THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

TERRY LEESON and

JASON WILLIAMS,

Grievants,

v. **Docket No. 06-DOH-033D**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Terry Leeson and Jason Williams ("Grievants") filed separate claims of default with this Grievance Board on January 27, 2006, alleging a default occurred when a level two response was not timely issued. Subsequently, Respondent admitted default, and this matter proceeded to a hearing regarding whether the requested remedy was contrary to law or clearly wrong, which was held in Westover, West Virginia, on June 26, 2006. Grievants represented themselves, and Respondent was represented by counsel, Barbara Baxter. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on August 7, 2006.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant Terry Leeson has been employed by Respondent Division of Highways ("DOH") since 1997. He has been working as a Transportation Crew Chief -- Maintenance ("TCC Main") since

2000.

2. Grievant Jason Williams has been employed by DOH since 1997. He is currently classified an Equipment Operator, and occasionally supervises inmate crews.

3. In the fall of 2005, DOH posted a vacancy for a TCC Main position in Doddridge County. The individual serving in this position would be responsible for daily supervision of multiple work crews performing highway maintenance and repair work.

4. Interviews for the position were conducted in November of 2005 by Chuck Richards, Highway Administrator, Anthony Paletta, Administrative Services Manager, and Jeff Pifer, Assistant District Maintenance Engineer.

5. Identical questions were asked of all applicants during the interviews, and Mr. Richards and Mr. Pifer took notes of the applicants' responses.

6. At the conclusion of the interviews, the committee members each selected their top three choices for the position. James Heflin was the unanimous first choice of the interviewers.

7. Mr. Heflin has been employed by DOH since January of 2002 as a Laborer, Equipment Operator, and inmate crew leader. Prior to his employment with DOH, Mr. Heflin was employed in the tree service industry as a manager, general foreman and crew foreman for approximately 19 years. During that time, he was often in charge of numerous work crews and foremen, and was responsible for all personnel, equipment, billing, andpayroll matters. Mr. Heflin was also required, in his capacity as a general foreman, to work closely with utility company personnel and landowners while performing right of way work.

8. Prior to his employment with DOH, Grievant Leeson had worked for various construction companies for approximately five years. He was employed as an equipment operator, truck driver, and laborer. In his capacity as a TCC Main for the past six years, Mr. Leeson has received good evaluations, is familiar with all of the workers, and is knowledgeable regarding the paperwork needed to be completed by the person in this position.

9. Grievant Williams has been a member of the Army National Guard since 1987 as a supervisor and equipment operator. Since 1991, he has supervised work crews on construction projects, and is in charge of assigning equipment, determining materials needed, preparing daily reports, and supervising the work. He also worked as an equipment operator, mechanic, and machine operator in the construction, oil and gas, and tire businesses from 1989 through 1995.

10. Mr. Heflin was selected for the position because of his numerous years of experience supervising multiple, large work crews. He also made a favorable impression during his interview as to his ability to deal with supervisory issues, work well with crews, and deal with the public.

11. Because Respondent has admitted default, Grievants are presumed to have prevailed on the merits of this grievance, showing that they should have been selected over Mr. Heflin for the position at issue.

Discussion

"The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud." (See footnote 1) "Upon finding a default occurred, it is presumed the grievant prevailed on the merits of the grievance, and the respondent must prove by clear and convincing evidence that to grant the remedy requested would be contrary to law or clearly wrong. This standard requires a respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt." (See footnote 2)

Because this is a default remedy case, Respondent is obligated to provide clear and convincing evidence that the facts were not as Grievants have contended, and that neither of them should have been selected over Mr. Heflin. The facts presented here establish that all three applicants discussed in this decision were uniquely well-qualified for the position. However, Respondent has failed to sufficiently justify its selection of Mr. Heflin over Grievant Leeson. Although DOH has emphasized Mr. Heflin's numerous years of experience supervising multiple crews, it is undisputed that Grievant Leeson has been performing the TCC Main duties effectively and efficiently, with no problems or complaints. Indeed, as Grievant Leeson has argued, the TCC Main position supervises a maximum of two work crews at a time, so it is difficult to understand why DOH officials believed that Mr. Heflin's experience supervising multiple, large crews was so important to this position. Moreover,Mr. Heflin's highway experience is limited, while Mr. Leeson has been a DOH employee for nearly ten years, most of which have been spent performing the duties of the position at issue. Therefore, the undersigned finds that Respondent has failed to establish by clear and convincing evidence that Mr. Heflin was more qualified than Grievant Leeson.

The following conclusions of law support this Decision.

Conclusions of Law

1. "Upon finding a default occurred, it is presumed the grievant prevailed on the merits of the grievance, and the respondent must prove by clear and convincing evidence that to grant the remedy requested would be contrary to law or clearly wrong. This standard requires a respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt." *Headley v. Div. of Highways*, Docket No. 04-DOH-397D (Aug. 22, 2005).

2. Respondent has admitted default in this grievance, entitling Grievants to the presumption that they prevailed on the merits of establishing that they should have been placed in the position at issue.

3. Respondent has failed to prove by clear and convincing evidence that it would be clearly wrong or contrary to law to place Grievant Leeson in the position at issue.

Accordingly, Grievant Leeson's grievance is **GRANTED**, and Respondent is ORDERED to place him in the TCC Main position, with any applicable back pay and benefits, effective the date that Mr. Heflin was hired. Grievant Williams' grievance is hereby **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 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 29, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

W. Va. Code § 29-6A-3(a).

Footnote: 2

Headley v. Div. of Highways, Docket No. 04-DOH-397D (Aug. 22, 2005).