

STEPHAN D. FRANTZ

v. Docket No. 89-ES-050

W.Va. DEPARTMENT OF EMPLOYMENT SECURITY

and

ROBERT DEVAUL

v. Docket No. 89-ES-186

W.Va. DEPARTMENT OF EMPLOYMENT SECURITY

DECISION

This is a decision in two interrelated grievances that were consolidated. Grievant, Stephan D. Frantz, filed the initial grievance in January, 1989, alleging, among other things, that the person selected to fill a vacancy in the West Virginia Department of Employment Security (DES) for which he had applied was appointed for political reasons. [\(See footnote 1\)](#) The level III grievance evaluator found that DES had violated its own written administrative policy and practice and the spirit of a civil service regulation in considering and appointing the successful candidate and, therefore, declared the appointment null and void. He denied the clam for appointment to the position and directed the position be reposted, finding that only one witness had testified the grievant was the best qualified applicant and that the managerial personnel involved had retired by the time of the level III hearing. Finally, the grievance evaluator found the evidence of alleged political influence to be inconclusive.

The present Commissioner of DES subsequently concurred in and approved the grievance evaluator's findings and conclusions, and by letter dated April 17, 1989, advised the successful applicant, Mr. Robert DeVaul, that his January 17, 1989, appointment was declared null and void effective immediately. He was also informed by the Commissioner that the position would be reposted and that he was welcome to submit his application again. Mr. DeVaul then filed a grievance directly at level IV on April 26, 1989, alleging the grievance evaluator's decision was erroneous and his removal was improper. [\(See footnote 2\)](#)

Grievant Frantz was also dissatisfied with the result of the level III decision and appealed to level IV, contending that he was the best qualified person for the position and should have been appointed with backpay and all related benefits. At the level IV hearing in the Frantz case, DES took an essentially neutral, non-adversarial position and supported the decision and findings of the level III grievance evaluator. DES argued it should have the opportunity to pass on the applications anew, since nearly all the persons involved in selection process had retired and a new Commissioner of DES had been appointed.

Grievant Frantz took the position that the retirements were not pertinent or relevant to the issue of his entitlement to the position and argued that but for the improper political influence he would have been appointed the position. For the reasons that follow, the undersigned concludes that Mr. DeVaul did not prove that DES acted improperly in vacating his appointment and that Mr. Frantz is entitled to the relief he seeks.

I.

Although few of the facts are in dispute, the testimony introduced by the parties will be reviewed in detail, beginning with the evidence introduced at levels III and IV in the Frantz case. At this hearing, grievant Frantz, who had been employed in the Employment Services (ES) Division of DES since 1975 and presently serves as the Parkersburg job service manager, introduced the testimony of five witnesses and twenty-eight exhibits. [\(See footnote 3\)](#) The record evidence shows that on December 6, 1988, the personnel office of DES issued a Job Opportunities Announcement seeking applications to fill a number of vacancies including two field supervisor positions in the ES Division. One of these field supervisors was to be responsible for the supervision and direction for seven branch offices, including Charleston, Huntington, Parkersburg and New Martinsville. The Job Announcement stated that applications were being accepted for these vacancies from employees within DES and all qualified personnel were encouraged to apply at once so the position could be filled as soon as possible. The announcement also stated that a standard Civil Service Application "must be received no later than December 19, 1988, to be eligible for consideration."

Eleven timely applications, not counting the application of Mr. DeVaul, were submitted for the position. All but two were from DES employees. Grievant Frantz filed his application for promotion to the field supervisor position on December 13, 1988. The application of the successful applicant, Mr.

DeVaul, is stamped as having been received by DES on December 21, 1988, after the deadline.

Grievant Frantz introduced overwhelming evidence at level III that the consideration of Mr. DeVaul's application and his appointment to the field supervisor position violated established DES policy and practice because he was hired from outside the agency and his application was untimely. Administrative Directive No. 6500.40, as revised on September 1, 1984, which is contained in the DES Policy and Procedures Manual, provides that the policy of the agency is "to give priority to present employees in filling permanent full-time job openings." [\(See footnote 4\)](#) It also provides that applications "must be received by the closing date."

