THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DANA BOWEN and STAN WILT,
Grievants,

v. **Docket No. 2012-0888-CONS**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievants, Dana Bowen and Stan Wilt, filed two separate grievances at level one on February 28, 2012, against their employer, Division of Highways. They allege that the "posting for assistant engineer improperly excluded technologists and new applicants." For relief, Grievants seek to be made whole, including a new selection process. The individual grievances were consolidated at level one by Sandra Castillo, Grievance Evaluator, by Order dated March 1, 2012. This grievance was denied at level one following a hearing on August 31, 2012, by letter dated September 24, 2012. A level two mediation session was conducted on February 11, 2013. Grievants perfected their appeal to level three on February 20, 2013. A level three hearing was conducted before the undersigned Administrative Law Judge on May 6, 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, West Virginia Department of Transportation/Division of Highways. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 6, 2013.

Synopsis

Grievants allege that the decision to use two postings to fill one vacancy, and to not fill the Transportation Engineering Technologist position that was posted on September 19, 2011, was somehow a violation of statute, policy, and applicable rule, or was an arbitrary and capricious act. Grievants failed to prove by a preponderance of the evidence that Respondent violated its rules by deciding to post a Transportation Engineering Technologist position to secure an eligible applicant for an Assistant Maintenance Engineer vacancy. Grievants failed to prove that this decision was arbitrary and capricious.

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

Findings of Fact

1. Grievants are employed by the West Virginia Division of Highways in District Seven as Transportation Engineering Technicians - Seniors.

2. Mr. Bowen has been employed with the Division of Highways since August 11, 1997. Mr. Wilt has been employed with the Division of Highways since January 2, 1990.

3. Ronald Smith, Assistant Maintenance Engineer for District Seven, has been employed with the Division of Highways since January 3, 1973. Mr. Smith oversees maintenance operations in District Seven.

4. Mr. Smith indicated that upon graduation from college, engineers must take a comprehensive full-day test to obtain an initial license. Subsequent to this test,

employees work for at least four additional years, must pass another comprehensive test, and then obtain another license to become a professional engineer. The employee may then apply as a Highway Engineer Associate.

5. A vacancy was posted for a Highway Engineer Associate position and Transportation Engineering Technologist position for what turned out to be the single position of Assistant Maintenance Engineer on September 19, 2011, in Lewis County, which is located in District Seven.

6. Mr. Bowen applied for the Transportation Engineering Technologist position, Mr. Wilt did not apply for either position.

7. Notwithstanding the fact that two positions were posted on September 19, 2011, only one position was actually available. Two postings were advertised for one vacancy because of a past record of the lack of applicants in District Seven in regard to previous postings.

8. Respondent's management in District Seven would prefer to hire licensed engineers as opposed to Engineering Technologists for Assistant Maintenance Engineer positions because they routinely have more experience, training and education. All of the Assistant Maintenance Engineer positions in District Seven are filled by engineers.

9. Tom Freeman was the previous incumbent to occupy the position of Assistant Maintenance Engineer in the September 19, 2011, posting. While the posting was for a Highway Engineer Associate, the vacant position was for an Assistant Maintenance Engineer.

10. After the September 2011 postings, Mr. Freeman returned to his job in early October of 2011. Mr. Freeman then decided to leave the Division of Highways and new

interviews were scheduled for only the engineers that applied for the posted positions. On March 7, 2012, new interviews were scheduled within the six-month period of the original filing.

11. Management did not fill the Transportation Engineering Technologist position. The Assistant Maintenance Engineer vacancy was filed with a licensed engineer from another district who had previously applied for the posting.

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 Public Employees Grievance Bd. 156 C.S.R. 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).

The first issue to be addressed is Respondent's request that Mr. Wilt's grievance be dismissed. The record of this consolidated grievance reflects that it is undisputed that Mr. Wilt did not bid for either of the September 2011 posted positions. Mr. Wilt filed a separate grievance and this case was consolidated at the request of the representative for the Grievants. The undersigned grants Respondent's motion to dismiss Mr. Wilt's grievance. The Grievance Board has previously addressed the issue of standing and

stated, "[s]tanding, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). When an individual is not personally harmed, there is no cognizable grievance. *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Cremeans v. Board of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for a grievant to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [he seeks] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979). The Grievance Board has frequently ruled that without some allegation of personal injury, a grievant is without standing to pursue a grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990). Given that Grievant did not bid on the posted positions, he is without standing to challenge the propriety of the postings.

