KATHY HARRIS,

Grievant,

v. **DOCKET NO. 04-DOH-177**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

On January 29, 2004, Grievant filed a grievance against Respondent, claiming:

> ADSVAS3 job has been awarded to an employee who was hired as ADSVMG1, but lost the job through a grievance. DOH has awarded this person the ADSVAS3 position without properly posting the position of ADSVAS3. If posted, I feel I meet the qualifications.

As relief, Grievant seeks, “ADSVAS3 job be posted and I should be given the equal opportunity to bid.”

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Beckley office on October 15, 2004. Grievant was represented by counsel, J. W. Feuchtenberger. Respondent was represented by counsel, Barbara Baxter The matter became mature for decision on November 15, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

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

FINDINGS OF FACT

1. Grievant is employed by Respondent as an Administrative Secretary in District Ten, and she has been so employed for approximately 25 years.

2. In August, 2002, Respondent posted a new position for an Administrative Services Manager

1 (ADSVMG1). Christine West Coburn was placed in the position, and the selection was successfully challenged by Everette Bailey through the grievance process. (See footnote 1)

3. As a result of Mr. Bailey's grievance, which was affirmed at the circuit court level and refused by the supreme court, Mr. Bailey was placed in that position. Ms. Coburn had been a new hire, and so had no old position to be returned to. She had previously retired from employment with Respondent, then applied for the ADSVMG1 position.

4. Jeff Black, Director of Respondent's Human Resources Division, then contacted Jim Wells, Assistant Director of Employee Relations at the Division of Personnel (DOP) for advice on what to do with Ms. Coburn, and was told to treat the situation as a reduction in force. Respondent normally returns an employee to his or her previous position when displaced by an invalidated selection process.

5. In January, 2004, Respondent filed a reduction in force proposal with the State Personnel Board. The proposal stated Respondent needed to layoff an employee due to “lack of work.”

5. The Personnel Board approved the proposal. To implement the proposal, Ms. Coburn “bumped” a less senior employee from the Administrative Services Assistant3 (ADSVAS3) position that was vacated by Mr. Bailey, and that less senior employee was placed in a vacant ADSVAS3 position.

6. Ms. Coburn's transfer was recorded as a demotion without prejudice and with no loss of pay.

DISCUSSION

In non-disciplinary matters Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant alleges that position Ms. West moved into should have been posted and filled competitively, and that Ms. Coburn should have been returned to her status before she was hired in the ADSVMG1 position, i.e., retired. Respondent argues it properly followed the directions of the DOP in implementing a layoff of Ms. Coburn.

A “Layoff” is “[a] reduction in the number of employees caused by a reduced work load, curtailment of funds or reorganization.” Administrative Rule 3.55. The Administrative Rule in section 9.7 also provides that:

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.

In addition to these personnel regulations, layoffs are also controlled by the Administrative Rule, in section 12.4:

(a) When it becomes necessary by reason of shortage of work or funds, or to permit reinstatement of employees released from periods of military service in the armed forces of the United States or to implement the provisions of this subdivision, the appointing authority may initiate a layoff in accordance with the provisions of this rule.

. . .

(f) Order of Separation. After the appointing authority has determined the number of positions to be abolished and the Board has approved the organizational unit to which the layoff will apply, the order of separation shall be applied in the following manner:

1. employees without permanent status in the same class or classes identified for layoff in the following order: emergency, ninety-day exempt, student, seasonal, contract, intermittent, temporary, exempt part-time professional, provisional, and probationary.

2. permanent employees by job class on the basis of tenure as a permanent employee of a state agency or in the classified service regardless of job class or title. No tenure credit accrues for periods during which terminal annual leave is paid nor for periods during which an employee is not paid a wage or salary except for military leave, educational leave, or periods during which the employee is paid temporary total disability benefits under the provisions of WV Code §23-4-1 for a personal injury received in the course of and resulting from covered employment as a permanent employee of a state agency or in the classified service, or unless otherwise provided by State or

> Federal statute. In the event of a tie in the order of separation, the appointing authority or his or her representative and those employees who are tied shall agree on a means of breaking the tie by either a coin toss or lot drawing and shall notify the Director in writing of the agreement and the results.