An October 1988 memorandum from the Assistant Director of the ES Division, Willard B. Legg, directed to all Employment Security employees, states that, "effective immediately, a standard Civil Service Application must be forwarded to Personnel in order to apply for any posted vacancy and the application must be current and up-to-date and must be signed and dated within the deadlines of the posting."

Mr. Robert Carpenter, who had been the Assistant Director of Field Operations for the ES Division for twelve years and who conducted the interviews, testified that he had never considered an applicant for either a position or a promotion whose application had not been received within the posting timeframe. He also testified that he did not feel there was any need to consider hiring someone from outside DES for this position in light of the number of qualified applicants within the agency. He recommended to the then- Commissioner of DES that Mr. Frantz be appointed to the position after reviewing the applications and conducting the interviews.

Mr. Carpenter also testified that he had considered the application and conducted the interview of Mr. DeVaul under protest and contrary to his established practice. He explained that he received a telephone call on the fifth or sixth of January from the Commissioner of DES inquiring about the status of Mr. DeVaul's application. He advised the Commissioner that his application had been submitted late and he would not be considered or interviewed. The Commissioner then told him that he would like for Mr. DeVaul to be interviewed. Not wanting to be insubordinate, he later interviewed Mr. DeVaul. On cross-examination, Mr. Carpenter testified that in his opinion the grievant was better qualified than Mr. DeVaul.

The Director of the ES Division, Orville Carpenter, who had served in that capacity for eight years and had been an employee of the agency for twenty-seven years, testified that he believed there

were enough qualified applicants within the agency to fill the position, that it was established practice within the ES Division not to consider late applications and that he knew of no other occasion when this had been done. He further testified that in the first part of December he had received a call from the Commissioner asking him if he would arrange to interview Mr. DeVaul for a position with the agency. He told the Commissioner he would be happy to do so and advised that Mr. DeVaul should file an application for one of the posted vacancies and he would then be contacted for an interview. Mr. Carpenter subsequently received an untimely application from Mr. DeVaul to supervise the Governor's Summer Youth Program, but declined to consider it in accordance with his established practice of not accepting applications beyond the date of the posting. He advised the Commissioner of this situation.

Later, on December 28, 1989, he was called to the Commissioner's office at 4:30 p.m. and was advised that he should interview Mr. DeVaul for the current field supervisor vacancies. The Commissioner indicated that according to Mr. Basford, the Civil Service System's Acting Director of Personnel, no civil service regulation existed prohibiting the acceptance of a late application, and that it is in the discretion of the person conducting the interviews to decide whether to interview an applicant who has submitted a late application. Mr. Carpenter testified that he informed the Commissioner that he had chosen not to interview Mr. DeVaul in accordance with his established practice. The Commissioner then stated that Mr. DeVaul's first choice was the field supervisor position for area III, since he could establish his office in New Martinsville which would be convenient for visiting his family. The Commissioner then apparently gave him Mr. DeVaul's application and told him to give it to Mr. Robert Carpenter, who would actually conduct the interview.

Mr. Legg, who had served in a personnel capacity with DES for the past twelve years, testified somewhat inconsistently with the other evidence and indicated that it had been accepted agency practice to permit the individual supervisor to make the decision as to whether to consider an application received after the posting deadline. He conceded, however, that this did not happen very often and acknowledged that he could not recall that it had ever occurred in the ES Division of DES. He also testified that the procedures followed in selecting Mr. DeVaul were not consistent with agency policy, under which the supervisor made the decision whether or not to consider a late application, since the former Commissioner vetoed the supervisor's decision. He also stated that Mr. DeVaul was the first applicant in his experience who had ever hand-carried a WV-11, Personnel Action Form,

through the Governor's Office to obtain approval. He explained that Mr. DeVaul came by his office with a WV-11 form from the Tax Department on one day and, on the following day, delivered the approved WV-11 Personnel Action Form to his office.

Finally, Mr. Basford testified that in his opinion nothing in the civil service statute and particularly W.Va. Code §29-6-24, or civil service rules and regulations, would forbid the consideration of job applications received after the posted closing date and that the civil service regulations permit agencies to adopt supplemental regulations which do not conflict with the civil service regulations. In his opinion at State agency could set its own policy concerning the deadline for accepting and considering applications without creating an impermissible conflict.

