LESLIE J. BARTLETT,

Grievant,

v. **Docket No. 03-DOH-138**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Leslie J. Bartlett ("Grievant") initiated this proceeding on November 21, 2002, challenging his non-selection for the position of TCC Main. He seeks instatement to the position. The grievance was denied at level one on December 2, 2002, and at level two on December 16, 2002. A level three hearing was conducted on April 2, 2003, and the grievance was denied in a written decision dated May 16, 2003. Grievant appealed to level four on May 23, 2003. A hearing was held in the Grievance Board's office in Westover, West Virginia, on July 11, 2003. Grievant represented himself, and Respondent was represented by counsel, Barbara Baxter. The parties elected not to file post-hearing submissions, so 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 credible evidence of record.

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") for approximately 22 years, and has most recently been classified as a Transportation Worker III/Equipment Operator. 2. On July 29, 2002, DOH posted a vacancy for the position of Transportation Crew Chief, Maintenance ("TCC Main").

3. The duties of a TCC Main are supervisory in nature, consisting of on-site supervision of work crews performing highway maintenance and repair or core drilling activities. To meet the minimum

qualifications for the position, two years of highways experience or two years of experience in drilling or surface mining are required.

4. There were three applicants for the position: Grievant, Russell Kennedy and Albert Hillberry. Grievant and Mr. Hillberry were both employed by DOH and met the minimum qualifications for the position.

5. Interviews of the applicants were conducted by Anthony Paletta, Administrative Services Manager for District Four, and Don Steorts, the Highway Administrator for Marion County.

6. The applicants were asked identical questions during the interviews and were rated in eight categories.

7. Mr. Hillberry was selected for the position, based upon the joint recommendation of Mr. Paletta and Mr. Steorts.

8. Mr. Hillberry has been employed by DOH for 11 years, and was classified as a Transportation Worker II/Equipment Operator when he applied for the position. For approximately one year prior to the interviews, Mr. Hillberry had frequently served as supervisor of a crew of inmate workers, and completed paperwork regarding jobs performed and materials used. He had used very little leave time and was considered a reliable employee. Mr. Hillberry had a good rapport with workers, and was believed by theadministrators to have a good “take charge” attitude, which would be effective for a crew chief position.

9. Grievant has maintained his own contracting business doing excavation work since he has been employed by DOH. Due to his work with his business, he has used a significant amount of leave time--over 800 hours in the past year. Grievant had very little experience supervising work crews, and he was not considered to have good supervisory skills.

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.

Grievant contends that he was more qualified for the position and has more seniority, so he should have been selected over Mr. Hillberry. In matters of non-selection, the grievance process is

not that of a "super-interview," but rather serves as a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). When any benefit such as a promotion, wage increase or transfer is to be awarded, and a choice is required between two or more employees in the classified service, 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. W. Va. Code § 29-6-10(4). Of course, seniority is merely a factor to beconsidered, and is not determinative. An employer certainly retains the discretion to select a less-senior applicant with greater qualifications. Lewis v. W. Va. Dep't of Administration, Docket No. 96-DOA-027 (June 7, 1996).

Mr. Paletta and Mr. Steorts testified that Mr. Hillberry was selected for this position because of his demonstration of supervisory skills while leading inmate crews on numerous occasions. Through this work, he had gained experience in supervising workers and completing paperwork required of a crew chief. In addition, he had provided his superiors with the opportunity to observe his supervisory techniques, which had proven to be positive and desirable. On the other hand, while skilled as an equipment operator, Grievant was not perceived to have the appropriate attitude for a supervisor--his superiors believed he may have a “too friendly” relationship with workers, which could interfere with his ability to exercise the proper authority over them. Also, Grievant's excessive use of leave gave reason to doubt his reliability to show up for work every day, which is imperative for a crew chief. Supervisory ability and reliability as an employee are two crucial qualities of a supervisor, so DOH acted appropriately in selecting Mr. Hillberry for the position, because his characteristics made him the more qualified applicant.

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. When any benefit such as a promotion, wage increase or transfer is to be awarded, and a choice is required between two or more employees in the

classified service, 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. W. Va. Code § 29-6-10(4).

3. An employer always retains the discretion to select a less-senior applicant with greater qualifications. Lewis v. W. Va. Dep't of Administration, Docket No. 96-DOA- 027 (June 7, 1996).

4. Grievant failed to prove by a preponderance of the evidence that he was more qualified than the successful applicant for the position at issue.

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: August 6, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge