FELIX NAPOLITANO,

Grievant,

v. Docket No. 02-DOH-398

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Felix Napolitano (Grievant), employed by the Division of Highways (DOH) as a Transportation Worker III Mechanic, filed a level one grievance on February 19, 2002, challenging his nonselection for the position of Highway Equipment Specialist. Grievant alleges that he is more qualified than the successful applicant, and that the decision was motivated by political favoritism and age discrimination. For relief, Grievant requests instatement as Highway Equipment Specialist. (See footnote 1) **The grievance was denied at all lower levels, and appeal was made to level four on December 5, 2002. An evidentiary hearing was conducted on April 1, 2003, at which time Grievant appeared pro se, and DOH was represented by Barbara Baxter, Esq. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, and the matter became mature for decision at the close of the hearing.**

The following facts are derived from the record in its entirety.

Findings of Fact

1. Grievant was first employed as a Transportation Worker II-Mechanic in District IV of DOH in November 1998, and has held the position of Transportation WorkerIII-Mechanic since January 2000. Grievant is presently sixty years of age, and has received three merit increases since October 2000. His performance evaluations for the past three years have rated him at 2.00, 2.04, and 2.22.

2. George Thomas, the successful applicant, has been employed by DOH since April 1979, and was classified as a Storekeeper for an unspecified period of time prior to his selection for the position of Highway Equipment Specialist. Mr. Thomas is fifty- three years of age, and his overall performance rating has been 2.52 for each of the past three years.

3. On November 5, 2001, DOH posted a vacancy for the position of Highway Equipment Specialist (HESPEC) in District Four. The individual who holds this position performs full performance level work assisting in the supervision of vehicle and heavy equipment repair work. He may have a specialty assignment, such as parts/supply procurement or inventory control, and performs in a lead worker or "assistant supervisor" capacity.

4. Grievant is a graduate of the Brooklyn High School of Automotive Trades, and served as an Automotive Maintenance Helper while serving in the U.S. Army. His work history in the private sector includes working as a mechanic for United Parcel Service for six years, and as a Garage and Maintenance Supervisor for Union Carbide Corporation for fourteen and a half years. Grievant has also owned/managed a service station and a used car lot. While an employee of DOH, Grievant has served as instructor of various training sessions.

5. Prior to his assignment as Storekeeper, Mr. Thomas worked as a Mechanic for more than twenty years. 6. Anthony Paletta, Administrative Services Manager; Lewis Swann, Equipment Supervisor; and employee Ron White interviewed the three in-house applicants for the position. The committee found Grievant and Mr. Thomas to be equally qualified, but recommended Mr. Thomas for the position, based upon his greater seniority.

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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §29-6A-6. Grievant asserts that he was better qualified for the HESPEC position than Mr. Thomas, as evidenced by his education and experience, and argues that he was not selected due to discrimination and political favoritism. DOH denies that the selection was based on discrimination or favoritism, but asserts that because Grievant and Mr. Thomas were both well qualified, the selection was based on seniority.

W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." This definition encompasses all types of

discrimination, including discrimination based upon age. It is not necessary to analyze Grievant's claims under the West Virginia Human Rights Act, as such claims are subsumed by Section 29-6A-2(d), Clark v. Kanawha County Bd. of Educ., Docket No. 99-20-088 (Aug. 19, 1999). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, Docket No. 95-BOT-387 (Jan. 31, 1995).

In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to by the Grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once Grievant establishes a prima facie case of discrimination, the burden shifts to Respondent to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248(1981).

Grievant testified that he is sixty years of age. Grievant also testified that Mr. Swann had made comments to the effect that he wanted "to get rid of" the older employees and hire younger men, and that merit increases should not be given to older employees who are close to retirement. Additionally, Grievant recalled a statement made by Mr. Paletta at his interview that Grievant had "graduated [from high school] a long time ago, and things have changed."

In response to the evidence presented by Grievant, Mr. Swann testified that he had no recollection of making statements regarding "getting rid of older employees" or denying them merit raises. Mr. Paletta testified that he never referred to Grievant as being "too old." DOH has also established that Mr. Thomas is fifty-three years of age. Because Grievant and Mr. Thomas are more than forty years of age, they are both members of a protected class under age discrimination laws. Although comments were made which were either clearly improper,

or were interpreted by Grievant to be age-related, DOH has successfully rebutted the prima facie case of discrimination.

