**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**SANDRA MORRAL,**
**Grievant,**

**v.** **DOCKET NO. 2008-1334-DOT**

**DEPARTMENT OF TRANSPORTATION/**
**DIVISION OF HIGHWAYS,**
**Respondent.**

## DECISION

Grievant filed this grievance on March 21, 2008, claiming she was not selected for a posted Storekeeper 2 position due to favoritism, discrimination and retaliation. Her stated relief sought is, "To be whole further no more retaliation nor discipline actions will be taken against me or anyone else who may assist me or this case may be reopened after the event."

A level three hearing was held in the Grievance Board's Elkins office on April 17, 2009. Grievant was represented by Richard Scott, and Respondent was represented by counsel, Robert Miller. The matter became mature for decision on May 30, 2009, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

## Synopsis

Grievant and one other, less senior, employee applied for a posted Storekeeper 2 position, and Grievant was not selected. Grievant did not show she was the most qualified candidate, and her grievance is therefore denied.

## Findings of Fact

Based on a preponderance of the evidence contained in the record and adduced at the Level Three hearing, I find the following material facts have been proven:

1. Grievant is employed by Respondent as a Driver 1 in District Eight. She has been employed by Respondent in various classifications for a total of ten years and seven months, as of the date of the Level One hearing on April 3, 2008.

2. In December 2007, Respondent posted an opening for a Storekeeper 2 position, for which Grievant applied.

3. Another District 8 employee, Anthony Markley, a Storekeeper 1, also applied.

4. Debbie Barnett, Comptroller, supervised the Storekeeper position, and took over that job in January 2007, at about the same time Respondent was hiring for the Storekeeper 1 position. Mr. Markley was awarded that position, and Ms. Barnett felt she was adding duties to his job that he was not hired to do, so she recommended he apply to be reallocated.

5. Mr. Markley filled out a Position Description Form requesting reallocation, and it was forwarded to the Human Resources Office. Instead of Mr. Markley being reallocated, a new Storekeeper 2 position was posted.

5. The duties Ms. Barnett added were responsibility for the P-Card, managing the fixed asset inventory, and overseeing the summer grass-cutting crew.

6. Ms. Barnett later learned that instead of reallocating Mr. Markley, the Storekeeper 2 position would have to be posted.

7. Grievant and Mr. Markley were the only applicants for the Storekeeper 2 position, and both were found to be at least minimally qualified.

8. Ms. Barnett and Henry Currence, District 8 Storekeeper for Materials, conducted the interviews of each candidate by asking each candidate a set of identical, pre-written questions, and writing down their answers.

9. Although Ms. Barnett believed Grievant's interview went well, she found Grievant to be much less qualified than Mr. Markley.

10. Grievant was not familiar with the P-Card, while Mr. Markley had been working with it already and was handling that responsibility well.

11. When Grievant was asked what she would do with unusable or obsolete inventory, she answered that she would keep it away from new inventory because it was oldest, and use it first. That question was repeated to ensure she understood it, and she gave the same answer.

12. Ms. Barnett felt that Mr. Markley's answers were more thorough and detailed. Mr. Currence also believed Grievant did not elaborate enough on her answers, and possibly did not understand some of the words that were in a question. Mr. Currence believed Grievant's interpersonal and communication skills were inferior to Mr. Markley's.

13. Ms. Barnett had worked with Mr. Markley, but had no first-hand knowledge of Grievant's work.

14. In addition to the interviews, the interviewers reviewed the applications submitted by the candidates.

15. Mr. Markley had been employed by Respondent since December 2006, as a Storekeeper 1. Prior to that, he worked for the Division of Corrections for almost three years, where his duties included inventory and record keeping. He could operate a forklift, and his work history as shown on his application went back to August 1993, the majority of which work involved warehousing and inventory work.

16. Grievant's application showed a work history with Respondent dating back to 1997. She first worked as an Equipment Operator, and then as a driver. On her

Equipment Operator job, she was responsible for keeping track of materials and tools used in snow removal. Her total time in the workforce dates back to 1975, and includes experience operating a forklift, cashiering and stock management.

17. Mr. Markley had completed 60 college credit hours at Fairmont State College in the areas of management and corrections. Grievant had no secondary education.

18. After Ms. Barnett and Mr. Currence conducted the interviews and reviewed the application materials, they recommended that Mr. Markley be hired. Mike Moran, District 8 District Engineer reviewed the recommendation and the application materials, and concurred in the recommendation, and hired Mr. Markley.

19. The Storekeeper 2 classification has the following characteristics, according to the Division of Personnel Class Specification:

> **Nature of Work**
> Under general supervision, at the full-performance level, performs duties in ordering, receiving, recording, storing, and shipping of materials, and equipment at a district, regional or state stockroom or warehouse. May oversee the work of lower level storekeepers or other related positions. Performs related work as required.
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> **Examples of Work**
> Solicits bids from vendors.
> Prepares contracts for some purchases.
> Locates and orders supplies and equipment as requested.
> Files, updates, and retrieves invoices, receipts, requisitions, transfers, and other information.
> Determines cost estimates of equipment or materials required.
> Issues materials and equipment as requisitioned and directs their shipping and/or delivery.
> Inventories equipment and supplies and assigns inventory numbers as required.
> Directs the work activities of lower-level storekeepers, clerks, stock clerks, drivers and related positions.
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> **Knowledge, Skills and Abilities**
> Knowledge of storeroom methods and procedures.