Mr. Basford testified that Mr. DeVaul had applied for a position in the Health Department as a Personnel Administrator II, but had been found by civil service not to meet the qualifications for the position. He further testified that a Ms. Canterbury, the director of the office which handles personnel functions for that department, had stated that the Governor's office had directed Dr. Heydinger, the Director, to employ Mr. DeVaul in that position. She had also said that probably the only reason he did not get the job was the adverse civil service determination on his qualifications. [\(See footnote 5\)](#) Mr. Basford also indicated in his testimony that it was an unusual situation during this time period for WV-11 Personnel Action Forms to be quickly approved by the Governor's Office.

A level IV hearing was conducted on June 9, 1989, in the DeVaul grievance. Grievant DeVaul introduced six documents in an attempt to prove that DES acted improperly in vacating his appointment. He testified that he telephoned and visited with the former Commissioner of DES perhaps as long as a month before the field supervisor vacancies were posted to express an interest in a position with DES and left his civil service application with the Commissioner. The application is signed and dated on November 11, 1988. He further testified that during the week in which the field supervisor positions were posted, he spoke to the former Commissioner on several occasions and expressed particular interest in the field supervisor position for area three, as it would permit him to be geographically located closer to his family.

The grievant testified on cross-examination that since May, 1988, he had been employed as an assistant to Mr. William Ritchie, the Commissioner of the Department of Highways, and admitted that one of the reasons he had been seeking a classified civil service position after the November, 1988, election was out of concern that he might be displaced by the incoming political administration. He

also denied ever stating that the former Commissioner of DES had no choice but to appoint him to the field supervisor position.

Grievant DeVaul also introduced a memorandum dated January 6, 1989, written by the former Commissioner to Mr. Legg advising that he had reviewed the applications of all the candidates and had selected the grievant as qualified and best suited for the position. The Commissioner stated in the memorandum that the civil service commission had certified the grievant as qualified for the position on January 10, 1989. He directed Mr. Legg to prepare the appropriate personnel transaction forms for his signature no later than January 9, 1989. A WV-11 Personnel Application Form was introduced into evidence that is signed by the former Commissioner and a representative of the Department of Finance and Administration on January 9, 1989. This form reflects that it was subsequently approved by the Governor's Office, and the grievant was appointed to the field supervisor position effective on January 13, 1989.

A letter from Mr. Legg dated March 16, 1989, was introduced in order to establish that late employment applications are sometimes considered by DES. The letter, addressed to an applicant for a posted position located in the Weirton area, advises the applicant that his application has been received too late to be included in the "regular Job Opportunities process," but that he could contact the present field supervisor for that area, who was at that time the grievant here, Mr. Robert DeVaul, and advise him of his interest in the position.

DES called Mr. Legg at the hearing in the DeVaul case, who testified that he had received Mr. DeVaul's civil service application on December 22, 1988. He stated that he contacted the former Commissioner that same day about the grievant's application being received too late and the Commissioner had, in effect, ordered him to accept the application. Based upon the Commissioner's order, he directed a clerk to send a standard memorandum to Mr. DeVaul advising him that his application had been accepted for consideration. On cross-examination Mr. Legg also said that the letter he wrote to the late applicant advising him that he could contact the field supervisor for that area was in accordance with the customary practice of DES. He testified that the customary practice is to send out such a letter so that the supervisor responsible for the interviewing and recommendation could interview an untimely applicant, if it were later determined that there were no qualified applicants for the position.

Before addressing the merits in these grievances, one procedural question must be decided. At the outset of the Level IV hearing, counsel for Mr. DeVaul objected to the consideration of any evidence introduced in the level III grievance proceeding in the Frantz case, upon which the appointment had been vacated. The grounds for this motion was that he had not been a party to that hearing and, consequently, had been denied his procedural due process right to notice and hearing prior to the termination of his employment. DES took the position that its action in the Frantz grievance was so interrelated with the present grievance that the evidence in that case had to be considered in order to properly decide the case. DES also contended that the ultimate issue presented by the DeVaul grievance was whether DES had correctly or incorrectly acted in vacating grievant's appointment based on the evidence adduced in the related grievance at level III.

