HERSHEL G. HEARL,

Grievant,

v. DOCKET NO. 05-DOH-100

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

This was a consolidation of two grievances filed by Hershel G. Hearl against Respondent, the Department of Transportation/Division of Highways (DOH). The first grievance, filed on May 8, 2003, contends that a Transportation Crew Chief position should have been filled by posting and competitive applications, rather than being created through reallocation of another employee. He seeks to have the reallocation rescinded and the job posted, giving him an opportunity to apply, or "a fair and reasonable wage increase to offset the spoiled opportunity." The second grievance, filed May 28, 2003, claims he was involuntarily transferred from the Disforce to the bridge department, in retaliation for pursuing the first grievance. He claims a violation of W. Va. Code § 18-23-3(h), and seeks to be transferred back to the Disforce, along with the Gradall and pickup truck he operates, but he also seeks to remain under the supervision of the bridge department supervisor until the Disforce has a new supervisor. A level four hearing was held in the Grievance Board's Beckley office on May 4, 2005. Grievant was represented by counsel, J. W. Feuchtenberger, and Respondent was represented by counsel, Barbara Baxter. The matter became mature for decision on June 3, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

There are two matters at issue in this consolidated grievance. The first concerns whether a position occupied by an Equipment Operator 3 should have been posted as a Transportation Crew Chief, instead of being reallocated to that classification. The second issue is whether DOH retaliated against Mr. Hearl, by means of an involuntary transfer to a different organizational unit, as a result of his complaints about the Transportation Crew Chief position.

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

Findings of Fact

1. Mr. Hearl has been employed by DOH for approximately twenty-one years, and at the time this grievance was filed he was in District 10 and his position was classified as Transportation Worker 3/Equipment Operator. (See footnote 1)

2. Until May 16, 2003, Mr. Hearl was assigned to the District 10 Disforce organization, ostensibly under the supervision of Disforce Supervisor Jennings Martin. Onthat date, Mr. Hearl was transferred to the District 10 Bridge Department, under the supervision of Clark Shreve.

3. Since 1990, Mr. Hearl, although he was assigned to the Disforce, has worked for the Bridge Department and McDowell County DOH. His performance evaluations were made and his time sheets were approved by Mr. Martin, although Mr. Martin had no control over his work assignments. In 2001, Mr. Shreve was directed to begin evaluating Mr. Hearl's work and approving his time sheets, although the time would continue to be charged to the Disforce organization.

4. Mr. Hearl's main duties were to operate a Gradall for the Bridge Department approximately 70% of the time and for the McDowell County organization about 30% of the time. He did no regular work for the Disforce. This arrangement did not change in 2001.

5. Another Transportation Worker 3 in the Disforce, Danny Eads, had, since around 1998, been performing additional duties such as filling out the rest of his crew's time sheets and directing their work. He had, based on these additional duties, been temporarily upgraded to Transportation Crew Chief on at least two occasions. Finally, in early 2003, Mr. Eads' position was permanently reallocated to Transportation Crew Chief.

6. Mr. Hearl filed his first grievance, challenging Mr. Eads' reallocation, on May 8, 2003.

7. On May 21, 2003, Mr. Hearl was notified by District Engineer William Bennett that, effective May 16, 2003, he was transferred to the Bridge Department, “because in effect you do not, nor have you for the past approximately five years, taken your assignments from the [Disforce] supervisor.”

8. Mr. Bennett saw the need to make Mr. Hearl's Bridge Department assignment official because, when Mr. Hearl filed his grievance, there was uncertainty over who should respond at level one.

9. DOH's operating procedure governing transfers and reassignments requires that “An employee selected for transfer will be given a minimum of ten (10) calendar days advance notice in writing of [the] transfer.” The operating procedure does not specify the consequence of a failure to give such notice.

