**JACK MILLER,**

**Grievant,**

**v.** **DOCKET NO. 02-PSC-102**

**PUBLIC SERVICE COMMISSION,**

**Respondent.**

## DECISION

Jack Miller filed this grievance at level two on February 19, 2002, stating:

> On February 13, 2002, an In-House Memorandum was issued to the Staff of the Waste and Wastewater Division by Director Amy Swann regarding the reorganization of the Division. Contained in this memorandum under Item #3 was the announcement that Utilities Analyst Bill Nelson had been promoted to Utilities Analyst Supervisor.
>
> This is a continuing practice of favoritism and discrimination due to my age. At my evaluation last Fall, Manager Dave Wagner told me face to face that I was receiving the highest evaluation of anyone in the Division - then shortly after when some salary increases were given, almost every younger analyst received from 50% to 200% higher increase than myself. I have been employed by the State, Commission and Division much longer than Analyst Nelson, have seniority as Utilities Analyst III, and have in fact given training to Analyst Nelson from time to time. In addition I have many years experience in the supervisory capacity and auditing in general. To my knowledge Analyst Nelson has **no** supervisory experience and limited auditing experience.
>
> It should also be noted that this position was not posted, therefore depriving myself and other qualified applicants from applying. Folks, under any stretch of the imagination, this was not right. I respectfully request that action be taken to remedy this situation now, and hopefully prevent this type of favoritism and discrimination in the future.

Grievant stated the relief sought as: “Promote Grievant to Utilities Analyst Supervisor or higher with a minimum 10% increase in salary (or) rescind promotion of Analyst Nelson, post position, and hire most qualified applicant.”

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's

Charleston office on December 6 and 30, 2002, and January 22, 2003. Grievant was represented by Darrel W. Preece, and Respondent was represented by Richard Hitt, Esq., its General Counsel. This matter became mature for decision upon the filing of the parties' proposed findings of fact and conclusions of law on February 21, 2003.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is a Utilities Analyst III (UA3) in the Case Control Section of the Water and Wastewater Division of the Public Service Commission (PSC). He has been employed by Respondent since 1989, and has been classified as a UA3 since 1994.

2. Grievant's immediate supervisor is Water and Wastewater Division Director Amy Swann.

3. In February, 2002, Ms. Swann decided to reorganize the division. By memorandum dated February 13, 2002, she notified her staff that "Geert Baker has been promoted to Chief Utilities Manager of the Assistance Section," "David Acord has been promoted to Utilities Analyst Supervisor of the Assistance Section," and "Bill Nelson has been promoted to Utilities Analyst Supervisor of the Case Control Section." 4. The personnel changes were accomplished by reallocating the positions of the various employees. (See footnote 1) Position Description Forms (PDFs) were completed for the changing positions and were submitted to the Division of Personnel (DOP) for approval. In some cases, such as Mr. Nelson's, the PDFs indicated both existing duties and proposed duties for the positions.

5. It is not uncommon for PDFs submitted to DOP for review to list proposed or anticipated duties for the position under review.

6. Grievant believed he should have been promoted to Utilities Analyst Supervisor instead of Bill Nelson.

7. Prior to his promotion, Mr. Nelson had been a UA3 since 1997, and had been with the PSC since 1989 when he was hired as a UA1 in 1989. Grievant was also hired as a UA1 in 1989, but became a UA3 in 1994.

8. Since the departmental reorganization was minor, the approval of the Commission was not required, but the DOP did approve the personnel transactions after being provided information about

the reorganization.

DISCUSSION

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. Id. Grievant's contention is that the promotion of Bill Nelson to Utilities Analyst Supervisor was a result of discrimination and favoritism, part of a continuing pattern of such behavior. Although Grievant referred to past behavior which he considers part of the pattern, such as pay raises, these acts were not grieved but were included as evidence of a past pattern of behavior. The only event upon which this grievance is based is the February 13, 2002 reorganizational promotions. (See footnote 2)

Although Grievant alleges discrimination based on his age, the motivating factor behind discriminatory practices is not a critical element under the definitions contained in the grievance procedure. It has previously been held that this Grievance Board does not have jurisdiction to determine whether the Human Rights Act has been violated, based upon the West Virginia Supreme Court of Appeal's holding in Vest v. Board of Education of County of Nicholas, 193 W.Va. 222,455 S.E.2d 781 (1995). *See* Prince v. Bd. of Trustees/W. Va. Univ., Docket No. 7-BOT-276 (Nov. 5, 1997); Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25, 1995). In Vest, the Court determined the Grievance Board's jurisdiction in discrimination-based claims extends only to “discrimination” as it is defined by W. Va. Code § 18-29-2. Vest, 455 S.E.2d at 784. While this Grievance Board does not have authority to determine liability for claims, such as age-based discrimination, that arise under the West Virginia Human Rights Act, the Grievance Board does have authority to provide relief to employees for “discrimination" and “favoritism" as those terms are defined in W. Va. Code § 29-6A-2; and thus, has jurisdiction to remedy discrimination that would also violate the Human Rights Act. In otherwords, the Grievance Board does have subject matter jurisdiction over age-based discrimination claims, but age is not an essential element that must be proven to support a claim of disparate treatment. Smith v. W. Va. Bureau of Employment Programs,

