ANTHONY MARASCIO,

Grievant,

v. **Docket No. 02-DOH-364**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Anthony Marascio, employed by the Division of Highways (DOH or Respondent) as an Inspector III, filed a grievance at level two in which he alleged an unspecified violation of administrative operating procedures when another employee was placed in the position of Assistant to the Maintenance Engineer. For relief, Grievant requested removal of the employee, an investigation by the Ethics Commission relating to political endorsement in the appointment, and corrective action to ensure that the appropriate guidelines are adhered to in the future. At level three the grievance was amended to address whether the position of Assistant to the Maintenance Engineer should have been posted. The grievance was denied at level three, and appeal was made to level four on November 7, 2002. At level four, Grievant again amended, without objection, his grievance to allege favoritism, and that the "District Engineer exceeded his authority in making a new position within the district and in filling that newly created position without proper posting in accordance with state law and administrative procedures." An evidentiary hearing was conducted in the Grievance Board's Wheeling office on February 13, 2003, at which time Grievant appeared pro se, and DOH was represented by Barbara Baxter, Esq. The matter became mature for decision upon receipt of the parties' proposed findings of fact and conclusions of law on or before March 14, 2003. The following facts are derived from the record, including the level three transcript and exhibits.

Findings of Fact

1. Grievant was initially employed by DOH on October 1, 1998, as an Assistant Highways Administrator. In 2001, he was reallocated to the position of Inspector II, and in December 2002, he was reallocated to the position of Inspector III.

2. Prior to May 1, 2002, Ron Faulk was employed by DOH as Highway Administrator II (HA-II) for Marshall County, in District VI. A Highway Administrator II is responsible for administering highway maintenance operations in compliance with all state and federal policies, or for a specialized maintenance function of advanced complexity. All county supervisors are HA-IIs.

3. Effective May 1, 2002, Mr. Faulk was appointed to the position of Assistant to the Maintenance Engineer in District VI. His duties in this position were to:

1) Review all applications for inclusion in the SLS system, meet with the petitioners and discuss responsibilities, R/W [right of way], etc., follow paperwork to ensure completion in a timely manner. (See footnote 1)

2) Review all existing HARP roads to determine if they meet the criteria for SLS roads and process the paperwork for changing the designation for those that meet. (See footnote 2)

3) Review existing HARP Roads to ensure that all landowners have signed the petition. Contact those that didn't to see ifthey will sign. Process paperwork for abandonment for those roads where R/W cannot be obtained.

4) Review existing HARP applications that were not processed to determine if the roads meet the SLS guidelines and follow through.

5) Assist with the guardrail replacement program. This will entail documenting damage, beginning work orders, filing accident reports in a timely manner.

6) Assist when needed to investigate complaints and report to District Engineer.

7) Other duties as assigned.

4. Mr. Faulk retained his classification of HA-II after his reassignment.

5. The position of Assistant to the Maintenance Engineer was not posted, or otherwise advertised, by DOH.

6. Subsequently, DOH posted and filled the position of HA-II, county supervisor, for Marshall County.

7. Mr. Faulk was reclassified as a HA-III, effective February 2003.

Discussion

Grievant argues that the position of Assistant to the Maintenance Engineer should have been posted and filled. DOH asserts that Mr. Faulk was simply reassigned, and there was no budgeted vacancy to be posted. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6. Division of Personnel Administrative Rule, Section 9.7 provides:

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." Thus, 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).

DOH Human Resources Director Jeff Black stated that Mr. Faulk had been reassigned. The subsequent upgrade in Mr. Faulk's classification, and the posting and filling of the HA-II county supervisor position establishes that this was no simple reassignment of an employee. At level three, District Engineer Robert Whipp, testified as follows:

I did not agree with the way Mr. Faulk was working in the county as county superintendent. When I became District Engineer, I didn't feel that the methods he was using to run the county is the method that I felt was appropriate for the goals I had in mind. That was the number one thing. You know, itwas a position that I felt needed more control than he was using.

Mr. Whipp continued to state that he “asked [Mr. Faulk] to take the position that would be created” to process the remaining HARP applications.

Notwithstanding DOH's assertion that there was no budgeted position vacancy to be posted, there was, in fact, a new position created. When Mr. Faulk moved to the district office and assumed his new duties, the position of county administrator was posted and filled. An additional position now exists in District VI. It appears that the position was made for Mr. Faulk; however, newly created positions must be posted for at least ten working days prior to making an appointment to fill the position.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. Newly created positions must be posted for at least ten working days prior to making an appointment to fill the position.

3. Grievant has proven by a preponderance of the evidence that Respondent failed to properly post and fill the position Assistant to the Maintenance Engineer Accordingly, this grievance is **GRANTED,** and Respondent Ordered to post and fill the HA-III position in compliance with applicable provisions of the Division of Personnel Administrative Rule.

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: APRIL 18, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

SLS, is an acronym for State Local Service roads.

Footnote: 2

HARP is an acronym for Home Acces Roads Programs. These roads are given low priority and minimal maintenance by DOH.