Discussion

In non-disciplinary matters Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. (See footnote 2) The events surrounding this grievance began more than fifteen years ago when Mr. Hearl, although his position was allocated to the Disforce, began working principally for the Bridge Department and the McDowell County organization. During this time, Mr. Hearl refused to voluntarily accept a formal transfer to the Bridge Department, because he feared he would not then be eligible for the overtime assignments he had previously been able to accept. In December 2001, he was notified that from that time, his evaluations, leave approvals and time sheets would be approved by Mr. Shreve, the Bridge Department Supervisor, rather than by Mr. Martin, the Disforce supervisor.

Meanwhile, the Disforce continued to operate as if Mr. Hearl were not a part of that organization, and Mr. Eades was, in April 2003,reallocated from Equipment Operator 3 toTransportation Crew Chief, triggering Mr. Hearl's first grievance. In that case, Mr. Hearl contends the Transportation Crew Chief position should have been posted, and avers that if it had been, he would have been the successful applicant due to his superior qualifications. “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.' . . . Absent such a showing, an agency is not required to post a position.” (See footnote 3) Mr. Hearl has not met his burden of proof on this vital element of his case. The same budgeted positions existed in the Disforce before and after Mr. Eads' reallocation, but one had been upgraded to a different classification due to the additional job duties that Mr. Eads had assumed over the years. There was no showing that there was either a new position created, or even that there was a need for a new position. In addition, Mr. Hearl did not show he was entitled to similar reallocation because he did not show a change in the duties assigned to his position such that reallocation to a higher classification would be merited.

Nevertheless, Mr. Hearl's challenge to that reallocation gave rise to the second of his grievances,

since his own position experienced a change shortly after he made that challenge. He argues that his permanent and official transfer from the Disforce to the Bridge Department was reprisal for his grievance. To demonstrate a *prima facie* case of reprisal, as defined by W. Va. Code § 29-6A-2(p), a grievant must establish by a preponderance of the evidence the following elements: (See footnote 4)

> that he engaged in a protected activity, e.g., filing or participating in a grievance;
>
> that he was subsequently treated in an adverse manner by the employer or an agent;
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> that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;
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> that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and
>
> that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

It is beyond dispute that Mr. Hearl was engaged in a protected activity, that his employer knew about, when his transfer became effective. What is less clear is whether an adverse action was taken against Mr. Hearl. The weight of the evidence, however, makes it more likely than not that the oddities of Mr. Hearl's employment situation rendered the eventual transfer on paper of Mr. Hearl's position a zero-sum solution to an long-term problem.

Since about 1990, Mr. Hearl's position has been assigned to the Disforce organization. However, almost all of the work Mr. Hearl performed was for the Bridge Department and the McDowell County organization. Mr. Martin, the Disforce supervisor, had no supervisory control over Mr. Hearl or the Gradall and pickup truck he operated, even though they were assigned to his organization. Mr. Martin was still expected, however, to complete Mr. Hearl's performance evaluations, even though he rarely saw his work.

When, in December 2001, Mr. Hearl complained that he should have gotten a merit raise, District Engineer William Bennett reviewed the situation and granted him one. He then directed Mr. Shreve,

who actually did supervise the vast majority of Mr. Hearl's work, to take over his leave and time sheet approval, make his work assignments, and evaluatehis performance. Many months later, in May 2003, DOH made the transfer official by moving Mr. Hearl's budgeted position on the books from Disforce to the Bridge Department. At no time, since 1990, have Mr. Hearl's actual duties, work assignments, or classification changed. The only effect of the May 2003 transfer was to put Mr. Hearl officially in the organization in which he had been working for the past fifteen years.

Mr. Hearl's theory as to how this caused him harm has to do with overtime opportunities and manual labor. He contended that Bridge Department Equipment Operators have fewer opportunities for overtime than those in the Disforce, but he provided no substantiation for this contention. He also complained that, in the Bridge Department, Equipment Operators are expected to perform a number of manual labor tasks, but that he was rarely expected to do so in his prior assignment. As for the propriety of the transfer itself, Mr. Hearl argues it was effected contrary to the established procedure DOH has promulgated for conducting transfers.

