EDWARD WORKMAN,

Grievant,

v. **DOCKET NO. 99-DOH-350R**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

This matter comes before the undersigned pursuant to an Order of the Circuit Court of Kanawha County dated July 13, 2001, remanding the grievance for a decision on the following issues:

> 1. The underlying grievance . . . is to be REMANDED to Administrative Law Judge Denise M. Spatafore at Level IV of the grievance procedure to set out with particularity the classification specification she used in making her Level IV Decision.
>
> 2. Furthermore, it is to be determined whether both Mr. Workman and Mr. Sam McPaters were qualified for the position of County Highways Maintenance Assistant 2, and whether Mr. Workman was the more qualified of the two individuals for the position.

During a conference call held on August 22, 2001, the parties decided to submit this matter based upon the record developed previously, supplemented by written fact/law proposals and documents. On remand, Grievant was represented by Andrew J. Katz, Esquire, and Respondent was represented by Jennifer E. Francis, Esquire. This matter became mature for consideration on October 5, 2001, the deadline for filing of the parties' response briefs.

Background

This grievance was previously brought to level four in August of 1999, pursuant to

Grievant's claim that he should have been selected over Sam McPaters, the successful applicant for a County Highway Maintenance Assistant II (CHMA II) position. After hearing and consideration, the undersigned issued a Decision dated December 17, 1999, finding that Mr. McPaters did not meet the minimum qualifications for the position at issue, and directing Respondent to reconsider the remaining applicants, including Grievant. The undersigned's prior Decision was based upon the parties' arguments regarding a portion of the classification specification for CHMA II, which requires two years of supervisory experience as a minimum qualification for the position. However, pursuant to the Circuit Court's Order, the arguments of counsel, and a review of the previously submitted record, it appears that the previous Decision was based upon an erroneous interpretation of the classification specification for CHMA II. Although the parties' arguments, and the undersigned's Decision, focused upon the supervisory experience requirement, the full classification specification for CHMA II reveals several alternative experience qualifications, only one of which requires supervisory experience. Accordingly, the undersigned makes the following findings.

Findings of Fact

1. Grievant has been employed by DOH since 1986 as a Transportation Crew Chief. His duties include organizing and directing work crews, keeping time reports and other records, and supervising the employees and their work.

2. In late 1997, DOH advertised a CHMA II position in District Eight.

3. Five applicants, including Grievant and Sam McPaters, were deemed by the Division of Personnel to meet the minimum qualifications for the CHMA II position.

4. The classification specification for CHMA II states, in pertinent part, as

follows:

Minimum Qualifications:

Training: Graduation from a standard high school or equivalent.

Substitution: Additional experience in highway construction or maintenance, construction (any kind), maintenance or building trades may substitute for the required training up to two years.

Experience: Two years of full-time or equivalent part-time paid experience in the supervision of a highway construction or maintenance crew for the Division of Highways.

OR

Four years of full-time paid experience in highway construction or maintenance, surface mining, or site development, two years of which must have been in a supervisory capacity.

OR

Three years of full-time or equivalent part-time paid experience in highway construction or maintenance with the Division of Highways with at least one year experience as a Highway Equipment Operator II, III, or IV or Craftsworker II or III.

5. The CHMA II position was awarded to Sam McPaters, who was classified as a Transportation Worker III ("TW III"), Equipment Operator, and had been employed by DOH for approximately 20 years. Mr. McPaters had been classified as a TW III for approximately 15 years.

6. As a TW III, Mr. McPaters served frequently as a crew leader, providing assistance and direction to lower-classified employees. Mr. McPaters would often coordinate workers and determine the equipment and manpower needed to perform DOH projects.

7. Each applicant for the CHMA II position submitted an application outlining his

work experience and qualifications. These applications were reviewed by James McCoy, county superintendent, along with their work histories, prior evaluations, and recommendations from supervisors. The applicants were also interviewed, then rated in eight categories of knowledge and abilities.

8. After all information was reviewed and the candidates were rated, Sam McPaters received the highest rating. Grievant was rated third.

9. Mr. McCoy focused the selection criteria on the applicant's work habits and ability to provide a finished work product. He also believed that Mr. McPaters' thorough working knowledge of equipment and mechanical abilities would be a valuable asset to the organization.

10. Although Grievant has formally served as a supervisor for several years, and Mr. McPaters had not, Mr. McCoy gave Mr. McPaters a higher rating for his ability to estimate the manpower and equipment needed for a specific job. This was based upon his observation that Grievant often assigned more workers than were needed to do the work. As a crew leader, Mr. McPaters often had been required to assess a project and inform his supervisors how many workers and what equipment was needed. His abilities in this area were considered by his supervisors and by Mr. McCoy to be superior.

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 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

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-RS-489 (July 29, 1994). See also Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 16, 1989). Moreover, 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. Sheppard v. W. Va. of Dep't Health & Human Resources, Docket Nos. 97-HHR-186/187 (Dec. 29, 1997). See Ashley v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995); Thibault, supra. Generally, an agency's action is arbitrary and capricious if the agency did not rely on the factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Sheppard, supra; Thibault, supra. 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 conducted correctly. See Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998).

As set forth above, the previous Decision in this matter was based upon an error regarding the minimum qualifications for the position at issue, and it was determined that Mr. McPaters did not meet those requirements. Obviously, in consideration of all of the possible types of experience that are set forth in the minimum qualifications section of the classification specification for CHMA II, Mr. McPaters--at the very least--met the

requirement of having "three years of full-time . . . experience in highway construction or maintenance with the Division of Highways with at least one year experience as a Highway Equipment Operator II, III, or IV[.]" Accordingly, both Grievant and Mr. McPaters met the minimum qualifications and were viable candidates for the position.

Grievant contends that he should have been rated higher than Mr. McPaters in the category of ability to assess manpower and equipment needs and plan maintenance activities. However, as set forth in the findings of fact above, Mr. McCoy thoroughly explained the reasons for his ratings of the candidates in that particular category, based upon his unfavorable perception of Grievant's abilities and Mr. McPaters' demonstrated capabilities in that area. Grievant has failed to prove an abuse of discretion with regard to this issue, nor has Mr. McCoy's decision been proven to have been arbitrary and capricious.

Grievant further contends that he was more qualified than Mr. McPaters because of his many years of experience as a supervisor. However, as set forth in the CHMA II classification specification, actual supervisory experience is not a requirement for this position. Moreover, Mr. McPaters' crew leader duties have provided his superiors with ample opportunities to assess his abilities as a supervisor, which have been deemed to be excellent.

Finally, Grievant alleges that Mr. McPaters changed his political registration shortly after this position was posted, which allegedly played some part in this selection decision. However, this allegation is unsupported by the evidence. While admitting that he had registered to vote as a Republican, Mr. McPaters did not know when he did this in relationship to when this position was posted. Moreover, there is no evidence in the record

regarding the political affiliations of the persons involved in the decision-making process. Mr. McPaters' qualifications are well-established by the record, and Grievant has failed to prove that his selection for the position at issue was improper in any respect.

Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate.

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 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. 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-RS-489 (July 29, 1994). See also Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 16, 1989).

_____3. Grievant and Sam McPaters were minimally qualified for the position of County Highway Maintenance Assistant II.

_____4. Grievant has failed to prove by a preponderance of the evidence that Respondent's selection of Sam McPaters for a County Highway Maintenance Assistant II position was arbitrary and capricious or an abuse of discretion.

_____Accordingly, this grievance 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, and such appeal must be filed within thirty (30) days of receipt of this Decision. 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: October 17, 2001

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DENISE M. SPATAFORE
Administrative Law Judge