LOUIS DELLA MAE,

Grievant,

v. **Docket No. 98-DNR-204**

WEST VIRGINIA DIVISION OF NATURAL RESOURCES,

Respondent.

D E C I S I O N

Louis Della Mae (Grievant) filed two grievances pursuant to W. Va. Code §§ 29-6A- 1, et seq., on December 3, 1996, alleging that Respondent West Virginia Division of Natural Resources (DNR) failed to follow applicable rules and procedures by the manner in which it conducted the process of selecting applicants for four Lieutenant vacancies statewide. Grievant was an unsuccessful applicant for one of those positions. Following denial of his grievance at Levels I and II, Grievant appealed to Level III where the two grievances were consolidated, and an evidentiary hearing was conducted on January 14, 1998. (See footnote 1) On May 19, 1998, Grievance Evaluator Jack McClung issued a decision denying the grievance at Level III. Grievant appealed to Level IV on June 2, 1998, and, following a series of continuances, a Level IV hearing was conducted in the Grievance Board's officein Charleston, West Virginia, on October 13, 1998. (See footnote 2) The parties agreed to a briefing schedule at the close of the hearing, and this matter became mature for decision following receipt of written submissions from the parties on November 23, 1998.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript and exhibits from the Level III hearing, as well as the testimony and documentary evidence presented at Level IV.

FINDINGS OF FACT

1. Grievant has been employed by the West Virginia Division of Natural Resources (hereinafter “DNR”) as a Conservation Officer since September 1972. In December 1986, Grievant was promoted

to Conservation Officer, Sergeant (hereinafter "Sergeant").

2. Upon promotion to Sergeant, Grievant began supervising Conservation Officers in Braxton, Clay and Nicholas Counties. G Ex 10 at L III. Since a reorganization in July 1996, Grievant has been the immediate supervisor of Conservation Officers assigned to Braxton, Lewis, Gilmer and Ritchie Counties. L III HT at 350. Sergeants holding positions supervising Conservation Officers in multiple counties are generally referred to as "Field Sergeants."

3. Jon Cogar has been employed by DNR as a Conservation Officer since January 1977. He was promoted to Sergeant in August 1989. 4. Since being employed by DNR as a Conservation Officer, no subordinate employees have been assigned to Sergeant Cogar for supervision. L III HT at 211. Prior to promotion to Lieutenant, Sergeant Cogar never formally evaluated the performance of any Conservation Officers employed by DNR. L III HT at 146, 194. Upon being promoted to Sergeant, Sergeant Cogar was assigned duties as a Regional Training Officer (hereinafter "RTO").

5. RTOs have primary responsibility for coordinating the training needs of DNR's Conservation Officers, and coordinating the agency's Hunter Education and Boater Education programs in their assigned geographic area of responsibility. L III HT at 87-88. See G Ex 9 at L III. RTOs devote the vast majority of their time to Hunter Education, because the state receives federal funds which substantially subsidize these positions. See L III HT at 45-47. Initially, the RTO position was titled "District Hunter Education and Boating Education Coordinator." L III HT at 115.

6. RTOs are paid according to the same pay scale as Field Sergeants and have the same authority to act in a law enforcement capacity as any other Conservation Officer. See R Ex 4 at L III. All RTOs are under the direct supervision of a Captain in DNR's Charleston office who supervises education and training statewide. Sayres testimony at L IV.

7. As an RTO, Sergeant Cogar has conducted training courses relating to Hunter Education, firearms safety and marksmanship attended by other Conservation Officers. L III HT at 80-82. A Conservation Officer is present at some point during every hunter education class. Stewart testimony at L IV. Thus, Conservation Officers assist RTOs in conducting Hunter Safety classes, and the RTO oversees their work while theyare assisting with a class. L III HT at 88. However, RTOs do not have formal authority to supervise other Conservation Officers. L III HT at 40, 88, 92, 264, 391; Stewart testimony at L IV.

8. For one week each year, during the first week of deer-hunting season, RTOs are sent into

the field to perform the duties of regular Conservation Officers. L III HT at 32- 33, 60. At such times, RTO Sergeants may provide leadership to other Conservation Officers, if more than one Conservation Officer is assigned to a particular activity and there is no Field Sergeant present.

9. In coordinating the Hunter Education program in his assigned region, Sergeant Cogar oversaw as many as 100 volunteers who conduct these training classes. L III HT at 190.

10. Sergeant Bobby Jones is a Conservation Officer employed by DNR as an RTO assigned to the Fairmont office. He was promoted to Sergeant in August 1989 and, since that time, has been performing similar duties to Sergeant Cogar. L III HT at 99.

11. On occasion, Sergeant Jones has been placed in charge of the Fairmont office when the Captain and Lieutenant were both out of the office. During those occasions, Sergeant Jones had authority to supervise Conservation Officers in the field. Stewart testimony at L IV.

12. The Classification Specification adopted by the West Virginia Division of Personnel (DOP) for Conservation Officer, Lieutenant (hereinafter “Lieutenant”), states the following minimum qualification regarding experience: “Five years experience as a West Virginia Conservation Officer, including two years experience in a supervisory capacity.” G Ex 1 at L III. 13. Richard Hall was Chief of DNR's Law Enforcement Section from February 1981 to December 1995, serving as a Conservation Officer, Colonel. L III HT at 8. During his tenure, Colonel Hall interpreted the classification specification for Lieutenant to exclude Sergeants who were assigned duties as RTOs from consideration for promotion to Lieutenant. L III HT at 14-15; Cool, Sayres & Stewart testimony at L IV.

14. During Colonel Hall's tenure as Chief of the Law Enforcement Section, Sergeants servings as RTOs wore a “T” under their sergeant stripes on their Conservation Officer uniform denoting their status as “Technical Sergeants” who were not assigned duties supervising Conservation Officers in the field.

15. In 1978, prior to Colonel Hall's tenure, one Conservation Officer who had served as an RTO Sergeant and subsequently transferred to a Field Sergeant position was promoted to Lieutenant after less than two year's service as a Field Sergeant supervising other Conservation Officers. L III HT at 308-309. The current classification specification for Lieutenant was established by DOP in 1993. See G Ex 1 at L III.

16. In August 1994, approximately 29 Sergeants, Lieutenants and Captains from the DNR Law

Enforcement Section attended a 40-hour training course on “Supervision of Police Personnel” at the West Virginia State Police Academy. See G Ex 2 at L III. No RTOs attended that training. L III HT at 142.

17. In February 1996, James Fields succeeded Colonel Hall as a Conservation Officer, Colonel, and Chief of DNR's Law Enforcement Section. L III HT at 372.

18. After conferring with Conservation Officers at all levels shortly after taking over the Law Enforcement Section, Colonel Fields determined that RTO Sergeants shouldbe treated the same as Field Sergeants. Colonel Fields rescinded the requirement that RTO Sergeants wear a “T” on their chevrons. Sayres testimony at L IV.

19. On October 28, 1996, DNR posted four Lieutenant vacancies, in four separate locations. See R Ex 1 at L III. Grievant applied for Lieutenant vacancies in Fairmont and Weston. See R Ex 3 at L III.

20. A Promotion Board consisting of seven Conservation Officers in the rank of Lieutenant and above was convened in Charleston, West Virginia, on November 19 and 20, 1996, to interview and rank the applicants for each of the Lieutenant vacancies. Lieutenant Colonel William Daniel was Chairman of the Promotion Board, but only voted when there was a tie in the ratings issued by the other six members.

21. The Promotion Board interviewed 13 applicants, posing the same questions to each applicant. The applicants also completed written responses to a series of written questions, and these responses were considered by the Promotion Board.

22. The Promotion Board assigned each applicant a numerical rating based upon their responses to the written and oral questions. Some applicants applied for all Lieutenant vacancies while other applicants applied for only certain vacancies at specific locations. Thus, the Promotion Board forwarded the names of the three applicants with the highest scores for each location, in random order, to Colonel Fields, who made the final determination of who would be promoted to Lieutenant.

23. The Promotion Board did not consider the applicants' prior personnel evaluations in recommending the three best candidates for each vacant position. L III HT at 155; Stewart testimony at L IV. 24. Colonel Fields reviewed the personnel files of the top-ranked applicants recommended for promotion by the Promotion Board. L III HT at 382-84, 398-99.

25. The Promotion Board ranked Grievant fifth for the Fairmont and Weston positions. Sergeants Cogar and Jones were ranked first and second, respectively, for the Fairmont and Weston positions.

26. Colonel Fields selected Sergeant Cogar to fill the Lieutenant's vacancy in Fairmont and Sergeant K.W. Ransom, a Field Sergeant, to fill the vacancy in Weston.

27. If Sergeants Jones and Cogar were not eligible for promotion to Lieutenant, Grievant's name would have been included in the top three applicants recommended to Colonel Fields to fill the Lieutenant vacancies in Fairmont and Weston.

DISCUSSION

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. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Grievant contends that DNR improperly considered and selected an applicant for promotion to Lieutenant who did not meet the minimum qualifications for the position as stated in the classification specification promulgated by the West Virginia Division of Personnel. The minimum qualifications for Lieutenant include an “experience” requirement which states: “Five years experience as a West Virginia Conservation Officer, including two years experience in a supervisory capacity.” G Ex 1 at L III.

It is well settled that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160W. Va. 723, 238 S.E.2d 220 (1977). See Parsons v. W. Va. Dep't of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995); Bailey v. W. Va. Dep't of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994). Moreover, an agency may not interpret its policies in a manner which is inconsistent with the common meaning of the language contained therein. See Watts v. W. Va. Dep't of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 877 (1995). However, where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). See generally W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431

S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

The use of the word “including” immediately preceding the requirement for “two years experience in a supervisory capacity” and immediately following the phrase “as a certified West Virginia Conservation Officer” makes it abundantly clear that the applicant's supervisory experience must have been obtained as a Conservation Officer in order to count toward fulfillment of this prerequisite. Accordingly, any further inquiry will be limited to determining whether Sergeant Cogar had sufficient supervisory experience as a Conservation Officer to meet this qualification.

Grievant conclusively established that Sergeant Cogar has never been formally assigned subordinate Conservation Officers or other “employees” to supervise on a regularbasis. Even assuming that Sergeant Cogar “supervises” Conservation Officers when he instructs Hunter Education classes or firearms training classes in which those officers participate, these activities are not of sufficient duration to attain two years of purported “supervisory” experience. Accordingly, Sergeant Cogar can only meet the experience requirement if he is credited with the time spent coordinating volunteer Hunter Education instructors and “supervising” the Hunter Education program.

Colonel Fields determined that Sergeant Cogar met the experience requirement for Lieutenant by supervising the Hunter Education program and the volunteer instructors who substantially perform the training involved. This conclusion was directly opposite the position taken by his predecessor, Colonel Hall, who recognized the RTO Sergeant positions as “dead end” jobs, because the incumbents were not working in a capacity which would qualify them for promotion to Lieutenant. The undersigned is not persuaded that Colonel Fields' interpretation is reasonable, given the plain language in the classification specification for Lieutenant. See Watts, supra.

DOP does not provide a definition for “supervisor” or “supervisory capacity” in its Administrative Rule or in the classification specification for Lieutenant. However, the undersigned takes administrative notice that in prior grievances adjudicated by this Grievance Board, DOP has generally asserted that an employee must be formally delegated responsibility for planning, assigning, reviewing and approving the work of full- time employees, as well as initiating disciplinary action, approving requests for sick and annual leave, conducting performance evaluations, recommending salary increases, and serving as the first step in the grievance procedure, in order to be considered a

"supervisor" for classification purposes. See, e.g., Lawhun v. W. Va. Bureau of Employment Programs,Docket No. 92-BEP-442 (Feb. 4, 1993); Cline v. W. Va. Div. of Human Serv., Docket No. 90-DHS-288 (Oct. 16, 1990). This interpretation is consistent with the expected attributes of a supervisor in an employment context. See Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). See also 29 U.S.C. § 152(11).

Notwithstanding that RTO Sergeants receive the same pay as Sergeants who supervise other Conservation Officers, (See footnote 3) and RTO Sergeants have the same authority to act in a law enforcement capacity as other Conservation Officers, DNR has not assigned subordinate employees to RTOs to supervise on a regular basis. While DNR argues that Sergeant is an inherent supervisor position, this argument is not supported by the classification specification for Sergeant. Of the nine examples of work listed in that specification, only one refers to supervising: "Supervises law enforcement activities in an assigned territory to enforce State Natural Resources Law, and Rules and Regulations, travels throughout assigned territory to insure the effective performance of the officers." G Ex 11 at L III. This language accurately describes the work performed by a Field Sergeant, such as Grievant, not an RTO, such as Sergeant Cogar or Sergeant Jones.

Thus, despite the fact that Sergeant Cogar effectively manages an important safety program and coordinates the work of a substantial number of volunteers, and his success in these endeavors could appropriately be considered as evidence of his ability to effectively perform the duties of Lieutenant, these activities do not place him in a "supervisory capacity" in order to meet the minimum qualifications for promotion to that position. Although Sergeant Cogar may be a coordinator or manager, and a very goodone, he has not been a supervisor as that term is applied in the context of state employment. (See footnote 4) Accordingly, Grievant established that DNR misapplied or misinterpreted the classification specification established by DOP (See footnote 5) for Lieutenant when it promoted Sergeant Cogar to that classification of employment despite his failure to meet the minimum experience requirement for promotion to that position. See W. Va. Code § 29- 6A-2(i).

In addition, Grievant alleges that DNR failed to consider certain factors in the promotion process as required by the West Virginia Division of Personnel's Administrative Rule, 143 C.S.R. 1 § 11.1(a) (1998):

> Whenever practical and in the best interest of the service, an appointing authority shall fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the career service upon the basis of the employees' demonstrated capacity and quality and length of service. In filling vacancies,

> appointing authorities should make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees.

Grievant alleges a number of deficiencies in the promotion process DNR employed in selecting applicants for four Lieutenant vacancies. The only issue which warrantsdiscussion is the assertion that DNR improperly failed to consider the past evaluations of the applicants for Lieutenant because the promotion board which interviewed the applicants did not review each applicant's personnel file which included their evaluations as a Sergeant. However, the record indicates that the promotion board performed a screening process to rank those applicants who had been determined to meet the minimum qualifications for the position. Colonel Fields testified credibly at Level III that he had access to and reviewed the personnel records for the applicants recommended for each of the four vacant positions by the promotion board. Although Grievant's personnel evaluations may not have been considered because he was not ranked in the top three by the board members, DNR substantially complied with DOP's Administrative Rule requiring that the quality and length of service be considered. Moreover, Grievant did not establish that there was any favorable information in his personnel file or unfavorable information in the personnel file of any of the successful applicants which might reasonably have changed the outcome of the selection process. See McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995).

However, Grievant did establish that at least one of the successful applicants, Sergeant Cogar, did not meet the minimum qualifications for the Lieutenant's positions at issue. In addition, Grievant established by a preponderance of the evidence that Sergeant Jones, an applicant who was ranked above Grievant by the Promotion Board, likewise had not served as a Conservation Officer in a supervisory capacity. Therefore, Grievant has established that, if DNR had followed the established classification specification for Lieutenant, a different result would have been reached. Accordingly, Grievant has established an entitlement to relief insofar as DNR will be required to reconsider thepromotion decisions made in regard to the particular vacancies for which Grievant previously applied, and to exclude from consideration, consistent with this opinion, those applicants who did not then meet the minimum qualifications for promotion to Lieutenant. Should Grievant be selected for a Lieutenant vacancy, he will be entitled to back pay, with interest, from the date he would have been promoted to Lieutenant in 1996. (See footnote 6) Because Grievant did not demonstrate that he was

the best qualified of the remaining eligible applicants for any position for which he applied, he has not established an entitlement to any further relief in this grievance.