DES argued that it had acted properly in voiding Mr. Devaul's appointment on the basis that it was effected in violation of agency policy and established practice, particularly with respect to the untimeliness of the application. DES also contended its actions were proper because the grievant's appointment was an eleventh-hour political appointment on the part of the outgoing Moore administration.

The undersigned took this issue under advisement and subsequently rejected the argument that the evidence in the Frantz grievance could not be considered. This ruling was based upon the reasoning that, even if DES vacated Mr. DeVaul's appointment without affording him procedural due process, such a procedural violation would not render the evidence introduced at level III incompetent. [\(See footnote 6\)](#) The appropriate remedy for evidentiary purposes is to afford the displaced employee the opportunity for a full and fair hearing to dispute the factual and legal determinations that formed the basis for the adverse personnel action. No other claim for relief on procedural due process grounds was raised. In these circumstances the grievances were accordingly ordered consolidated and all parties were afforded the opportunity for an additional evidentiary hearing on the merits of all the issues raised. No additional hearing was requested.

III.

The primary factual issue in these grievances is whether Mr. DeVaul submitted a timely application for the field supervisor vacancy. The evidence indicating that he did so is his own self-

serving testimony that he left a application with the former Commissioner before the position was posted. His application is also signed and dated in November, 1988, and the former Commissioner gave a copy of the application to Mr. Orville Carpenter in late December. This evidence, however, is at odds with the date stamped on his application indicating it was received on December 21. It is also contrary to the testimony of Messrs. Orville and Robert Carpenter and Willard Legg concerning their conversations with the former Commissioner about the application being received too late for consideration. Furthermore, grievant DeVaul did not call the former Commissioner to testify concerning when the application was submitted to him for consideration.

The record evidence preponderates in favor of a finding that the application was not timely filed. The preponderance of the evidence also shows that the untimely application of the successful applicant was improperly considered in violation of DES policy and the established and uniform practice in the ES Division.

Moreover, even if grievant DeVaul's application had been timely, the preponderance of the evidence demonstrates that his selection contravened the letter and spirit of a DES policy which provides that qualified DES employees ordinarily receive first consideration in filling vacancies. ([See footnote 7](#)) There was no evidence presented that qualified persons were not available within the agency to fill the vacancy and in fact all the evidence was to the contrary. There is also no evidence to indicate that management had determined that a person from outside the agency was needed for balance.

The West Virginia Supreme Court of Appeals has consistently held that State agencies must comply with properly established personnel regulations. E.g., AFSCME v. Civil Serv. Comm'n, 341 S.E.2d 693 (W.Va. 1985); Hooper v. Jensen, 328 S.E.2d 519 (W.Va. 1985); Swallop v. Civil Serv. Comm'n, 304 S.E.2d 25 (W.Va. 1983). Failure of an employer to abide by its regulations ordinarily invalidates the personnel action taken. This is in accord with the rule that civil service statutes, and valid rules and regulations promulgated thereunder, must be complied with in order for an appointment to be valid. See, 67 C.J.S. Officers § 57 (1978).

IV.

In addition, grievant Frantz argued forcefully at level IV that the consideration and appointment of grievant DeVaul was based upon political considerations and therefore was in violation of the basic

purpose of the civil service statute. He contended that Mr. DeVaul was placed in a classified position after the 1988 General Election in order to protect him from removal at the will and pleasure of the new political administration. The grievant relied primarily on the provisions of W.Va. Code §29-6-20(b), which provides in pertinent part:

No person shall seek or attempt to use any political endorsement in connection with any appointment in the classified service.

The evidence outlined earlier supports the allegation that political considerations more likely than not led to the acceptance of Mr. DeVaul's application and his selection to the field supervisor position. The totality of the circumstances surrounding his appointment all point to the conclusion that the appointment was made for political reasons.

According to his application, Mr. DeVaul had been the Campaign Coordinator for the "Arch Moore for Governor Committee for 1984" and had been a special assistant to former Governor Moore from January, 1985, until May, 1988. He then served as an executive assistant to William S. Ritchie, Jr., the former Commissioner of the West Virginia Department of Highways, until his appointment to the field supervisor position.