Mr. Bowen asserts in this grievance that it was somehow an arbitrary and capricious act when Respondent did not consider technologists when filing the Assistant Maintenance Engineer position. The posting of a position within the classified service necessary to

accomplish the work of the agency is a management decision, and this type of decision is judged by the arbitrary and capricious standard. "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). 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, 474S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

This Grievance Board has frequently ruled that, "[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 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).

Historically, many state agencies do not automatically post a position when an employee retires, resigns, or is promoted. *See Smith v. Parkways Economic Dev. and Tourism Auth.,* Docket No. 00-PEDTA-133 (July 7, 2000); *Staggers v. Div. of Highways*, Docket No. 98-DOH-505 (Apr. 30, 1999); *Law/Bragg v. W. Va. Dep't of Health and Human Res.*, Docket No. 95-HHR-452 (July 17, 1997). "Frequently, the agency examines whether the specific position needs to be filled, whether the assigned duties can be assumed by a current employee, and whether other areas have more pressing needs that require the shifting of the position to another section[,] . . . [and] it is up to the administration of [the agency] to make these decisions." *Mikles v. Dep't of Environmental Protection*, Docket No. 06-DEP-320 (March 30, 2007).

The Division of Highways posted two job announcements on September 19, 2011, in District Seven. The first posting was for a Highway Engineer Associate. The second posting was for a Transportation Engineering Technologist. Mr. Bowen applied for the Transportation Engineering Technologist position. Management determined it was necessary to post two positions due to historically not receiving enough applicants for job openings in the district. The record established that the Transportation Engineering Technologist posting was to be used only if no licensed engineers applied for the Highway Engineer Associate posting. In addition, Respondent's Human Resources had requested that the vacant Assistant Maintenance Engineer position be filled with a licensed engineer if at all possible.

Mr. Bowen applied for the vacant position based on the assumption that a Transportation Engineering Technologist is eligible to hold the title of Assistant Maintenance Engineer in District Seven due to past practices. However, the record

established that it has been many years since a technologist was in an Assistant Maintenance Engineer position in District Seven. Both of the employees whom Mr. Bowen referenced during the hearings on this case have not been employed by Respondent since 2003.

As mentioned before, the vacancy was for one Assistant Maintenance Engineer in District Seven due to Tom Freeman, previous Assistant Maintenance Engineer, being promoted to Regional Maintenance Engineer. Mr. Freeman left District Seven in August 2011. After a brief stay in his new position, Mr. Freeman determined that he was not suited to be the Regional Maintenance Engineer and requested to return to his former position. District personnel sent letters dated October 7, 2011, to applicants that the Division of Highways would no longer be filling the Assistant Maintenance Engineer position that was posted on September 19, 2011.

Mr. Freeman was subsequently offered employment from an outside company and left the Division of Highways altogether, causing the same vacancy. Management decided to draw from the pool of previous applications and contacted possible candidates to see if they were still interested in interviewing for the Assistant Maintenance Engineer position. Management determined that they had enough engineer applicants and would not need to interview any employees holding the classification of Transportation Engineering Technologist.

The decision to not fill the Transportation Engineering Technologist position, based on the record of this case, was not arbitrary and capricious since District Seven made it clear that there was only one position that would be filled. In addition, the record established that management did rely on criteria intended to be considered with the

reasonable belief that the position would be better filled with an engineer. The Division of Highways' management provided a viable explanation for its decision to use two postings in District Seven to fill one 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. 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. "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).

3. 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 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).

4. The posting of a position within the classified service necessary to accomplish the work of the agency is a management decision, and Grievant has failed to prove Respondent's decision in this case was arbitrary and capricious or a violation of any law, rule, or regulation.

Accordingly, this grievance is **DENIED**.

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 (2008).

Date: July 15, 2013

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Ronald L. Reece
Administrative Law Judge