In addition to the foregoing, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See Parsons v. W. Va. Dep't of Transp., Docket No. 97-DOH-289(Oct. 30, 1997); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995); Bailey v. W. Va. Dep't of Transp., Docket No. 94-DOH- 389 (Dec. 20, 1994).

3. An agency may not interpret its policies in a manner which is inconsistent with the common meaning of the language contained therein. See Watts v. W. Va. Dep't of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 877 (1995). However, where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). See generally W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

4. The grievance procedure in W. Va. Code §§ 29-6A-1, et seq., is not intended to be a ”super interview” for unsuccessful job applicants, rather, in this context it allows review of the legal sufficiency of the selection process. Ward v. Dep't of Transp., Docket No. 96-DOH-184 (July 24, 1997); Thibault v. Div. of Rehabilitation Serv.,Docket No. 93- HRS-489 (July 29, 1994). See also Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 16, 1989).

5. In order to obtain relief on the basis of an alleged error in a promotion action, a grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different if the selection had been conductedcorrectly. See Hoffman v. Mingo

County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998).

6. Respondent DNR misapplied or misinterpreted the classification specification for Conservation Officer, Lieutenant, promulgated by the West Virginia Division of Personnel, when it selected Sergeant Cogar for promotion to Lieutenant before he had served in a supervisory capacity as a Conservation Officer for at least two years.

7. Respondent DNR did not fail to comply with the West Virginia Division of Personnel's Administrative Rule requiring consideration of an employee applicant's “demonstrated capacity and quality and length of service” under the circumstances presented by this grievance. See 143 C.S.R. 1 § 11.1(a) (1998).

Accordingly, this grievance is **GRANTED, IN PART**. Respondent DNR is hereby **ORDERED** to reconsider Grievant's application for promotion to Lieutenant for the particular vacancies for which he previously applied, and to exclude from consideration, consistent with this opinion, those applicants who did not then meet the minimum qualifications for promotion to Lieutenant. Should Grievant be selected for a Lieutenant vacancy, he will be entitled to back pay, with interest, from the date he would have been promoted to Lieutenant in 1996. All other relief is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of thisdecision. W. Va. Code § 29-6A-7 (1998). 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: February 26, 1999

Footnote: 1

The record does not explain the extensive delay between the denial of these grievances at Level II on December 23, 1996, and the Level III hearing in January 1998.

Footnote: 2

Grievant was represented by counsel, Richard A. Facemire. Respondent was represented by Senior Assistant Attorney General Daynus Jividen.

Footnote: 3

See W. Va. Code § 20-7-1c.

Footnote: 4

An employer has considerable discretion in determining the minimum qualifications for holding a particular position or classification of employment. See, e.g., Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999); Holmes v. W. Va. Dep't of Transp., Docket No. 97-DOH-553 (June 30, 1998); Carovillano v. W. Va. Div. of Envtl. Protection, Docket No. 93-EP-343 (Dec. 14, 1993). However, once those qualifications are established through DOP, absent a properly approved revision, the employer must make selections from applicants who qualify under those terms. See Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-546 (June 24, 1998); Edwards v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-426 (May 7, 1998).

Footnote: 5

DOP did not exercise its right to appear in this matter at either Level III or Level IV. See W. Va. Code §§ 29-6A-4(c) & (d).

Footnote: 6

If Grievant is selected for promotion, in lieu of displacing another Conservation Officer, Lieutenant, DNR may compensate Grievant as a Lieutenant until the next Lieutenant vacancy arises, at which time Grievant will be entitled to noncompetitive placement in that position. See McMillen v. Bd. of Trustees, Docket No. 92-BOT-341 (Nov. 12, 1993); W. Va. Code § 29-6A-5(b).