Of particular significance is the fact that the appointment took place after the November, 1988, General Election in which the Republican Governor, Arch A. Moore, was defeated and only a short time before the new Democratic Governor, Gaston Caperton, took office. In order to effectuate the appointment, Mr. DeVaul was reinstated with the West Virginia State Tax Department where he had been employed in the classified service as a Real Estate Appraiser I from 1974 until 1977, and he was then immediately transferred and promoted to the field supervisor position in the ES Division of DES.

The preponderance of the evidence shows that the consideration and appointment of Mr. DeVaul to the field supervisor position was due to political considerations, and was not done on the basis of merit and fitness alone. The purpose of the appointment was to provide him a secure position within the classified service where he could not be removed except for good cause. Grievant DeVaul conceded that job security was one of the reasons he sought a position in DES, a federally-funded agency, and that he took a four thousand dollar pay cut to take the position. This provides an explanation of why DES policy and practice was violated in making the appointment and the other

unusual circumstances surrounding the appointment.

The evidence establishes that Grievant DeVaul's appointment was contrary to the basic purpose of the civil service law and the explicit language of W.Va. Code §29-6-1 which mandates that “[a]ll appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness.” It was also violative of W.Va. Code §29-6-20(a), which provides in material part that “[n]o person shall be appointed or promoted to ... any position in the classified service or in any way favored ... because of his political ... affiliations.” [\(See footnote 8\)](#) These salutary provisions of the civil service law were intended to ensure that political affiliation would not influence employment decisions. [\(See footnote 9\)](#)

The Supreme Court of this State has recognized that one of the principal purposes of the civil law is to provide a “means ... of attracting competent, principled, and dedicated individuals into the public service.” W. Va. Dep't of Corrections v. LeMasters, 313 S. E. 2d 436, 438-39 (1984). See generally, State ex rel. Callaghan v. West Virginia Civil Serv. Comm'n, 166 W. Va. 177, 273 S.E.2d 72 (1980). One way of achieving that goal is to ensure existing personnel are not denied opportunities for advancement because positions are filled based upon political affiliation.

For the foregoing reasons, grievant DeVaul has not proven that DES lacked sufficient justification to vacate his appointment.

V.

The final question is whether Mr. Frantz is entitled to be appointed to the field supervisor position. The testimonial evidence supports a finding that he was the best qualified applicant for the field supervisor position. Mr. Charles Higginbotham, who had been the field supervisor of area III for nine years until his retirement in December, 1988, testified that he had worked with the grievant for the past nine years and believed him to be by far the most qualified candidate for the position from within the agency, pointing out that he knew nearly all the people who had applied for the position because they worked in the area III region which he supervised. He had recommended that Mr. Frantz be appointed to his position after he decided to retire and had also recommended his appointment after the position was posted. [\(See footnote 10\)](#)

Robert Carpenter, who interviewed the applicants for the position, testified at the level III hearing that the grievant was the best qualified person for the position and recommended his appointment.

The grievant called Mr. Carpenter to testify at the Level IV hearing to demonstrate that he was the best person to assess the relative qualifications of the applicants and select the person for the position. During his tenure at DES, Mr. Carpenter had been a field supervisor for five or six years and the assistant director of personnel for a number of years. He reiterated his opinion that the grievant was the best qualified applicant for the position.

The foregoing evidence establishes that more likely than not Mr. Frantz would have been appointed to the position if the application of Mr. DeVaul had not been considered and that the recommendations of Messrs. Carpenter and Higginbotham, both long-term ES Division employees, would have been followed and that he would have been promoted to the position. This case bears some similarity to Drennen v. Department of Health, 163 W.Va. 185, 255 S.E.2d 584 (1979), although here there is no direct evidence of communications between the former Commissioner of DES, who was not called to testify, and officials of the previous political administration.

In Drennen a memorandum from the Governor's Office had been sent which requested the assistance of officials in the Health Department in appointing a particular person to a particular vacancy. The Supreme Court, in reversing the Civil Service Commission, held the State officials had been politically influenced and would have employed Ms. Drennen in the position except for the memorandum. Although Ms. Drennen had found suitable employment elsewhere and was not seeking an appointment to the position, she was awarded lost wages and reasonable attorney's fees for the violation of the civil service law and regulation. Here too, but for the political affiliation of the person appointed to the position, Mr. Frantz would have more likely than not been appointed to the position as a matter of routine.

