THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RICKY WOOD,
Grievant,

v. **Docket No. 2012-1143-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Ricky Wood, is employed by Respondent, Division of Highways. On April 2, 2012, Grievant filed this grievance against Respondent for failing to award him a Bridge Safety Inspector IV position for which he applied. For relief, grievant seeks instatement into the position with back pay, including overtime, effective January 1, 2012.

Following the April 23, 2012 level one hearing, a level one decision was rendered on May 9, 2012, denying the grievance. Grievant appealed to level two on May 21, 2012. Grievant perfected the appeal to level three of the grievance process on September 17, 2012. A level three hearing was held on December 18, 2012, before the undersigned in Beckley, West Virginia. Grievant was represented by counsel, John W. Feuchtenberger. Respondent was represented by counsel, Robert Miller. This matter became mature for decision on January 22, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant, the sole applicant for a position, was not selected despite being a well-qualified, long-term employee in good standing. Instead, Respondent filled this position under the temporary upgrade policy for twenty months. The reason Grievant was not

selected for the position was because a supposed disparity in pay this would create between Grievant and an incumbent employee in the same classification. Although Respondent may properly refuse to fill a vacant position, in this instance, the position did not remain vacant as Respondent abused the temporary upgrade policy in order to install another employee in the position for twenty months. Respondent's decision was arbitrary and capricious. Accordingly, the grievance is granted.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. On September 19, 2011, Respondent posted a vacancy for Bridge Safety Inspector IV ("Inspector"), for which the deadline for application was September 28, 2011. Grievant applied for the position on September 28, 2011. Grievant was the sole applicant for this position. Timothy Powell, District Bridge Engineer, was responsible for filling the position. As there was only one applicant, Mr. Powell then requested the register twice to obtain additional applicants, but no further applications were made.

2. On October 24, 2011, Respondent posted a vacancy for Highway Administrator I ("Administrator"), for which the deadline for application was November 9, 2011. Grievant applied for the position on November 3, 2011.

3. Grievant interviewed for the Inspector position on November 9, 2011 and interviewed for the Administrator position on December 1, 2011.

4. Grievant's promotion to the Administrator position would have carried a 10% increase in salary while promotion to the Inspector position would have carried a 15% increase in salary.

5. Grievant was selected for the Administrator position and was offered that position on December 8, 2011. After speaking with the Personnel Director and Mr. Powell, Grievant declined the position because he preferred the Inspector position and believed it was very likely he would get the position based on his qualifications and experience.

6. Grievant has been employed with Respondent since 1978. He had previously served in the bridge department until transferring to the environmental department in 2007. Grievant was qualified for the Inspector position and had previously left the bridge department on good terms.

7. Grievant was not selected for the Inspector position and the posting was allowed to expire on March 19, 2012.

8. Mr. Powell stated the main reason he chose not to hire Grievant was because of the disparity in salary it would cause between Grievant and one of the existing employees in the same classification, Mr. Purdy.[1] If hired, Grievant's salary would have been 25% higher than that of Mr. Purdy.

9. Grievant's salary, with the 15% increase, would have been within the pay range for the classification.

10. Respondent has filled the Inspector position through the temporary upgrade policy since April, 6, 2011. The same employee has remained in that position continuously through the present.

11. Temporary upgrades are only to be sought when "all other management options have been duly considered and determined to be ineffective" and "should be the

[1] Level One Transcript at page 46.

agency's final, not initial, method for addressing [needs]." Further, temporary upgrades are to be a maximum of six months with extensions granted in three month increments only upon the "express written authorization of the Director of Personnel." Division of Personnel Temporary Classification Upgrades policy DOP-13.

12. Respondent's operating procedures instruct that "[m]anagers must interview a minimum of three (3) applicants; however, managers may, at their discretion, interview more than three applicants. If there are three (3) or less applicants for any vacancy, all applicants must be interviewed." WVDOH Administrative Operating Procedures Sec. II, Ch. 14, E. Interviewing Process.

13. "The decision regarding whether a vacancy which exists in any organization at any given time will be filled is the inherent right of management." WVDOH Administrative Operating Procedures Sec. II, Ch. 14, E. Filling of Vacancies.

14. On October 1, 2012, Grievant was promoted to another position and received a 15% increase with that promotion. He still seeks instatement into the Inspector position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true

than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

There is no law, rule or policy that specifically states that a position must be filled once it is posted. It is permissible for an agency to withdraw a posting prior to the extension of any employment offer. *Staggers v. Div. of Highways*, Docket No. 98-DOH-505 (Apr. 30, 1999). Further, "[t]he decision regarding whether a vacancy which exists in any organization at any given time will be filled is the inherent right of management" under Respondent's operating procedures. WVDOH Administrative Operating Procedures Sec. II, Ch. 14, E. Filling of Vacancies. However, these decisions, like all discretionary decisions, must be made in a manner that is reasonable and not arbitrary and capricious. *See Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Grievant argues that Respondent did not choose to leave the Inspector position vacant as Respondent abused the temporary upgrade policy to fill this position "temporarily" for twenty months. In addition, Grievant argues Respondent is mistaken

that three applicants must be interviewed, and that salary was not a hiring criteria that Respondent could consider. Respondent argues it is not required to fill a vacant position. Respondent further argues its actions were reasonable because Respondent's operating procedures require a minimum of three applicants be interviewed and that management could not justify paying Grievant 25% more than an incumbent employee in the same classification.

