grievant Allen second, Mr. Blake third, Mr. Phillips fourth, Grievant Lowther fifth, and Grievant Tenney sixth. Mr. Ware did not rank the remaining applicants.

10. Mr. Smith and Mr. Ware met with Mr. Davis on July 13, 2001, and gave him their recommendations. Mr. Smith and Mr. Ware advised Mr. Davis that any of their top four applicants would probably make a very good County Administrator, and that the next three could probably do the job, even though they were not as qualified as the top four.

11. Mr. Smith made his recommendation based upon a comparison of the interview and applications to the job qualifications, as he has been trained to do. Mr. Ware has known the Grievants for many years. Mr. Ware took into consideration his personal knowledge of the applicants in evaluating the qualifications.

12. On August 24, 2001, Mr. Davis told Mr. Smith he had received a telephone call from DOH's Central Office which advised him that Jack Belknap would be assuming the duties of Acting County Maintenance Supervisor for Braxton County beginning August 27, 2001.

13. On August 27, 2001, Jack Belknap was temporarily upgraded to Highway Administrator III, and placed in the position which had been posted on a temporary basis.

14. Jack Belknap was employed at the time by DOH as a Transportation II Equipment Operator, a non-supervisory position. He had worked in that position, which involved the operation of equipment, since 1996. Prior to that, he had worked for a little over three years for DOH as a Craftworker I, which also involved the operation ofequipment. He worked in the Braxton County Assessor's Office for about two years as a data collector. He had almost 11 years of supervisory

experience as a state liquor store manager, supervising 2 to 3 cashier/clerks. Prior to that, he had worked for DOH as a laborer, maintaining a rest area for four months, and as a laborer for a mobile home business for five years. He completed five semesters at Glenville State College.

15. Mr. Smith and Mr. Ware did not believe Jack Belknap met the minimum qualifications for the position, as they found him lacking in the knowledge, skills, and abilities necessary to perform the duties of the position, and in supervisory skills. DOH's Human Resources Division made a determination that he did meet the minimum qualifications.

16. Jack Belknap's father has served on the Democratic Executive Committee in Braxton County, and as Chairman of that Committee. Braxton County Delegate Brent Boggs and Ron Satler, Chairman of the Democratic Executive Committee in Braxton County, were present for coffee and doughnuts when Mr. Belknap was introduced to the employees on August 27, 2001.

17. As of October 25, 2001, the date of the Level III hearing, the posted position had not been filled on a permanent basis.

18. Grievants Lowther and Allen are Republicans. Grievants Collins and Tenney are Democrats.

19. Grievants were better qualified for the posted position than Jack Belknap.

Discussion

Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dept. of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997). W. Va. Code § 29-6-10(4) states:

> (4) For promotions within the classified service [rules shall be developed] which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination, when such examination is practicable. An advancement in rankor grade or an increase in salary beyond the maximum fixed for the class shall constitute a promotion. When any benefit such as a promotion, wage increase or transfer is to be awarded, . . . and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit or have the benefit withdrawn, as the case may be.

Grievants have demonstrated that they are substantially better qualified than the person who was

placed in the position on a temporary basis, and that any of them was well qualified to fill the position on a permanent basis. In addition, all the Grievants had more seniority with DOH than Jack Belknap, and all the Grievants except Mr. Collins had more seniority with the state than Mr. Belknap. The question is whether DOH was required to fill the position on a permanent basis. DOH argued the grievance was premature, as the position had not been filled on a permanent basis, and it was not required to fill the position.

The position at issue was posted in June 2001. While DOH had several qualified applicants, went through an interview process, and obviously is in need of someone in the position on a permanent basis, it chose not to fill the position on a permanent basis at this time, filling it instead on a temporary basis once again, with an applicant who was not well qualified for the position, but who obviously had the support of the political leaders in Braxton County. DOH did not offer any explanation whatsoever for its decision to continue to man the position on a temporary basis, with Mr. Belknap, nor did it offer any insight into when the position might be filled on a permanent basis; although Jeff Black, Director of Human Resources, correctly pointed out that the Division of Personnel's Rules require the position to be posted again if it is not filled within six months of the first posting. DOH did not contest that the Grievants were much better qualified than Mr. Belknap for the position at issue, nor did DOH dispute that any one of the Grievants would have done a good job in the position. While some testimony was offered that there had been problems inBraxton County under Frank Belknap's supervision, and thus it would be prudent to be cautious in the selection of his replacement, no testimony was offered to suggest that the Grievants would not be good candidates to correct whatever problems may exist.