> (g) Bumping Rights. A permanent employee who is to be laid off may request a lateral class change or an involuntary demotion to a job class in a lower pay grade in the occupational group in the same unit approved by the Board for reduction in force unless the results would be to cause the layoff of another permanent employee who possesses greater seniority than the employee who is exercising the request for lateral class change or involuntary demotion. The employee requesting the lateral class change or involuntary demotion must be available for the work schedule and at thework location of the job to which he or she has requested the change or demotion. A permanent employee who is laid off under these provisions as a result of another employee having a greater seniority has the same right of demotion or reassignment as provided for in this procedure. The Director shall develop the occupational groups in the classified service based on similarity of work and required knowledges, skills and abilities.

> (h) Recall. Recall of a permanent employee shall be to the agency as a whole and in reverse order of the layoff to the class from which the employee was laid off or any lower class in the class series or to any class previously held in the occupational group. A permanent employee shall remain on the recall list for the length of his or her tenure on the date of the layoff or for a period of two years, whichever is less. The agency shall first consider for reemployment those former permanent employees whose names appear on the recall list for the class in which a vacancy has occurred and no original appointment of a new employee or reinstatement of a former permanent employee shall be made to the class until all former permanent employees on the recall list have been given first chance of refusal of the vacancy. A permanent employee shall be recalled to jobs within the county wherein his or her last place of employment is located or within a contiguous county. The agency shall notify any laid off permanent employee who is eligible for recall to a position under these provisions by certified mail of the vacancy. It is the responsibility of the employee to notify the agency of any change in mailing address.

It appears Respondent, with DOP's consent, completely ignored the established layoff procedure and the fact that Ms. Coburn, having been improperly hired, had no right to be treated as a long-term employee. The error arose from the central fallacy of Respondent's proposal that it submitted to the Personnel Board _ that the layoff was necessary due to a “lack of work.” Although the proposal fully described the circumstances surrounding the need to replace Ms. Coburn in her position, Respondent mistakenly assumed it could not terminate Ms. Coburn “because she had not done anything wrong.”

Nevertheless, Respondent subverted the established DOP procedure for demoting an employee,

by claiming the reason for the layoff was for a reason other than the real reason. There was no lack of work, so the basis for the layoff was false. Even if somesemantic contortion could construe this situation as creating a lack of work, there was no layoff as no positions were eliminated. This distortion of the procedure only lends credence to the inference of improper motive that first cast a shadow in *Bailey.*

In the *Bailey* decision, it was determined that Ms. Coburn's selection for the ADSVMG1 position was arbitrary and capricious, and therefore invalid. Nevertheless, Respondent continues to argue she was legally in the position, an argument that was ill then and is dead now. As a result of that decision, it may now be fairly said that at the time Ms. Coburn was hired, Mr. Bailey was entitled to the position, and Ms. Coburn was not. (See footnote 2) A similar situation has been addressed by the Grievance Board in a pair of cases, *Roush and Forbes v. Dep't of Transp. and Robert Watterson, Intervenor,* Docket No. 01-DOH-573/561 (Feb. 28, 2003) and *Watterson v. Dep't of Transp.,* Docket No. 03-DOH-155 (Aug. 26, 2003). In *Roush*, Intervenor Watterson was found to have been improperly hired for a posted position, and Respondent was ordered to instate Grievant Roush in the position. Intervenor Watterson was then demoted from that position to his former position, and filed the *Watterson* grievance challenging the loss of pay attendant with that demotion. Interestingly, in *Watterson,* “Mr. Black opined that, to allow the wrongly selected employee to retain the higher salary, even though being demoted, could encourage collusiveness among employees and supervisors to attain higher salaries within a unit.” Those cases taken together stand for the proposition that an employee who isimproperly hired must be returned to the position he or she was in prior to the hiring. In Mr. Watterson's case, that was a position in a lower paygrade, but in Ms. Coburn's case, that would be as if she were never hired.