Respondent incorrectly quotes its own operating procedures regarding interviewing requirements. While the procedure does state that a minimum of three persons must be interviewed, it goes on to state that if there are three or less applicants, all applicants must be interviewed. This procedure in no way states a position cannot be filled if there are less than three applicants.

Respondent is not required to post or fill a vacant position as those decisions are the right of management. In this case, however, the issue is not that simple. Under the facts of this case, the position in question cannot reasonably be said to have remained vacant. Instead, Respondent chose to allow the posting to expire, and continued another employee in the position utilizing the temporary upgrade policy. That employee remained in the position for twenty months.

Temporary upgrades are only to be sought when "all other management options have been duly considered and determined to be ineffective" and "should be the agency's final, not initial, method for addressing [needs]." Further, temporary upgrades are to be a maximum of six months with extensions granted in three month increments only upon the "express written authorization of the Director of Personnel." Division of Personnel Temporary Classification Upgrades Policy (DOP-13). The policy is clear that

it is to be used as a temporary solution, and is not to be used in place of hiring. Filling the Inspector position under the temporary upgrade policy for twenty months in these circumstances is not temporary, and it is obviously a circumvention of the requirements for hiring a civil service employee.

As Respondent did not actually leave this position vacant, analysis then turns to whether it was reasonable for Respondent to refuse to hire Grievant, the only applicant for the position. It is undisputed that Grievant was qualified for the position, was a former employee in good standing of the relevant department, and that he had extensive years of service with the Division of Highways. Mr. Powell chose not to hire Grievant simply because of the salary he would receive upon his fifteen percent pay increase on promotion. To be clear, Mr. Powell did not consider Grievant's potential salary as a budgetary concern. His concern was only that Grievant would receive a twenty-five percent higher salary than Mr. Purdy, an incumbent Inspector. While it is certainly not unreasonable for a manager to take into consideration how the hiring of a new employee will impact existing employees, Mr. Powell's ultimate decision in this case is unreasonable.

Neither side provided any law or policy regarding whether or not it is proper to consider salary in a hiring decisions. However, the administrative rule provides some guidance:

> The general purpose of the Division of Personnel is to attract to the service of this State personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, removal, discipline, classification, compensation, and welfare of its employees, and other incidents of state employment. *All appointments and promotions to positions in*

> *the classified service shall be made solely on the basis of merit and fitness.*

Westfall v. Dep't of Transp./Div. of Highways, Docket No. 2009-0339-DOT (Oct. 30, 2009) (citing W. VA. CODE ST. R. 143-1-2 (2007)). Refusing to hire Grievant, a well-qualified, thirty-three year veteran of civil service, flies in the face of this stated purpose. While it is commendable that Mr. Powell was concerned for his incumbent employee, such concern was largely unfounded. It is well-settled law that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994). Further, if Mr. Powell had concerns regarding the disparity of pay between Grievant and Mr. Purdy, then the discretionary pay increase policy would be available for him to address that concern to seek an increase in salary for Mr. Purdy.

In sum, the Inspector position was one that obviously needed to be filled, Grievant was the only applicant, and Grievant was qualified for the position with no concerns as to his merit or fitness. The decision to refuse to hire Grievant based on supposed disparity in pay between Grievant and an incumbent employee, and to fill that position with another employee through a twenty-month "temporary" upgrade was arbitrary and capricious.

Grievant requested back pay, including overtime, and argued it should commence either December 9, 2011, January 1, 2012, or February 1, 2012.[2] Respondent simply argued Grievant is not entitled to receive back pay and offered no argument as to when back pay should commence if awarded. Overtime is not guaranteed, therefore granting back pay for overtime would be speculative. The commencement date of the back pay is a more difficult question, as there is no obvious date, such as there would be in a more typical selection decision in which another person was improperly selected for a position. In *Westfall* above, it was reasoned that, when an employee was improperly left in a position under the temporary upgrade policy, the back pay entitlement of the successful grievant should commence one month after the completion of the interviews. In this case, after the posting closed with only one applicant, Mr. Powell also requested the register to see if additional applicants could be obtained. It was reasonable for Mr. Powell to delay his decision until after no additional applicants were found on the register. The record, however, is unclear as to the exact dates this occurred. Therefore, given the guidance of *Westfall*, with additional time granted to allow for the inquiry into the register, back pay should commence January 1, 2012. Back pay entitlement would cease effective September 30, 2012, as Grievant was promoted to another position on October 1, 2012 and received a fifteen percent increase with that promotion.

[2] In his Proposed Findings of Fact and Conclusions of Law, Grievant argued back pay should commence December 9, 2011, the date upon which Grievant refused the Administrator position. This is a different relief than what Grievant sought in his grievance filings at level one, two, and three where he requested back pay beginning either January 1, 2012 or February 1, 2012.

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. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. It is permissible for an agency to withdraw a posting prior to the extension of any employment offer. *Staggers v. Div. of Highways*, Docket No. 98-DOH-505 (Apr. 30, 1999). However, discretionary decisions must be made in a manner that is reasonable and not arbitrary and capricious. *See Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998).

3. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to

ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

4. Respondent's decision to refuse to hire Grievant based on supposed disparity in pay between Grievant and an incumbent employee, and to fill that position with another employee through a twenty-month "temporary" upgrade was arbitrary and capricious.

Accordingly, the grievance is GRANTED**.** Respondent shall place Grievant in the position of Bridge Safety Inspector IV immediately, with the commensurate salary and benefits. Respondent shall also pay Grievant back pay of the fifteen percent increase he should have received from January 1, 2012 to September 30, 2012, plus statutory interest.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: June 26, 2013

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Billie Thacker Catlett
Administrative Law Judge