Grievants contended that DOH could not fill the position for a third consecutive temporary period, relying on the Division of Personnel's Rule on Temporary Appointments, which provides as follows:

> 9.5. Temporary Appointments
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> (a) If an employee is needed for a temporary period, the Director shall make a certification of the names of those eligibles who have indicated a willingness to accept temporary employment in the order of their places on an appropriate competitive register. The Director shall make the certification in the manner prescribed in Section 8 of this rule. Appointing authorities shall make temporary appointments in the same manner as prescribed in this rule for probationary appointments.
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> (b) The duration of a temporary appointment shall be limited to the period of the need and in no event shall a temporary appointment continue for more than 6 consecutive months in any twelve-month period. The acceptance or refusal of a temporary appointment shall not affect an eligible's standing on a register or his or her

> eligibility for a probationary appointment. Successive temporary appointments to the same position shall not be made nor shall an employee receive continued temporary appointments in the same agency, nor shall a temporary appointment be preceded or followed by an intermittent appointment or any other limited term employment within the twelve-month period.

Jeff Black, DOH's Director of Human Resources, testified that it was his opinion that this Rule did not apply to this situation. He explained it was his belief that this Rule referred to the employment of a person, who was not an employee, from a competitive register, on a temporary basis. While counsel for Grievants did not agree with Mr. Black's interpretation, no testimony was offered as to how the Division of Personnel interprets this Rule. Absent Personnel's explanation, the undersigned agrees with Mr. Black. This Rule is not applicable to this situation.

The Division of Personnel's Rules provide with regard to temporary upgrades, which is what occurred here, according to Mr. Black's testimony:

> 4.8. Temporary Classification Upgrade. With the approval of the Director, an appointing authority may temporarily upgrade the classification of an employee temporarily performing the duties of a position in a higher pay grade due to a separation or an extended leave of absence, for a short-term project, or in an emergency situation. A temporary classification upgrade shall be within the same service, classified or classified-exempt, and, except for classifications allocated to the approved hourly pay schedule, shall be for a continuous period of no less than 30 days and no more than six months. The Director, at his or her discretion, may extend the period of a temporary classification upgrade period by increments of three months or less. The Board shall establish salary, qualification, and administrative standards for implementation of this subsection.

It is clear from the Rule that a temporary upgrade can last for an initial six months, and the Division of Personnel may extend the temporary upgrade for additional periods of three months. This Rule does not address successive appointments of different employees. As Mr. Phillips was temporarily upgraded on April 4, 2001, the six month period would expire on October 4, 2001. The Division of Personnel could have then approved the temporary upgrade for another three months.

As noted by DOH, this Grievance Board has ruled that an agency is not required to fill a position simply because it has been posted.

> The only regulation which addresses job postings is Section 9.07 of the Division of Personnel's Administrative Rule (6/95), which provides that notices of job openings must be posted for at least ten days throughout the agency; that all eligible applicants shall be given due consideration; and that, if the vacancy is not filled within six months, it must be re-posted prior to any appointment. There is nothing in the Rule or the posting provision which specifically that states that a position <u>must</u> be filled. Grievant

> has cited no authority for this alleged requirement. This Grievance Board has previously held that it is permissible for an agency to withdraw a posting and re-post it, prior to the extension of any employment offer. In Law/Bragg v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-452 (July 17, 1997), the administrative law judge noted that "it is not uncommon for agencies to withdraw recommendations of employment for a variety of reasons, including loss of funds, abolishment of the position, a failure to draw a sufficient field of applicants, and errors in the posting." (Emphasis added).

Staggers v. Div. of Highways, Docket No. 98-DOH-505 (Apr. 30, 1999)(footnote omitted). However, in this case, DOH did not offered no reason for not filling the position, and there is obviously a need for someone to serve in the position, as it has instead been filled bytemporary upgrade. Grievants have demonstrated that the actions taken by DOH in this matter were improperly based upon political considerations.

Grievants are only required to produce circumstantial evidence of political patronage.

> Constitutional "patronage" law is clear that the requisite political motivation, as any state of mind, can be proved by circumstantial evidence as commonly the only kind available for this purpose. See e.g., Anthony v. Sundlen, 952 F.2d 603, 605-06 (1st Cir. 1991)(holding that proof of political motivation in patronage case not confined to "(relatively rare) instances in which a 'smoking gun' can be produced" and commenting that "circumstantial evidence alone can support a finding of political discrimination"); Cygnar v. City of Chicago, 865 F.2d 827, 844-45 (7th Cir. 1989)(holding that evidence that patronage targets names were known by defendant to be on Democratic Party contributors' list sufficient to support finding that defendant knew, despite his denial, of their political affiliations). Sales, supra.

Wiley v. W. Va. Dep't of Transp., Docket No. 99-DOH-109 (Aug. 3, 1999). Grievants demonstrated the strong political ties of Mr. Belknap, his lesser qualifications for the position, and the need for the position to be filled. The appearance of the Chairman of the local Democratic Executive Committee and a Democratic member of the House of Delegates to honor Mr. Belknap on his first day in a position which was only a temporary upgrade would be unusual at best. Grievants have met their burden. As noted, DOH did not offer rebuttal evidence.