In this particular circumstance, he should be appointed to the position and made whole. The fact that most of the persons involved in this grievance proceeding have now retired does not provide adequate justification for a new selection process. The Grievance Board has consistently ruled in numerous decisions that it will not interfere with the discretionary authority of an employer to decide who is the best qualified person to fill a position, so long as that authority is exercised in good faith and not arbitrarily or capriciously. Shaver v. Jackson Cty. Bd. of Educ., Docket No. 18-88-107 (November 7, 1988); Skinner v. Harrison Cty. Bd. of Educ., Docket No. 17-88-114 (Sept. 30, 1988); Myles v. Ohio Cty. Bd. of Educ., Docket No. 35-88-081 (August 1, 1988). See also, State ex rel. Hawkins v. Tyler Cty. Bd. of Ed., 166 W.Va. 363, 275 S.E.2d 911 (1980). It is only fair and equitable

that grievant Frantz be given the benefit of the same basic principle. He was recommended by a number of managerial personnel within DES, who were clearly in the best position to evaluate the relative fitness of the applicants.

In addition to the foregoing analysis and finding, the following findings of fact and conclusions of law are appropriate:

Findings of Fact

1. DES issued a job announcement for a field supervisor position in the ES Division on December 6, 1989, which stated that applications must be received no later than December 19, 1988, to be eligible for consideration to fill the vacancy.
2. DES policy provides that first consideration will ordinarily be given to present employees in filling vacancies. It also requires that applications be received by the closing date in order to be eligible for an appointment.
3. Mr. Frantz filed a timely application for promotion to the field supervisor position on December 13, 1988.
4. The successful applicant, Mr. DeVaul, who was not an employee of DES, filed an untimely application for the position on December 21, 1988.
5. It was established policy and practice in the ES Division of DES not to consider applications received after the deadline stated in the job posting.
6. Mr. Frantz was the best qualified applicant for the field supervisor position.
7. If the successful candidate's application had not been considered, Mr. Frantz would have, more likely than not, been selected for promotion to the field supervisor position.
8. The preponderance of the evidence shows that Mr. DeVaul's consideration and appointment to the field supervisor position were due to political considerations, rather than on the basis of merit and fitness.

Conclusions of Law

1. Grievant Frantz established by the clear preponderance of the evidence that the application of the successful applicant was improperly considered in violation of DES policy, which provides that qualified DES employees will ordinarily receive first consideration in filling vacancies within the

agency, and was contrary to the established policy and uniform practice of the ES Division not to consider untimely applications.

2. It is well established law in this jurisdiction that State agencies must comply with properly established personnel regulations. E.g., AFSCME v. Civil Serv. Comm'n, 341 S.E.2d 693 (W.Va. 1985); Hooper v. Jensen, 328 S.E.2d 519 (W.Va. 1985); Swallop v. Civil Serv. Comm'n, 304 S.E.2d 25 (W.Va. 1983).

3. Grievant Frantz established by the preponderance of the evidence that he was the best qualified DES applicant for the field supervisor position and that he would have, more likely than not, been appointed to the position, if the untimely application of successful applicant had not been considered.

4. Grievant DeVaul failed to prove by a preponderance of the evidence that he submitted a timely application.

5. The preponderance of the evidence establishes that the grievant DeVaul was considered and appointed to the field supervisor position based upon political considerations and not on the basis of merit and fitness. 6. The appointment of grievant DeVaul was contrary to the basic purpose of the Civil Service law and the explicit language of W.Va. Code §29-6-1, which mandates that “[a]ll appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness.” It was also violative of W.Va. Code §29-6-20(a), which provides in material part that “[n]o person shall be appointed or promoted to . . .any position in the classified service or in any way favored. . .because of his political. . .affiliations.”

7. Grievant DeVaul also failed to establish on the merits that his appointment was improperly vacated by DES.

8. Even if DES committed a procedural due process violation in vacating the appointment, the evidence adduced at level III in the Frantz grievance was not rendered incompetent and was properly considered in the disposition of these grievances.

