BRIAN BURKHAMMER,

Grievant,

v. **Docket No. 03-HHR-073**

DEPARTMENT OF HEALTH & HUMAN RESOURCES/SHARPE HOSPITAL and DIVISION OF PERSONNEL,

Respondents.

DECISION

Brian Burkhammer ("Grievant") initiated this proceeding on December 31, 2002, challenging a decision that he was not qualified for a vacant Environmental Control System Technician ("ECST") position. He sought as relief "an increase in my pay grade to that of an ECST and corresponding increase in salary, and back pay with interest." Because the outcome of this grievance is based, in part, upon the events which occurred after level one, the details of those proceedings will be set forth in the findings of fact below.

Upon appeal to level four, a hearing was held in the Grievance Board's office in Elkins, West Virginia, on May 1, 2003. Grievant was represented by co-worker Rocky Kimble; the Department of Health and Human Resources ("DHHR") was represented by counsel, Darlene Ratliff-Thomas; and the Division of Personnel ("DOP") appeared by Assistant Director Lowell D. Basford. This matter became mature for consideration at the conclusion of the level four hearing.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed at Sharpe Hospital as a telephone operator.

2. On October 23, 2002, Sharpe Hospital posted two vacancies for ECST positions.

3. Prior to the posting, Grievant heard that these positions in the maintenance department were going to become available. He asked Shane Epp, Engineering Director, what he could do to become

qualified for the positions. After discussing the matter with Mr. Epp, Grievant took a 16-week HVAC course and received certification.

4. Grievant timely applied for the ECST positions.

5. After review of the classification specification for ECST and Grievant's qualifications, Mr. Epp and Debbie Cook, Human Resources Director, determined that Grievant did not meet the minimum qualifications. Accordingly, Grievant was not considered for the positions and was not interviewed.

6. Interviews were conducted in late December, 2002, for these positions. Successful applicants were selected for both positions.

7. Grievant filed this grievance at level one on December 31, 2002, and it was denied by his immediate supervisor.

8. Upon appeal to level two on January 7, 2003, the parties discussed possibilities for resolving this grievance. The level two conference was put “on hold” so that Grievant's application could be reviewed by DOP. In addition, Mr. Epp agreed to delay hiring for one of the positions until Grievant's qualifications could be reviewed.

9. On January 14, 2003, DOP reviewed Grievant's qualifications and determined that he met the minimum requirements for the ECST classification. 10. Since Grievant should have been considered for the positions, DHHR offered Grievant the opportunity to have himself and the successful applicant interviewed by an independent interview committee from outside Sharpe Hospital, with the exception of Mr. Epp. In the alternative, DHHR proposed that the position be re-posted statewide and that the entire interview and selection process be redone.

11. Grievant rejected DHHR's offers for an interview or a new opportunity to apply for one of the ECST positions. He stated he no longer wanted the job.

12. Grievant reiterated at the level four hearing that he is not interested in being placed in the position, because he “would be hated in the [maintenance] department if he got the job that way.” Instead, he wants to be compensated for DHHR's “arbitrary” treatment of him, by being given a merit raise to the maximum for his pay grade as a telephone operator.

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.

This grievance presents an unusual situation, in that Grievant has rejected DHHR's offers to provide him the opportunity to be considered for the position which he has grieved, and he has made it quite clear that he no longer is interested in placement in the job at issue. Normally, a grievant who is alleging he was qualified for a particular position will seek placement in the position or at least consideration for the position, both of whichhave been rejected by Grievant in this case. Grievant's request to be compensated for DHHR's alleged “arbitrary process” by being given a pay raise is quite unusual.

The relief requested by Grievant does not logically "flow from" the infraction committed by the employer, a prerequisite for granting a requested remedy. See Gruen v. W. Va. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994). This is especially true of the instant case, where DHHR's offer to allow Grievant an interview and consideration for the position were offered and--aside from placement in the position--would have been the only relief which could have been granted by this Grievance Board. Moreover, the requested relief is certainly not a “fair and equitable remedy” for the error made by DHHR. See W. Va. Code § 29-6A-5(b).

Grievant's rejection of the opportunity to be selected for the position has essentially made this grievance moot. A grievant must show an injury-in-fact, economic or otherwise to have what constitutes a matter cognizable under the grievance statute. Dooley v. W. Va. Dept. of Transp., Docket No. 94-DOH-255 (Nov. 30, 1994). See also Pridemore v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-561 (Sept. 30, 1996)("Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable by the court"); Carney v. W. Va. Dept. of Rehabilitation Serv., Docket No. VR- 88-055 (Mar. 28, 1989)(De minimus relief has been held to be unavailable from the West Virginia Education and State Employees Grievance Board); Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997)("The jurisdiction of the Education and State Employees Grievance Board is limited to the resolution of grievances as defined by W. Va. Code § 29- 6A-2(i) (1988) and W. Va. Code § 18-29-2(a) (1992) so that its 'authority extends only toresolving grievances made cognizable by its authorizing legislation.' Vest v. Bd. of Educ., 193 W. Va. 222, 225, 455 S.E.2d 781, 784 (1995)."). Grievant is not entitled to the relief requested.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-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.

2. The relief requested must "flow from" the infraction committed by the employer. See Gruen v. W. Va. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994).

3. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." Pridemore v. W. Va. Dep't of Health and Human Resources, Docket No. 95-HHR-561 (Sept. 30, 1996).

4. In a non-selection grievance, Grievant is not entitled to his requested relief of a pay raise in his current classification.

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 grievanceoccurred, 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: May 30, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge