BONNIE FARLEY,

Grievant,

v. **DOCKET NO. 04-DOH-308**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Bonnie Farley ("Grievant") initiated this proceeding against her employer Division of Highways (DOH") on August 29, 2003, challenging her non-selection for three positions: Highway Administrator 4, Administrative Services Manager 1, and Transportation Engineering Technician - Senior ("TRETSR"). Her Statement of Grievance reads:

> Pursuant to WV Code 29-6A-1, I am filing this grievance because of the DOT - DOHs Retaliatory acts against me for reporting waste and wrongdoing; filing a Civil suit for Discrimination and upholding EEO principles. These acts have resulted in ongoing reprisal _ resulting in adverse impact and disparate treatment. This is in violation of WV Code 29-6-24; DOP - 11; WV Code 6C-1-3; WV Code 5-11-1; WV Code 21-5B-3. Also these selections for positions were decided in part based on Political Favoritism. (See footnote 1)

> Relief sought: To be made whole in every way. To be promoted to a position and salary increase commensurate to the individuals awarded the jobs for which I have applied: Administrative Services Manager; Highway Administrator IV; TRETSR.

This grievance was denied at Level I for lack of authority, and Level II, in part, because of timeliness. Grievant filed to Level III on September 12, 2003, a Level III hearing was held on March 15, 2004, and the grievance was denied by Decision dated August 6, 2004. Grievant appealed to level four on August 12, 2004. (See footnote 2) After numerouscontinues for good cause, a Level IV hearing was held in the Grievance Board's office in Charleston, West Virginia, on May 31, 2005. Grievant was represented by Dwight Staples, Esq., and Respondent was represented by counsel, Barbara Baxter. This case became mature for decision on October 21, 2005, after receipt of the

parties' proposed findings of fact and conclusions of law. (See footnote 3)

The following facts have been proven by a preponderance of the evidence of record. (See footnote 4)

Findings of Fact

1. Grievant has been employed by DOH since 1973 in clerical positions in District 2. She is currently classified as a Secretary 2. Grievant received a Bachelor's Degree in Counseling and Rehabilitation in 1975.

2. Although Grievant worked for three years, from 1970 to 1973, in counseling, the rest of her work experience is in the clerical and secretarial field. Grievant possesses no technical DOH experience and has very limited DOH technical training. Additionally, Grievant describes herself as "not technical . . . I'm not oriented towards that." Test. Grievant, Level III Hearing at 120. 3. Although DOH offers a variety of technical training sessions, Grievant has attended only one training session of this type during her thirty plus years with the agency. 4. The duties of an Equal Employment Opportunity ("EEO") counselor were added to her position in 1993 and removed in 1998 by Jessie Haynes, State EEO Coordinator. Grievant was removed from her EEO duties because she had expanded the role from information-giver to employee advocate. These duties were removed from Grievant in 1998, and Grievant stated in her deposition dated September 17, 2002, and indicated her on applications for the positions at issue, that she had not engaged in these duties since that time. Grievant testified during her grievance hearings that she was never formally told these duties were removed, and she continues to perform these duties to this day. These actions are without the approval or knowledge of Wilson Braley, the District Engineer of District 2.

5. On August 30, 2001, Grievant applied for the position of Administrative Services Manager 1 in District 2. She was interviewed by Mr. Braley, and she made the short-list of three candidates to be interviewed by Mike Browning from the Commissioner's office. Grievant was not found to be the most qualified applicant, and the position was awarded to James Roberts on October 12, 2001. Grievant was notified by letter dated November 19, 2001, that she had not been selected. Mr. Roberts was found to have better interpersonal skills, a key requirement of the position.

6. On August 9, 2002, Grievant applied for one of two posted Highway Administrator 4

positions in District 2. She was granted an interview, but found not qualified because of her lack of technical experience and training. The positions wereawarded to Christopher Sowards and Timothy Pullen in September 10, 2002. Grievant was notified by letter dated October 25, 2002, that she had not been selected.

7. In July 2003, Grievant applied for the position of TRETSR in District 2. She was not interviewed for the position because she did not meet the minimum qualifications stated in the class specification. Grievant was not certified as a Transportation Engineering Technician Senior by Fairmont State College, and this certification is required for the position.

8. This position was awarded to Charles Hughes, the only qualified applicant on August 22, 2003.

9. Grievant filed this grievance on August 29, 2003.

Issues and Arguments

Grievant asserts she was the most qualified applicant for these three positions, and the reasons for her non-selection were discrimination, whistle-blowing that occurred in 1994, and being the lead plaintiff in a class action lawsuit filed against DOH.

Respondent asserts the grievance was not timely filed as to the first two positions, and Grievant did not meet the minimum qualifications for the TRETSR position. Respondent also maintains Grievant was not the most qualified applicant for the position as she has no technical training or experience, thus, there was no discrimination or retaliation involved in any of the selection processes. Respondent also notes the whistle- blowing activities were long ago and did not affect the selection process.

Discussion

In a selection case such as this, Grievant's burden is to demonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. Surbaugh v. Dep't of Health and Human Serv., Docket No. 97-HHR-235 (Sept. 29, 1997). Her claim must be proven by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that his claims are more likely valid than not. Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

I. Timeliness

DOH contends that a portion of this grievance was untimely filed as it was not initiated within the timelines contained in W. Va. Code § 29-6A-4(a). (See footnote 5) Grievant received notice she was not selected for the positions of Highway Administrator 4 and Administrative Services Manager 1 on October 25, 2002, and November 19, 2001, respectively. Grievant did not file this grievance until August 29, 2003.

Where an employer seeks to have a grievance dismissed on the basis it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance hasnot been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

The timeliness issue is governed by the timelines set out in W. Va. Code § 29-6A- 4(a), which states a grievance must be filed:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .

The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

In this case, Respondent demonstrated Grievant did not file her grievance about the Highway Administrator 4 position or the Administrative Services Manager 1 position within the required ten-day time period. Thus, Grievant has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner. Grievant did not address the issue of timely filing, thus, no excuse was asserted.

II. Selection - TRETSR Grievant asserts she was the most qualified applicant for the TRETSR position. In a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehab. Serv., Docket No. 93-RS-489 (July 29, 1994). This Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. Skeens-Mihaliak v. Div. of Rehab. Serv., Docket No. 98-RS-126 (Aug. 3, 1998).

Typically, the issue raised in a selection grievance is who is the best qualified applicant, and an agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault, supra. Additionally, "when a position involves knowledge and abilities of a technical nature, it is of the utmost importance that an employer's substantial discretion in these matters must not be disturbed, absent evidence that its decision was unreasonable." Ferrell v. Dep't of Transp./Div. of Highways, Docket No. 04-DOH-240 (Dec. 209, 2004).

As cited in the Division of Personnel's Administrative Rules at Section 2. "Preamble":

> The general purpose of the Division of Personnel is to attract to the service of this State personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, removal, discipline, classification, compensation, and welfare of its employees, and other incidents of state employment. All appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness.

(Emphasis added). In this case, it is not necessary to reach the issue of who was the most qualified. The class specification for a TRETSR lists the "Minimum Qualifications" as "Certification as a Transportation Engineering Technician Senior by Fairmont State College." The listed "Substitution" is for new hires only, and is "[a]n associate degree in Civil Engineering Technology from an ABET accredited college or university, plus ten years of paid experience in a technical capacity in a civil engineering environment may be substituted for the Certification." (Emphasis added).

As Grievant did not possess either qualification, she was not minimally qualified for the position. Because Grievant did not possess this required certification, she was not interviewed or considered for the position. This action by DOH is correct and cannot be seen as a violation of the selection process. Grievant's contentions that, because of her numerous years working with DOH, she should

have been selected for this position and/or and that she could learn to perform the duties of the position is without merit. DOH is required to follow the minimum qualifications listed in the class specification.

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 her 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 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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). "The preponderance standard generally requires proof that a reasonableperson would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. W. Va. Code § 29-6A-4(a) states a grievance must be filed "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant. . . ."

3. The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

4. Grievant was aware that she had not received the Highway Administrator 4 and Administrative Services Manager 1 positions many months before she filed this grievance.

5. This grievance was untimely filed as to the Highway Administrator 4 and Administrative Services Manager 1 positions.

6. An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault, supra.

7. "[W]hen a position involves knowledge and abilities of a technical nature, it is of the utmost importance that an employer's substantial discretion in these matters must not be disturbed, absent evidence that its decision was unreasonable." Ferrell v. Dep't of Transp./Div. of Highways, Docket

No. 04-DOH-240 (Dec. 20, 2004). 8. Grievant was not qualified for the TRETSR position, because she did not meet the minimum qualifications.

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 are 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Date: January 12, 2006

Footnote: 1 *Grievant capitalized words at random.*

Footnote: 2 *There were several continuances at Level III, as well as a problem with the transcript.*

Footnote: 3 *Grievant's attorney was directed to supply dates concerning the class action lawsuit filed by Grievant and other DOH employees in April 1999. One key piece of information requested was the date this case was settled, as Grievant's attorney tied certain actions to this date as well as other events in this lawsuit. This information was not provided.*

Footnote: 4 *It is noted the length of time it took the parties to get this grievance to Decision at Level IV affected the ability of witnesses to remember events and dates clearly. This fact was not viewed by the undersigned Administrative Law Judge as a lack of credibility, but rather the normal effect of time on retention of information.*

Footnote: 5 *Timeliness was the reason for the denial of the grievance on these two positions at Level II. The issue was not addressed at Level III. There was a considerable length of time between the Level II response and the filing at Level IV. Additionally, there had been many continuances. Accordingly, the undersigned Administrative Law Judge asked the parties, during a Level IV pre-hearing conference on March 17, 2005, if this issue had been abandoned, so there*

would be no surprise about the possible assertion of this issue. DOH confirmed this matter was not abandoned. The issue was not addressed at the hearing to supplement the lengthy Level III record at Level IV, but, as it was reasserted at the Level IV pre-hearing conference, it was considered.