This Grievance Board has previously noted that the County Maintenance Supervisor position is not one in which politics can determine who will be placed in the position.

> Historically, the CMS positions had been political appointments, and the incumbents were replaced whenever a new administration took office. W. Va. Code § 29-6-4(d)(1989) listed certain positions where political affiliation was deemed essential to effective performance, and as an appropriate hiring requirement. The CMS positions were included in that list. However, the West Virginia Supreme Court of Appeals, in Akers v. W. Va. Dept. of Highways, 188 W. Va. 698, 425 S.E.2d 840 (1992), held that

> the position of CMS did not require its holder to share the same political affiliation or association as the governor, to effectively perform the duties attendant to such position. Akers, 425 S.E.2d at 846.
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> . . .
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> . . . the Circuit Court of Kanawha County . . . held that the CMS' were not policymaking positions, and that W. Va. Code § 29-6-4(d), as it applied to CMS positions, was unconstitutional. The West Virginia Supreme Court of Appeals agreed, as noted above.

Wiley, supra.

Grievants have demonstrated that the selection process was flawed by political considerations, and these improper considerations caused the position to be filled on a temporary basis. DOH will be required to fill the position on a permanent basis, effective August 27, 2001, with one of the Grievants.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dept. of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. There is nothing in DOP's Rules or the posting provision which specifically states that a position must be filled once it is posted. It is permissible for an agency to withdraw a posting and re-post it, prior to the extension of any employment offer. Staggers v. Div. of Highways, Docket No. 98-DOH-505 (Apr. 30, 1999). “[I]t is not uncommon for agencies to withdraw recommendations of employment for a variety of reasons, including loss of funds, abolishment of the position, a failure to draw a sufficient field of applicants, and errors in the posting.” Law/Bragg v. W. Va. Dep't of Health and Human Resources, Docket No. 95-HHR-452 (July 17, 1997).

3. In this case, there was no reason not to fill the position, and there is obviously a need for someone to serve in the position, as it has instead been filled by temporary upgrade.

4. Grievants are only required to produce circumstantial evidence of political patronage.

Constitutional “patronage” law is clear that the requisite political motivation, as any

> state of mind, can be proved by circumstantial evidence as commonly the only kind available for this purpose. See e.g., Anthony v. Sundlen, 952 F.2d 603, 605-06 (1st Cir. 1991)(holding that proof of political motivation in patronage case not confined to "(relatively rare) instances in which a 'smoking gun' can be produced" and commenting that "circumstantial evidence alone can support a finding of political discrimination"); Cygnar v. City of Chicago, 865 F.2d 827, 844-45 (7th Cir. 1989)(holding that evidence that patronage targets names were known by defendant to be on Democratic Party contributors' list sufficient to support finding that defendant knew, despite his denial, of their political affiliations). Sales, supra.

Wiley v. W. Va. Dep't of Transp., Docket No. 99-DOH-109 (Aug. 3, 1999).

5. The County Maintenance Supervisor position is not one in which politics can determine who will be placed in the position. Akers v. W. Va. Dep't of Highways, 188 W. Va. 698, 425 S.E.2d 840 (1992); Wiley, supra.

6. Grievants demonstrated that the posted Braxton County Maintenance Supervisor position was improperly filled on a temporary basis based upon political patronage, not upon fitness and merit.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to fill the posted Braxton County Maintenance Supervisor position on a permanent basis with one of the Grievants, effective August 27, 2001, and to pay the successful applicant back pay, if any, in the amount of the difference between his salary from that date and the salary he would have earned as Braxton County Maintenance Supervisor, plus interest.

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. 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) toserve 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: March 27, 2002

Footnote: 1

Grievants' supervisor responded to each Grievant on September 10, 2001, that each grievance was denied as he had no authority to grant the relief sought. Appeal was made to Level II by each Grievant. Grievants' second level supervisor responded to each grievance on September 21, 2001, that he was without authority to grant the relief requested. Grievants appealed to Level III, where the grievances were consolidated. After a hearing held on October 25, 2001, the grievance was denied on November 21, 2001. Grievants appealed to Level IV on November 28, 2001, and a Level IV hearing was set for January 22, 2002. On January 18, 2002, counsel for Grievants, Bernard R. Mauser, Esq., advised that the parties had agreed to submit the grievance for decision based upon the lower level record. Respondent was represented at Level IV by Jennifer Francis, Esquire. This grievance became mature for decision on March 8, 2002, upon receipt of Grievants' written argument. Respondent did not submit written argument.