THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PAUL HEATER, et al.,
Grievants,

v. **Docket No. 2012-0934-CONS**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievants, Paul Heater, Eric Powers, John Whiting, William Heath, Rex Rohrbaugh, Leslie Blake, Randy Stalnaker and Kendall Heckert filed this grievance on March 6, 2012, alleging an improper posting of an upgrade. They seek to be made whole, including an equal upgrade. This grievance was denied at level one by letter dated September 24, 2012, and issued by Sandra Castillo, Grievance Evaluator. A level two mediation session was conducted on February 11, 2013. Grievants perfected their appeal to level three on February 15, 2013. A level three hearing was conducted before the undersigned Administrative Law Judge on August 15, 2013, at the Grievance Board's Westover office location. Grievants appeared in person and by their representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Robert Miller, Legal Division. This matter became mature for consideration upon the receipt of the last of the parties' proposed findings of fact and conclusions of law on September 30, 2013.

Synopsis

Grievants filed this action challenging what they described as an improper posting of upgrade. At level one, the hearing examiner ruled that Grievants met the burden of proof required to establish that the Respondent failed to properly post additional duties in the Lewis County garage. However, the hearing examiner ruled that Grievants did not request that the additional duties upgrade be re-posted, and, therefore, were not entitled to relief. Grievants established at level three that they were seeking to have the additional duties posting re-posted and to allow for the selection process to be undertaken once again.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievants are all classified as Transportation Workers and are employed at the Lewis County garage, District 7, by the Division of Highways.

2. On November 17, 2011, the West Virginia Division of Personnel issued a memorandum to Respondent approving the posting for a Transportation Worker 3 Equipment Operator. The notice was to be displayed from November 18, 2011, through December 5, 2011, at a location visible to all employees of the Organization. This "Posting Notice" is an opportunity for eligible employees to express their interest in assuming new duties for a possible reallocation and subsequent increase in salary. Eligible employees are directed to go to District 7 Headquarters, and sign the "Posting Log" within the time frame listed on the notice.

3. The record at level one and level three established that the Grievants did not see the posting of the additional duties.

4. Robert Morrison was the only employee of the Lewis County garage to go to District 7 Headquarters and place his name on the sign-up sheet for consideration for the additional duties. Mr. Morrison was subsequently awarded the duties and reallocated to a Transportation Worker 3 Equipment Operator on February 16, 2012.

5. Grievants all indicated that they did not see the posting dated November 17, 2011, in the area in which information for employees of the garage is customarily posted.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Grievants contend that the improperly posted additional duties announcement should be re-posted in order to give all eligible employees of the Lewis County garage an opportunity to request the additional duties.[1] Respondent argues that this is, in essence, a non-selection case and Grievants do not have standing to challenge their employer's action since they are not qualified for the additional duties. The central issue in this case, as identified by the level one evaluator, is whether the posting for additional duties was improper.

The Division of Personnel Administrative Rule in section 9.5 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. Posting of job openings using electronic or other communications media shall satisfy the requirement to post a notice provided that the appointing authority makes regular and convenient access to the media used available to each classified employee in the agency, or otherwise provides notice to each classified employee in the agency. 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 class to be used to fill the job opening.[2]
>
> (a) The term job opening refers to any vacancy to be filled by original appointment, promotion, demotion, lateral class change, reinstatement, or transfer . . .

The Division of Personnel Administrative Rule in section 3.92 provides that:

> 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."

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[1]Grievants also request that all eligible employees of the Lewis County garage receive the same pay upgrade given to Robert Morrison following his reallocation. The record of the grievance did not support such a ruling, and Grievants provided no authority upon which to base such a ruling.

[2]This posting requirement is also found at WEST VIRGINIA CODE § 29-6-24.

The undersigned agrees with the level one evaluator that Grievants were able to demonstrate that the "Posting Notice" concerning the additional duties was not properly posted as dictated by the Division of Personnel Rule. The flaw in posting was sufficient enough to render Respondent's selection process arbitrary and capricious.[3] The record did not establish that any of the Grievants were more qualified than the successful applicant. Where the selection process is proven to be arbitrary and capricious, but the Grievants failed to prove that they should have been selected for the position, the position should be re-posted and a new selection process undertaken. *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009); *Spradling v. W. Va. Insurance Comm'n*, Docket No. 2010-1015-DOR (Feb. 28, 2011). Consequently, the Grievance is GRANTED and the position concerning additional duties must be re-posted by Respondent and a new selection process undertaken. The present employee garage configuration should stay in place while the selection process proceeds.

The following conclusions of law support the decision reached.

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[3]"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). A [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." *Ball v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-141 (July 31, 1997); *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997).

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

2. Where the selection process is proven to be arbitrary and capricious, but the Grievants failed to prove that they should have been selected for the position, the position should be re-posted and a new selection process undertaken. *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009); *Spradling v. W. Va. Insurance Comm'n*, Docket No. 2010-1015-DOR (Feb. 28, 2011).

3. Grievants established that the posting of the position was not properly done pursuant to procedures enacted to insure that the interview process treats all applicants in a fair and equitable manner.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to re-post the position previously marked and admitted as Respondent's Exhibit No. 2 at level one, and select the most qualified applicant for the position.

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* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: October 30, 2013

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Ronald L. Reece
Administrative Law Judge