Docket No. 94-BEP-099 (Dec. 18, 1996). See Vest, *supra*; Markley v. W. Va. Div. of Rehabilitation Services, Docket No. 01-RS-087 (Sep. 24, 2001).

"'Discrimination' means 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." W. Va. Code § 29-6A-2(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h).

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, 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 their detriment, been treated by their 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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). In order to establish a *prima facie* case of favoritism, Grievant 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., 2Docket No. 97-DOH-416 (May 1, 1998). *See* McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996).

Although Grievant presented voluminous evidence purporting to show a past pattern of behavior, that evidence did not help meet the simple burden of proof needed to meet the grievance procedure's definitions. Grievant has met his burden of proving a *prima facie* case of favoritism. With respect to Mr. Nelson, Grievant was similarly situated but did not receive the benefit of reallocation to a higher classification and pay grade.

Once Grievant establishes a *prima facie* case of discrimination or favoritism, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). *See* Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hogsett, *supra.*

Both Grievant and Mr. Nelson were well-qualified for the promotion. Grievant's 2001 performance evaluation rated him as “Exceeds Expectations,” and he has performed work on every type of case that there is to do in the Agency, and has done some types much longer than Mr. Nelson. Mr. Nelson has also done a wide variety of cases, some of which he has done longer than Grievant. Ms. Swann testified she considered everyone in the Division in making her choices for the reorganization, taking into account variety and types of case work, quantity of work as well as quality, management of work and how theemployees work with others. In Mr. Nelson's case, she considered his willingness to take on new assignments and duties and to complete them with minimal supervision.

Granted, the decision to promote some employees instead of others involved a certain amount of subjective judgment by the director, but the simple existence of subjective factors in a management decision does not invalidate that decision. As was stated in a virtually identical grievance filed over this same reorganization, “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.'” Knurek v.

Public Service Comm'n, Docket No. 02-PSC-184 (Dec. 20, 2002). The considered use of subjective judgment to select one employee over another for a responsible position does not equate to favoritism.

Grievant did not present evidence sufficient to establish that Respondent's reasons were pretextual. Ms. Swann considered the relative strengths and weaknesses of each of her employees, and exercised her judgment as to which employee would work out best in more responsible positions.

Grievant's contention that the “promotions” should have been posted as open positions so everyone could apply for them was also addressed in Knurek*, Id.* by reference to Rule 9.7 of the Division of Personnel's Administrative Rule, which 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 willbe 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."

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. No evidence was presented that supports Grievant's contention that the personnel transactions at issue were anything more than the reallocation of existing positions, despite Ms. Swann's use of the term “promotion.” As reallocations, Respondent had no duty to post the positions.

The following conclusions of law support this discussion:

## CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, Grievant must prove all of his claims by a preponderance of the evidence. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95- DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. Id. ___2.___The Grievance Board's jurisdiction in discrimination-based claims extends only to "discrimination" as it is defined by W. Va. Code § 18-29-2. Vest v. Board of Education of County of Nicholas, 193 W.Va. 222,455 S.E.2d 781 (1995)___

3. "'Discrimination' means 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." W. Va. Code § 29-6A-2(d).

4. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h).

5. 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, Grievant must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their 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 Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

6. In order to establish a *prima facie* case of favoritism, Grievant 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., 2Docket No. 97-DOH-416 (May 1, 1998). *See* McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996).

7. Once 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. Thereafter, Grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). *See* Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hogsett, *supra.*

8. 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.” Knurek v. Public Service Comm'n, Docket No. 02-PSC-184 (Dec. 20, 2002).

9. 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. Knurek, *supra.* For the foregoing reasons, this grievance is hereby **DENIED.**

Any party 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) 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.

**Date: March 19, 2003** _____

**M. Paul Marteney**

**Administrative Law Judge**

---

*Footnote: 1*

*Although Ms. Swann used the term, "promoted," she was using the term in its ordinary sense and not as the term of art defined in the DOP Administrative Rule covering personnel transactions.*

---

*Footnote: 2*

*Grievant proposes in his Level IV brief that the undersigned conclude that a pattern of discrimination has resulted in a disparity in pay and that events which took place during the lower- level grievance proceedings were part of the pattern. These issues are not part of this grievance and have not been considered.*