DOH Operating procedures § II, Chapter 8 requires a minimum ten-day advance written notice to an employee prior to a transfer. Except as otherwise provided in subsection 10.4 of the DOP Administrative Rule, appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time. (See footnote 5) But, it is axiomatic that “[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its own affairs.” (See footnote 6) In this case, no prior noticewas given to Mr. Hearl before the transfer was made. In fact, he was notified five days after the fact.

However, as before stated, the net effect on Grievant's position was nil. He maintained his classification, pay, supervisor, equipment, and work assignments. He produced no evidence of lost overtime opportunities. His fear of actually getting his hands dirty because other Equipment Operators 3 in the Bridge Department sometimes perform manual labor is immaterial, as he has always had as part of his classification specification, the ubiquitous “Performs related work as required.” “Examples of Work” listed in the classification specification include a large number of manual labor tasks. However, since nothing about Mr. Hearl's actual job changed except the processing of some long-overdue paperwork, Mr. Hearl suffered no harm from the error in failing to give him ten days' notice. "Relief which entails declarations that one party or the other was right or

wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]." (See footnote 7) Since Mr. Hearl was not harmed by the mistake, it would be useless to direct DOH to reverse the transfer and then do it properly. Mr. Hearl presented no argument or evidence to support a finding the transfer should not be done at all.

The following conclusions of law support this discussion:

Conclusions of Law

1. 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 validthan 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 Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. "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.' *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.*" *Gillum v. Dep't of Transp./Div. of Highways*, Docket No. 01-DOH-012 (May 30, 2001).

3. Grievant presented no evidence of a vacancy within the Disforce.

4. To demonstrate a *prima facie* case of reprisal as defined by W. Va. Code § 29-6A-2(p), a grievant must establish by a preponderance of the evidence the following elements:

that he engaged in a protected activity, e.g., filing or participating in a grievance;

that he was subsequently treated in an adverse manner by the employer or an agent;

that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;

that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and

> that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Jordan v. Dep't of Trans./Div. of Highways, Docket No. 03-DOH-057 (Sep. 15, 2003). *See W. Va. Dep't of Natural Res. v. Myers*, 443 S.E.2d 229 (W. Va. 1994); *Conner v. BarbourCounty Bd. of Educ.,* Docket Nos. 93-01-543/544 (Jan. 31, 1995); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Gruen v. Bd. of Directors/Concord College,* Docket No. 95-BOD-281 (Mar. 6, 1997).

5. Grievant did not meet his burden of proving he was adversely treated by DOH.

6. Except as otherwise provided in subsection 10.4 of the DOP Administrative Rule, appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time. 143 C.S.R. 1, § 11.6(a). “The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. *Childers v. Civil Serv. Comm'n*, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971).” *Jordan, supra.*

7. “An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977).” *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999); *Swallop v. Civil Service Comm'n of W. Va.*, 172 W. Va. 121, 304 S.E.2d 25 (1983).

8. Respondent was required by its own policy to give Grievant ten days advance notice of his transfer to another organizational subdivision, but it did not do so.

9. Under the unique facts and circumstances of this case, Grievant suffered no harm from Respondent's failure to abide by its own policy. 10. "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board].” *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).

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

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.

June 23, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

The terms Transportation Worker 3/Equipment Operator and Equipment Operator 3 are used interchangeably by the DOH. The official Division of Personnel (DOP) classification title is Transportation Worker 3.

Footnote: 2

Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

Footnote: 3

Gillum v. Dep't of Transp./Div. of Highways, Docket No. 01-DOH-012 (May 30, 2001).

Footnote: 4

Jordan v. Dep't of Trans./Div. of Highways, Docket No. 03-DOH-057 (Sep. 15, 2003).

Footnote: 5

143 C.S.R. 1, § 11.6(a).

Footnote: 6

Swallop v Civil Service Comm'n of W. Va., 172 W. Va. 121, 304 S.E.2d 25 (1983).

Footnote: 7

Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993).