AVERY C. GORE,

Grievant,

v. **DOCKET NO. 98-DOH-461**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

This grievance was filed by Grievant Avery C. Gore against Respondent, West Virginia Department of Transportation, Division of Highways ("DOH"), on or about October 19, 1998. Grievant alleges he should have been selected for an Equipment Storeroom, Supervisor II position, because the successful applicant did not meet the minimum qualifications as described in the Supervisor II job description. (See footnote 1) As relief he sought, "promotion to Supervisor I in the maintenance storeroom where I am currently employedor if this can not be accomplished, I will accept the Supervisor II position in the Equipment Storeroom as stated in the above grievance." (See footnote 2)

The following Findings of Fact are made based upon the record developed at Level III.

Findings of Fact

1. Grievant is employed by DOH as a Storekeeper III in District Two.

2. On August 24, 1998, DOH posted a Supervisor II vacancy. The posting stated the job duties as, "[u]nder general supervision, performs supervisory work overseeing employees engaged in technical work required [sic] advanced training. Performs employee evaluations, approves annual and sick leave, disciplinary actions and other employee [a]ctivities. May be a working supervisor performing related work of a more advanced level than the subordinates supervised. Performs related work as required." This position was stationed in the equipment storeroom.

3. The minimum qualifications for the posted position were a four-year college degree and "two

years of full-time or equivalent part-time paid experience in the area of assignment, one year of which must have been in an administrative or supervisorycapacity." Additional experience in the area of assignment could be substituted for education.

4. The Division of Personnel lists the areas of assignment for a Supervisor II as arts and humanities, auditing/accounting, bookkeeping, budget and budget planning, clerical, education/training/library, food services, general supervision, health, inspection, laundry services, law enforcement/investigation, natural resources, office management, purchasing, security, and taxation.

5. Grievant, Dennis Lawson, and three other people applied for the posted position.

6. Mr. Lawson was chosen to fill the posted position.

7. Grievant was employed by DOH as a Storekeeper III from 1992, and began supervising college students in June 1993. From 1987 to 1992 he was employed by DOH as an audit clerk II, and supervised three custodians from November 1988. From 1986 to 1987 he was employed by DOH as a Storekeeper I, from 1981 to 1986 as a Craftsman II, and for three months in 1981 as an Auto Parts Clerk II, all non-supervisory positions. From 1978 to 1981 he was employed by DOH as an Auto Parts Clerk II, supervising four employees, and prior to that he was employed in the private sector in a supervisory position for two years. He earned 63 credit hours at Marshall University from 1970 to 1974.

8. Mr. Lawson was employed by DOH as a Transportation Crew Chief from 1990 to 1997, and supervised 5 crew chiefs and 25 work release employees. Prior to that, he had worked in another supervisory job for DOH from October 1989. From 1980 to 1982 he worked for DOH as an Inspector and Craftsworker I, and in that capacity had performed office work, kept daily logs of materials used on road projects, filled work orders, performedequipment repair, and changed tires, oil and spark plugs, among other things. He does not hold a four-year college degree.

9. Both Grievant and Mr. Lawson met the minimum qualifications, as confirmed by DOH's Division of Human Resources.

10. Wilson Braley, District Two Engineer, interviewed the applicants and chose Mr. Lawson to fill the posted vacancy based upon his demonstrated supervisory qualifications, leadership qualities, and maturity in the ability to work with other employees, which he believed exceeded Grievant's qualifications, and made him the best qualified candidate.

Discussion

An agency's decision as to who is the most qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). The arbitrary and capricious standard of review of personnel decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the agency. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Thibault, supra.

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). If a grievantcan demonstrate that the selection process was so significantly flawed that he might reasonably have been the successful applicant if the process had been conducted in a proper fashion, the employer will be required to compare the qualifications of the grievant to the successful applicant. Thibault, supra.

Grievant argued that the required year of supervisory or administrative experience had to be in a storeroom, and Mr. Lawson did not have this type of experience. He pointed out that the Storekeeper I classification specification states that two years experience as a stock clerk or in a clerical capacity in connection with a large-scale warehouse operation or in handling materials is required, and asserted that Mr. Lawson would not have this experience, and accordingly could not be hired either as a Storekeeper or a Supervisor. He further pointed out that the classification of Highways Storekeeper had been recently placed in the Supervisor II classification, and that the minimum requirements for the Highways Storekeeper were "five years experience as a storekeeper, in inventory control or procurement in connection with large scale warehouse operation, one year of which must have included supervisory responsibility." However, the current classification specification does not contain this same requirement, and Grievant has not demonstrated his interpretation of the area of assignment is necessary. No evidence was presented regarding the specific job duties of the posted vacancy to support Grievant's interpretation. Respondent found Mr. Lawson to be minimally

qualified, and the best qualified applicant, and Grievant has not demonstrated this conclusion was arbitrary and capricious.

Finally, Grievant submitted for consideration a Grievance Board decision issued May 1, 1998, in Blake v. West Virginia Department of Transportation, Docket Number 97-DOH- 416. He did not indicate how he felt this decision was relevant to his grievance. Afterreviewing that decision, the undersigned finds no resemblance between Mr. Blake's grievance and the present grievance. The decision in Blake includes findings of fact that a number of factors were considered by the respondent which should not have been considered regarding the grievant's personal life, and a conclusion that the grievant demonstrated favoritism and retaliation. These findings were important to the conclusion that the respondent's action was arbitrary and capricious. None of these factors exist in the present grievance.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. An agency's decision as to who is the most qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

3. Grievant failed to prove he was more qualified than the successful applicant, that the successful applicant was not minimally qualified, or that DOH's decision was otherwise arbitrary and capricious or clearly wrong.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: January 13, 1999

Footnote: 1

In addition Grievant stated, "Dennis Lawson received this job as compensation for the previous supervisor[']s job that he applied for and did not receive. That position was filled by Gilbert Frye. Dennis's previous supervisor, Paul Browning stated to me that he was asked to come back to work and defer his retirement so Dennis would not be able to get the job." No evidence was offered in support of this assertion.

Footnote: 2

Grievant's supervisor responded on October 19, 1998, that he was unable to grant the requested relief, and Grievant appealed to Level II on that same date. The grievance was waived to Level III by agreement of the parties on October 27, 1998. A Level III hearing was held on November 5, 1998, with Grievant appearing pro se, and Respondent represented by Nedra Koval, Esquire. The grievance was denied at Level III on November 9, 1998, and Grievant appealed to Level IV on November 13, 1998. A Level IV hearing was set, and then the parties agreed to submit this matter for decision on the record developed at the lower levels of the grievance procedure, and this matter was subsequently reassigned to the undersigned for administrative reasons. This grievance became mature for decision on January 4, 1999, upon receipt of Grievant's post-hearing written submission. Respondent declined to submit written argument.