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**WEST VIRGINIA EDUCATION AND
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JAMES POWELL

v.

DOCKET NO. 89-DOH-534

WEST VIRGINIA DIVISION OF HIGHWAYS

DECISION

Grievant, James Powell, is employed by the West Virginia Division of Highways (DOH or the Division) and is presently classified as an Engineer Technician. On September 11, 1989, Mr. Powell advanced a grievance to level four in which he alleged that favoritism was shown to another applicant when filling a position of Maintenance Analyst II, thus discriminating against him. The matter was set for hearing on October 16, 1989; however, after continuances on that date and hearings rescheduled for December 1, 1989, January 17, 1990, February 16, 1990, and June 12, 1990, the parties agreed that a decision could be made on the record developed at level three. The record was provided on June 14, 1990; a final written statement was filed by the

grievant on December 11, 1990 and proposed findings of fact and conclusions of law were submitted by the Division on December 12, 1990 thereby completing the record for decision.¹

The facts leading to this grievance are as follows. In November 1988 DOH advertised the position of Maintenance Analyst II. There were two applicants for the position, John K. Groves, who had previously held the job in 1987-88, and the grievant. Mr. Groves was recommended for the position and the requisite paperwork to reinstate him was filed with Civil Service. The DOH was advised by Civil Service that new hires or reinstatements into the Maintenance Analyst positions were to be limited to the Maintenance Analyst I classification, but with the same salary as the Maintenance Analyst II classification. Mr. Groves chose to accept the position at the lower classification.

The crux of the grievance appears to be that the position in question had been classified as a Senior Engineering Technician until 1986, had been posted as a Maintenance Analyst II or III in June 1987 and was eventually filled in November 1988 as an Analyst I. The grievant alleges that the downgrading was to accommodate the placement of a certain individual, either a friend or a political

¹The grievance had previously been denied at levels one, two and three.

party favorite, in that position depriving him of fair consideration during the selection process.

The Division denies that it engaged in favoritism or discrimination in filling the vacant position and asserts that Mr. Groves was awarded the position because he had previously held the same for a period of six months prior to transferring to another post within DOH, Highways Administrative Manager. It further argues that downgrading the position's classification to Maintenance Analyst I was a decision made by the West Virginia Division of Personnel (Personnel) and had not been solicited by DOH. Mr. Groves was reinstated to the position with no loss in pay however, because his salary fell within the range for Maintenance Analyst I.

The Education and State Employees Grievance Board recently held in Prince v. Wayne Co. Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990), that the prima facie case standard would be applied in education employee favoritism grievances. This standard is now also extended to state employee favoritism grievances.

A prima facie showing of favoritism, under the broad Code §18-29-2(o) definition of the term, shall consist of a grievant's establishment:

- (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
- (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him;

and

(c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

If the grievant successfully proves a prima facie case, a presumption of favoritism exists, which the respondent can rebut by articulating a legitimate reason for its action. However, the grievant may still prevail if he can demonstrate the reason proffered by the respondent was mere pretext. See W.Va. Inst. of Technology v. WVHRC & Zavareei, 383 S.E. 2d 490 (W.Va. 1989).

After a review and consideration of the evidence presented at the level three hearing it must be determined that the grievant failed to establish a prima facie showing that DOH acted with favoritism, defined by W.Va. Code §29-6A-2(h) as the "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees" or discrimination as defined by W.Va. Code §29-6A-2(a), "any difference in the treatment of employees unless related to their actual job responsibilities or agreed to by them in writing."

It does not appear from the record that the changes were a manipulation of the position to accommodate the placement of a certain individual who had advantageous political, familial or social relationships. Nick Bromhal, Assistant District Engineer for Maintenance, advised the grievant in his level one decision that the position of Senior Engineering Technician had been reclassified to Maintenance Analyst in or about 1984 but that the individual

who held the position at that time was allowed to retain the title until he vacated the position. Both Mr. Bromhal and Perry Dotson, whose title was not given, testified that the downgrading of the position in December 1988 from Maintenance Analyst II to Maintenance Analyst I was at the direction of Lowell Basford from Personnel and was not a decision made within or by DOH. Mr. Dotson explained that the decision had been the result of an evaluation of the positions by Personnel. Mr. Groves suffered no loss of salary according to Mr. Dotson because the amount which he would have earned as an Maintenance Analyst II fell within the scale of a Maintenance Analyst I.² Addressing his decision regarding his choice of Mr. Groves over the grievant, Calvin Alt, District Engineer, listed Mr. Groves' prior experience as an Maintenance Analyst II and his certification for the positions of Maintenance Analyst II and III. Mr. Alt stated that he believed Mr. Groves' experience made him the most qualified applicant and that he would require less training than the grievant who had approximately twenty-four more years experience than Mr. Groves, but none in the position of Maintenance Analyst.³

²The information regarding Mr. Groves' salary was presumably presented in support of the grievant's assertion that he not only received the position but managed to retain the same salary as stated on the posting for the Maintenance Analyst II as a result of favoritism.

³There was no requirement that the "most-qualified" applicant be hired.

The grievant also attempted to support his case by showing that Mr. Groves and Mr. Alt were in Charleston in early December immediately prior to Mr. Groves' reinstatement. To confirm his vague assertion that some action took place resulting in Mr. Groves' reinstatement, the grievant offered the testimony of William Donaldson, also an employee of DOH, who had submitted application for Interstate Supervisor in Berkeley County. Mr. Donaldson stated that the assignment was eventually awarded to another applicant who he heard had gone to Charleston with Mr. Alt "and somehow or other he was put under Civil Service and got the job." It is understandable that from the grievant's limited viewpoint these incidents may at least have created a questionable appearance; however, no specific wrongdoing was established. On the contrary, Mr. Groves and Mr. Alt both stated that they were in Charleston in December to attend grievance meetings.

Finally, the grievant questions whether the position should have been reposted after it was downgraded from Maintenance Analyst II to Maintenance Analyst I. Because he offers no policy, resolution or other authority which specifically addresses the issue and because he had already been considered qualified for the Maintenance Analyst II position he has not been deprived of any opportunity for consideration and reposting would serve no useful purpose or provide no benefit to him.

The remainder of the grievant's evidence consisted of testimony intended to establish patterns of wrongdoing which he indicated to the level three panel of evaluators he must do in order to prove his allegation of favoritism. The grievant was misinformed or misunderstood the nature of what constituted his burden of proof and the considerable amount of testimony relating to the ratio of office furniture to personnel, the assignment of state cars to some individuals but not others, the failure of one employee to receive any assignments of overtime and incidents relating to employee evaluations are irrelevant to the issue of whether the grievant was improperly denied the position of Maintenance Analyst II because of an act of favoritism or discrimination.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. The grievant has been employed by the DOH for approximately twenty-seven years and is presently classified as an Engineer Technician serving as Permits Officer for District Five.

2. Beginning November 21, 1988 the position vacancy for Maintenance Analyst II was posted. The grievant and John Groves applied and were interviewed for the position.

3. The position was subsequently awarded to Mr. Groves who had previously, and most recently, held the position prior to accepting another assignment within the DOH.

4. During the reinstatement process Personnel advised the DOH that the position would be downgraded to Maintenance Analyst I.

5. Mr. Groves accepted the downgraded classification of Maintenance Analyst I and retained his same salary which fell within the pay scale for the lower-level position.

Conclusions of Law

1. In order to prevail, a grievant must establish his claims by a preponderance of the evidence. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. The grievant has failed to prove violations of W.Va. Code §§29-6A-2(h) or (d), specifically that he was treated unfairly and that another employee was shown preferential, exceptional or advantageous treatment or that he was treated differently in any way from another employee in the filling of the position of Maintenance Analyst II.

Accordingly the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Mineral County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code §29-6A-7) Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED

January 31, 1991

Sue Keller

**SUE KELLER
SENIOR HEARING EXAMINER**