9. Grievant Frantz is entitled to be promoted to the field supervisor position with back pay and all the attendant rights and benefits.

Accordingly, the Frantz grievance is **GRANTED** and the Respondent employer is hereby **ORDERED** to appoint him to the field supervisor position in issue with full backpay less any appropriate set-off, and the DeVaul grievance is hereby **DENIED**.

Any party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriated court.

C. RONALD WRIGHT
DIRECTOR

Dated: July 25, 1989

[Footnote: 1](#)

The Frantz case was initially filed at level IV on February 7, 1989. The case was subsequently remanded to level III for the hearing required by W.Va. Code §29-6A-4. The present Commissioner of DES did not initially have a level III hearing conducted because the grievance procedure statute for State employees does not contain any express language regarding the authority of the chief administrator of a State agency to grant relief if the grievance has merit. In the remand order, it was noted that the powers and duties of the Commissioner of Employment Security are set forth in W.Va. Code §21A-2-6(4) which provides, in part, that the Commissioner shall have the power to appoint and remove the officers and employees of DES. A level IV hearing was conducted on May 17, 1989, and the case was submitted for decision at that time without written briefs.

[Footnote: 2](#)

Because Mr. DeVaul's employment was terminated by DES based upon the level III decision, he was permitted to proceed under the expedited procedure provided for in W.Va. Code §29-6A-4(e), even though his removal was not for disciplinary reasons.

[Footnote: 3](#)

The transcript and exhibits introduced at level III became a part of the record as a matter of law. W.Va. Code §29-6A-6 provides in material part:

All materials submitted in accordance with section three [§ 29-6A-3] of this article; the mechanical recording of all testimony and evidence or the transcription thereof, if any; the decision, and any other materials considered in reaching the decision shall be made a part and shall constitute the record of a grievance. Such record shall be submitted to any level at which appeal has been made, and such record shall be considered, but the development of such record shall not be limited thereby.

[Footnote: 4](#)

The Administrative Directive provides in relevant part:

It shall be the policy of this Agency to give priority to present employees in filling permanent full-time job openings. All vacancies will be advertised agency-wide in order that qualified full-time employees with permanent status may have an opportunity to be considered.

Even though first consideration will be given to current employees, instances will occur when it is in the best interest of the Agency to select from outside rather than inside the Agency because there are no qualified applicants available for a particular position, those that are considered are not deemed suitable, or a new employee is desired to maintain a balanced work force.

DES's Administrative Directive is consistent with the Administrative Rules and Regulations of the West Virginia Civil Service System governing promotions and W.Va. Code §29-6-10(4). Section 12.01(a) provides as follows:

12.01. Method of Making Promotions

(a) Whenever practicable and in the best interest of the service, a vacancy will be filled by promotion, after consideration of the eligible permanent employees in the agency or in the career service upon the basis of demonstrated capacity and quality and length of service. In filling vacancies, an effort should be made to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees.

[Footnote: 5](#)

Although there was no objection to this testimony, it is nonetheless obviously hearsay and appears to be at least double hearsay. Although it is not in any way contradicted by any other evidence in the case, it is not entitled to any weight in the circumstances of this case.

[Footnote: 6](#)

Mr. DeVaul was not unaware of the Frantz grievance, as he was subpoenaed by grievant Frantz to testify at the level III hearing but was not called to testify.

[Footnote: 7](#)

This policy as noted earlier is generally consistent with civil service regulations. No question has been raised as to whether the appointment may have also violated other civil service rules and regulations and DES policy.

[Footnote: 8](#)

The identical language is also found in Section 18.01(a) of the Administrative Regulations of the Civil Service Commission.

[Footnote: 9](#)

*A brief history and overview of federal and state civil service laws and listing of a number of specific federal statutes forbidding federal agencies from taking personnel actions involving civil service employees on the basis of political affiliation can be found in 3A A. Larson, *Employment Discrimination* §115 (1982).*

[Footnote: 10](#)

He admitted on cross-examination that he did not know Mr. DeVaul and did not know whether he was qualified for the position or not. The fact that he did not know Mr. DeVaul's qualifications, however, is of no relevance here for the reasons discussed earlier.