W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." The test to determine whether Grievant has established a prima facie case of favoritism requires Grievant to establish by a preponderance of the evidence:
(a) that he is similarly situated in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

As with discrimination, once Grievant establishes a prima facie case of favoritism, the burden shifts to Respondent to demonstrate a legitimate, non-discriminatory reasonfor the employment decision. Smith, supra; See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant established that Mr. Thomas is a cousin to West Virginia House of Delegates member Barbara Warner, who serves as Chair of the Committee on Roads and Transportation in the West Virginia State Legislature. He also presented the testimony of Joe Nagy, Warehouse Supervisor, that Mr. Thomas had boasted of his political ties, and had even stated that if Ms. Warner was elected, he would have another position. Roger Amos, Transportation Worker III-Mechanic, testified at level three that he was also interested in the HESPEC position, but that Mr. Swann told him not to bid on it because it was "lower paying and was for George Thomas." Jack Jacobs, Assistant Equipment Operator, testified that he heard Mr. Swann state the position had been posted for Mr. Thomas, because they "wanted him out of the shop." Based upon this evidence, Grievant has established a prima facie case of favoritism.

Addressing the issue of political favoritism, all three members of the interview committee

testified that their decision was in no way influenced by political pressure. Although Mr. Thomas had boasted of his connections, and claimed he would have another position if his cousin won the election, there is no evidence that Ms. Warner exerted any influence on Mr. Thomas' behalf. However, Mr. Swann did seem to know that Mr. Thomas would receive the position and why, as established by Mr. Jacobs.

Grievant opines that his technical training in high school, his military experience, and his years of mechanical experience, including teaching for DOH, exceeds the qualifications of Mr. Thomas. Mr. Thomas did not entirely complete the application, and his qualifications are not clearly set forth in the record. Although he refers to having twenty years ofexperience as a mechanic, presumably at DOH, there is no evidence as to how recent the experience was, or the exact nature of his work. The record shows that both individuals have completed numerous training sessions while at DOH.

W. Va. Code §29-6-10(4) provides:

For promotions within the classified service which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination, when such examination is practicable. An advancement in rank or grade or an increase in salary beyond the maximum fixed for the class shall constitute a promotion. When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, 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 or have the benefit withdrawn, as the case may be.

Based upon the evidence of record, the determination that Grievant and Mr. Thomas presented substantially equal or similar qualifications was clearly wrong. Grievant has more education, and more recent experience as a mechanic than Mr. Thomas. Therefore, the determination to award the position on the basis of seniority was improper. Mr. Swann may well have revealed the true motivation for Mr. Thomas' selection, i.e., administrators wanted

him out of the Storekeeper position. In any case, Grievant was more qualified than Mr. Thomas for the position.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law 1. 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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

3. A grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once Grievant establishes a prima facie case of favoritism, the burden shifts to Respondent to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). 5. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

6. A grievant, seeking to establish a prima facie case of favoritism under W. Va. Code § 29-6A-2(h), must demonstrate the following:

(a) that he is similarly situated in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once Grievant establishes a prima facie case of favoritism, the burden shifts to Respondent to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

7. Grievant has met his burden of proof and established a prima facie case of discrimination and favoritism.

8. Respondent successfully rebutted Grievant's prima facie cases of discrimination and favoritism, and Grievant failed to show that the articulated reasons were pretextual. 9. When two or more employees of the classified service make application for a position and are found to be similarly qualified, 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 position. W. Va. Code § 29-6-10(4).

10. Grievant has proven that he was better qualified for the position of HESPEC than the successful applicant; therefore, DOH improperly based the decision on seniority.

Accordingly, this grievance is GRANTED, and DOH is Ordered to instate Grievant to HESPEC with back pay, seniority, and all other benefits, effective the date the position was originally filled.

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 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 12, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***At the level four hearing, Grievant raised other issues related to discrimination and favoritism generally; however, this decision is limited to the primary issue of selection.***