PATRICIA A. McDONALD,

and CHERYL A. McNEILL,

Grievants,

v. **Docket No. 97-DOH-005**

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

DECISION

Patricia A. McDonald and Cheryl A. McNeill, Grievants, filed this grievance against Respondent, West Virginia Department of Transportation/Division of Highways, alleging that they applied, and were better qualified, for an Administrative Secretary position than the successful applicant, Ms. Kelly Dressler. As relief, Grievants seek to be instated into the Administrative Secretary position in question, and back pay.

Grievants were denied relief at the lower levels of the grievance procedure. At Level III, the grievances were consoli-
dated. Grievants did not appeal to Level IV together. Subsequently, Grievant McNeill's case was issued Docket No. 97-DOH- 012, and Grievant McDonald's case was issued Docket No. 97-DOH-005. By Order dated January 27, 1997, Grievant McNeill's case was consolidated with Grievant McDonald's case. Grievants were granted three continuances before the Level IV evidentiary hearing was finally held on July 24, 1997. The case became mature for decision on September 22, 1997, with receipt of Respondent's proposed findings of fact and conclusions of law.

The parties stipulated to the following facts: 1. Grievants are employed as Secretary IIs in District Five. 2. The position of Administrative Secretary to the District Five Engineer was posted on October 13, 1995.

3. At least three individuals applied for the Administrative Secretary position: Ms. McDonald, Ms. McNeill, and Ms. Kelly Dressler, the successful applicant.

4. As of the date of the posting, Ms. McDonald and Ms. McNeill had at least 26 and 11 years of service respectively. Ms. Dressler had 4 years, seven months of continuous service with the [Respondent]. In total, Ms. Dressler has 10 years of total service through November, 1995.

5. Ms. Dressler has never passed the West Virginia Division of Personnel's typing test.

The Findings of Fact, listed below, were derived from the record by the undersigned Administrative Law Judge.

FINDINGS OF FACT

1. From January 2, 1991, through April 10, 1995, Ms. Dressler substituted regularly for the Administrative Secretary to the District Five Engineer. She served as acting Administrative Secretary on a full-time basis from April 25, 1995, until she was awarded the promotion.

2. Ms. Dressler failed the typing test in 1993.

3. “The testing process” for Administrative Secretary was established in August, 1994. It included a typing test.

4. Ms. Dressler should not have been approved for the promotion to administrative secretary without passing the typingtest, and was erroneously approved for the promotion to administrative secretary.

5. In May, 1997, Mr. Willard Farley, Assistant Director of Staffing Services for the West Virginia Division of Personnel, discovered that his staff had made a mistake in December, 1995, when reviewing Ms. Dressler's qualifications, and had over-looked the fact that she had not passed the typing test which was required for the Administrative Secretary position.

6. Grievant McNeill has passed the typing test required for, and is qualified to hold, the Administrative Secretary position in question.

7. Grievant McDonald is no longer interested in the Administrative Secretary position in question.

DISCUSSION

Grievant McDonald's grievance is moot. "In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." See State ex rel. M.C.H. v. Kinder, 317 S.E.2d 150, 152, (W. Va. 1984), citing Murphy v. Hunt, 455 U.S. 478, 481, 102 S.Ct. 1181, 1182-83, 71 L.Ed.2d 353, 356 (1982); Powell v. McCormack, 395 U.S.

486, 496, 89 S.Ct. 1944, 1950, 23 L.Ed.2d 491, 502 (1960). See also Harrison v. Cabell County Bd. of Educ., 351 S.E.2d 604 (W. Va. 1985), ("[m]oot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or property are not properly cognizable by a court.")

Grievant McDonald stated that she was no longer interested inthe position in question, but desires compensation. First, because she is no longer interested in the position, her grievance is moot. See Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-714 (Feb. 22, 1990); Green v. Kanawha County Bd. of Educ., Docket No. 20-86-344-1 (Mar. 12, 1986). Second, Grievant McDonald failed to establish an injury which would entitle her to compensation. See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-002-007 (June 30, 1997); Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996); Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).

Only Grievant McNeill's case remains for decision, and the parties do not disagree that Ms. Dressler should not have been approved for the promotion to administrative secretary without passing the typing test, and was erroneously approved for the promotion to administrative secretary. (See Respondent's proposed Findings of Fact). Respondent asserts Section 8.04(c) of the West Virginia Division of Personnel (Personnel) rules and regulations as a defense in this case. (Id.). Section 8.04(c), in pertinent part, provides that “[i]n the event a name is certified in error and the error is discovered after the effective date of the appointment of one of the named applicants, the appointment shall continue.”

Respondent's reliance on Section 8.04(c) is misplaced. While Section 8.04(c) might prohibit Personnel and Respondent from challenging the appointment, it does not prevent Grievants from challenging the appointment of Ms. Dressler, nor does it impede the Grievance Board from correcting Respondent's error. Section8.04(c) does not supersede or preclude the operation of W. Va. Code §29-6A-1, et. seq.

Grievants asserted that Ms. Dressler does not meet the minimum qualifications for the position in question. However, she substituted regularly in the position for over four years. Her substitution was not sporadic as Grievants alleged.

Grievants also asserted that Respondent failed to consider seniority pursuant to W. Va. Code §29-6-10(4), which provides:

> For promotions within the classified service which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination, when such examination is practicable. An advancement in rank or grade or an increase in salary beyond the maximum fixed for the class shall constitute a promotion. When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit or have the benefit withdrawn, as the case may be.

Emphasis added.

Although there is no evidence that Respondent considered seniority, there was no need to do so as Grievants' and Ms. Dressler's qualifications were not “substantially equal or similar.” Ms. Dressler had regularly substituted for over four years in the position she was awarded. Grievant McNeill has never been an Administrative Secretary. Therefore, while Grievants met the minimum qualifications for the position, the record will notsupport a finding that Respondent's selection of Ms. Dressler was arbitrary and capricious given Personnel's approval of its selection. (See footnote 1)

At Level IV, Mr. Farley testified that if he or his staff had realized that Ms. Dressler had not passed the typing test, she would have been given the opportunity to take the test, and that the mere lack of her not having passed the test would not have excluded her from the position in question. Then, if she had passed the typing test, she would have been approved by Personnel.

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

CONCLUSIONS OF LAW

1. In nondisciplinary matters Grievants must prove all of the allegations constituting their grievance by a preponderance of the evidence. Rice v. W. Va. Dept. of Tax and Revenue, Docket No. 90- ABCC-452 (Jan. 23, 1992); Owens v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 90-ABCC-003 (Apr. 30, 1990).

2. Section 8.04(c) of the West Virginia Division of Personnel Rules and Regulations does not prevent Grievants from challenging
the appointment of Ms. Dressler, nor does it impede the Grievance Board from correcting Respondent's error.

Accordingly, the grievance is **REMANDED**. Respondent is **ORDERED** to provide Ms. Dressler an

opportunity to take the required typingtest for the position in question within thirty (30) days of receipt of this **DECISION**. If the West Virginia Division of Personnel certifies that Ms. Dressler received a passing score on the test, then she shall remain in the position. However, if Ms. Dressler fails the required typing test in question, then Respondent is **ORDERED** to place Grievant McNeill in the Administrative Secretary position in question, with appropriate compensation, benefits, and back pay, if any, as if she had originally received the position instead of Ms. Dressler.

Any party may appeal this decision 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. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Dated:_October 20, 1997_____ _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 See Mowery v. W. Va. Dept. of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).