Respondent is bound to follow the laws and procedures related to posting and filling positions. When a given hiring decision is challenged, the grievance procedure allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994). *Bailey* was just such a review, and that decision found the selection process by which Ms. Coburn was hired to be legally insufficient. Although a specific improper motive for Ms. Coburn's hiring was not proven in *Bailey*, her hiring was found to be invalid by Respondent's arbitrary and capricious actions. Such acts are akin to *ultra vires acts*, which are non-binding, null and void. *See Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985).

State employees are generally regarded as having a property interest in their jobs, (See footnote 3) a fact that no doubt gave rise to Respondent's belief it could not return Ms. Coburn to non-employment without terminating her for cause. However, the Supreme Court of Appeals of West Virginia later held that *Freeman* established “that unlawful or ultra vires representations by public officials, their predecessors, or subordinates usually do not give rise to a due process property interest.” *Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991). Further, the court has held that "a 'property interest' . . . extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." *Waite v. Civil Serv. Comm'n*,161 W. Va. 154, 241 S.E.2d 164 (1977). Ms. Coburn never had a legitimate claim to employment with Respondent because she gained her position through an arbitrary and capricious selection process.

As of the date the *Bailey* decision became final, as has been stipulated by the parties, Respondent only had one employee, Mr. Bailey, in the ADSVMG1 position, instead of the two it claimed in its layoff proposal. This eradicates the entire basis for the layoff and Respondent's contention that, even if Ms. Coburn had not been allowed to “bump” into the vacant position, she would have been granted preference in hiring for the position. With Ms. Coburn out of the picture, it now becomes clear that when Respondent elevated Mr. Bailey to the ADSVMG1 position, it was left with a vacancy in his former, ADSVAS3 position. As cited earlier, DOP's Administrative Rule § 9.7 requires Respondent to post that vacancy and fill it by competitive selection among the applicants therefor.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. In non-disciplinary matters Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. Any person who is improperly hired or promoted into a position must be returned to his or her former employment status if the hiring or promotion is invalidated. *See Roush and Forbes v. Dep't of Transp. and Robert Watterson, Intervenor,* Docket No. 01-DOH-573/561 (Feb. 28, 2003); *Watterson v. Dep't of Transp.,* Docket No. 03-DOH-155 (Aug. 26, 2003). 3. “A 'property interest'

. . . extends [only] to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." *Waite v. Civil Rights Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1978).

3. An arbitrary and capricious hiring decision does not confer a property interest in continued employment with the employer.

4. Grievant met her burden of proving Respondent improperly placed Ms. Coburn into a position that should have been posted.

For the foregoing reasons, this grievance is **GRANTED**. Respondent is **ORDERED** to vacate the position held by Ms. Coburn and to post and fill the position in accordance with the DOP Administrative Rule.

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, and 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.

Date: December 22, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

See Bailey v. Dep't of Transp./Div. of Highways, Docket No. 02-DOH-350 (Mar. 31, 2003). The parties stipulated that the Bailey decision is now final.

Footnote: 2

It should be noted that, although the grievance procedure for state employees, W. Va. Code §§ 29-6A-1 et seq. does not provide for a right of intervention for state employees whose rights may be affected by the outcome of a grievance, Ms. Coburn was nonetheless permitted to intervene. She thus had a full and fair opportunity to present evidence and argument supporting her entitlement to retain the position, but failed to overcome the evidence to the contrary. Ms. Coburn also appealed the Bailey decision to circuit court, where it was affirmed.

Footnote: 3

See McLendon v. Morton, 162 W.Va. 431, 249 S.E.2d 919 (1978).