Knowledge of safe handling procedures of equipment and supplies used by the agency.
Knowledge of various types and grades of equipment and supplies used by the agency.
Knowledge of transportation and shipping methods.
Ability to safely perform moderately heavy manual labor in lifting and storing materials and equipment.
Ability to understand, follow and relay written and/or oral communications.
Ability to operate a fork lift may be required for some positions.

## Discussion

In a selection case, a grievant bears the burden of proving, by a preponderance of the evidence, that he or she was the most qualified applicant for the position in question.[1] The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process.[2]

It is true, as Grievant contends, that she had more seniority than Mr. Markley. West Virginia Code § 29-6-10(4) requires an employer to consider seniority in selection decisions “if some or all of the eligible employees have substantially equal or similar qualifications[.]” In other words, seniority is a “tie breaker,” not a primary consideration. In this case, the qualifications of the candidates, as determined by the interviewers, were not so similar that seniority needed to be used as anything other than evidence of past experience. “An employer may determine that a less senior applicant is more qualified for the position in question on the basis of particular qualities or qualifications that it

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[1] *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep’t of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

[2] *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994).

determines are specifically relevant."[3] Grievant's seniority with Respondent was relevant and considered, but it was not particularly helpful, since it did not include duties relevant to the position.

Both applicants were given a fair opportunity to be hired. Their interviews were conducted similarly, and they were both given the same chance to identify their job skills and experience through their applications. Mr. Markley had a natural advantage because he was already working in the Storekeeper classification and had experience with essentially the job that was posted, but there is no requirement that an employer ignore relevant, applicable job experience just because other candidates do no have it. Rather, it has a duty to employ the best qualified candidate. In this case, by all objective and subjective criteria, Mr. Markley was the best candidate.

Grievant claimed that discrimination and/or favortism in the selection process rendered it flawed. Discrimination is defined as "any differences in the treatment of similarly situated employees unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees."[4] "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities.[5] In discussing discrimination claims under the old grievance statutes, the Supreme Court of Appeals has

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[3] *McKinney, et al., v. Dep't of Transp./Div. of Highways,* Docket No. 2008-0316-CONS (Dec. 27, 2007).

[4]W. VA. CODE § 6C-2-2(d).

[5]W. VA. CODE § 6C-2-2(h).

noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]"[6] In order to establish a claim of discrimination or favortisim, an employee must establish a prima facie case by a preponderance of the evidence. In order to meet this burden, the Grievant must show[7]:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Grievant has not met her burden of proving she was treated any differently than the successful applicant. Both were given the same interview questions, and both were given the same chance to submit an application form.

Grievant also claimed her non-selection was retaliation. A grievant claiming retaliation must establish by a preponderance of the evidence:

> (1) that the grievant engaged in protected activity, e.g. filing or participating in a grievance;
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> (2) that the grievant was subsequently treated in an adverse manner by the employer;
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> (3) that the employer had actual or constructive knowledge that the employee engaged in the protected activity; and

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[6] *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

[7] *White, supra; Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

(4) that the employer had a retaliatory motive for the adverse treatment (which may be inferred from the period of time between the protected activity and the adverse action, or from other satisfactory evidence).[8]

Grievant identified no issue for which she claimed to be retaliated against. She did bring up the fact that she had previously decided to accept a lower-paying position under a different supervisor when she went from Transportation Worker 2 to Driver 1, but neither of the interviewers seemed to know much about that event, much less have any stake in it to cause any hard feelings toward Grievant. Even so, Grievant never pointed out any event and said, "this is what I am being retaliated against for." The grievant offered no motive for retaliation against her by the actors involved in the selection process.

Grievant has not met her burden of proving a flaw in the selection process, and she did not prove she was the most qualified candidate for the position. She did not meet her burden of proving discrimination, favoritism, or retaliation.

The following conclusions of law support this discussion:

**Conclusions of Law**

1. Grievant bears the burden of proving, by a preponderance of the evidence, that he or she was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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[8] *W. Va. Department of Natural Resources v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229 (1994); *Frank's Shoe Store v. W. Va. Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

2. 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 Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994).

3. Grievant did not meet her burden of proving the selection process was insufficient.

4. 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 he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

*The Board of Education of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

5. Grievant did not meet her burden of proving she was discriminated against.

6. "Reprisal" is "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. VA. CODE § 6C-2-2(o).

7. Grievant did not meet her burden of proving she had been retaliated against.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA.

CODE § 6C-2-5. Neither the West Virginia Public 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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also W. VA. CODE R. §156-1-6.20 (2008).

**June 22, 2009**

**M. Paul Marteney**
**Administrative Law Judge**