RAY ECKES

v. Docket No. 95-DOH-126

DIVISION OF HIGHWAYS,

TIM WEBER, INTERVENOR

DECISION

Grievant, Ray Eckes, is employed by the Division of Highways (Respondent), as a Building Equipment Mechanic assigned to District Seven in Weston, West Virginia. Mr. Eckes filed a level one grievance on October 24, 1994, in which he alleged discrimination and favoritism occurred when Respondent violated Division of Personnel Rules 2.01 and 11.01 (a) and (b) and W.Va. Code §29-6A [sic] by failing to promote him to Building Maintenance Supervisor II. After the grievance was denied at levels one, two, and three, appeal was made to level four on March 28, 1995. An evidentiary hearing was conducted on June 1, 1995, and the grievance became mature for decision with the submission of proposed findings of fact and conclusions of law on July 17, 1995.

The facts of this matter are as follows:

1. Grievant has been employed by Respondent since December 1986, and has been classified as a Building Equipment Mechanicassigned to District Seven at all times relevant to this grievance.

2. Respondent posted a vacancy report from September 28, 1993, through October 12, 1993, listing the position of Building Maintenance Supervisor II at District Seven. This vacancy occurred as the result of the retirement of Harold Raines.

3. The minimum qualifications listed on the classification description for Building Maintenance Supervisor II includes five years of full-time or equivalent part-time paid experience in general maintenance or construction work on buildings, grounds, or electrical and mechanical equipment, at least two years of which must have been in a supervisory

capacity.

4. Prior to, and immediately following, Mr. Raines' retirement, Timothy Weber filled in as Supervisor.

5. Nine individuals applied for the position of Supervisor. Mr. Weber, Respondent's first choice, rejected the position after expressing a concern that the salary was inadequate for the responsibilities.

6. Respondent's second choice also declined the position for unstated reasons. A third individual accepted the position but resigned after one day.

7. Mr. Weber ultimately accepted the position, effective July 16, 1994, at a higher salary than that originally offered. (See footnote 1)

Division of Personnel Administrative Rules, Section 2 (asamended 1995), titled "Preamble" states:

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, with the exception of the State College System of West Virginia and the University System of West Virginia, are included in a classification plan known as classified-exempt service.

Division of Personnel Administrative Rules, Section 11.01, "Promotions, Demotions and Transfers" provides:

(a) Whenever practical 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 the employees' 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.

(b) A candidate for promotion must be certified by the Director to possess the qualifications

for the position as set forth in the specifications for the class of position for which he is a candidate, and he may be required by the appointing authority to qualify for the new position by a promotional competitive or non-competitive examination administered by the Director.

Grievant argues that the selection process was flawed in that he was afforded only a fifteen minute interview by Don Williams, the Planning and Design Engineer who selected the successful applicant, while Mr. Williams had discussed the position with Mr. Weber over a period of months. Grievant asserts that a structured interview, as promoted by the Division of Personnel, would have resulted in a more accurate decision.

Grievant offered testimony of co-workers to the effect that he is an excellent carpenter and is skilled at electrical work, plumbing, and welding. He asserts that he has the required five years of full-time experience, two of which were in a supervisory capacity, in general maintenance or construction work and is fully qualified to hold the position. In fact, Grievant claims ten years of supervisory experience in construction as owner of Precision Builders from 1976-1986.

Grievant notes that the level one decision issued by Mr. Williams stated that Mr. Weber was more dependable than Grievant. Grievant perceives this comment to refer to use of sick leave. Mr. Williams had commented on Grievant's 1993 evaluation that Grievant "[n]eeds to improve on building up sick leave. Have 57.32 hrs. of sick leave after 7 years (1008 hrs)." Because he had provided legitimate reasons for using the sick leave, and had never been disciplined for abuse of the leave, Grievant argues that it was improper to consider as a negative factor.

Grievant questions whether Mr. Weber had accrued the necessary supervisory experience required for the promotion. Although Mr. Weber reported four years' supervisory experience, Grievant asserts that the time was intermittent, effective only when Mr. Raines was on leave. Grievant opines that Mr. Weber had accrued approximately six months supervisory experience over the four year period. He concedes that Mr. Weber may have earned one year of supervisory experience if he is credited with the entire time from Mr. Raines' retirement until he was officially appointed to the position.

Finally, Grievant argues that a disciplinary action taken against Mr. Weber should have been considered when making the decision for promotion. Documentation establishes that Mr. Weber was suspended without pay from October 19 through October 21, 1992. The reason

for the action was that:

On Wednesday, September 30, 1992, between the hours of 11:30 a.m. and 12:30 p.m., you took a half hour of unauthorized leave. During this half hour absence you were observed at the Four Star Pizza in Braxton County. Your actions in regards to this entire incident could be characterized as detrimental to your position with and to the West Virginia Division of Highways. Furthermore, your actions exhibited a lack of sound and prudent judgment.

Grievant notes that he has not been subject to any disciplinary action during his employment with Respondent. He argues that this factor, together with his supervisory experience and construction skills entitle him to the position of Building Maintenance Supervisor II. (See footnote 2)

Respondent asserts that Mr. Weber's performance evaluations have been consistently better than Grievant's evaluations over the past four years, and that the Division of Personnel determined Mr. Weber to be qualified for the position. Absent any evidence of discrimination or favoritism, Respondent argues that the appointment of Mr. Weber was neither arbitrary and capricious nor clearly wrong.

In non-disciplinary cases the Grievant must prove all of theelements of the complaint by a preponderance of the evidence. Patterson v. W.Va. Div. of Corrections, Docket No. 95-CORR-308 (Oct. 13, 1995). Further, in matters of non-selection, the grievance process is not that of a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. Thibault v. Division of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994). Unless proven arbitrary or capricious or clearly wrong, an agency decision regarding promotion will be upheld. Ashley v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-070 (June 2, 1995).

In the present matter it cannot be determined that Respondent's selection of Mr. Weber for the position of Supervisor was arbitrary or capricious or clearly wrong. A review of past evaluations establishes that while both Grievant and Mr. Weber were generally rated "Satisfactory," the comments included on the document indicate that Mr. Weber's performance was more positive, overall. Grievant has failed to prove that disciplinary action imposed upon Mr. Weber three years earlier should have been a determining factor in the selection. Neither has he established that Mr. Weber was lacking in supervisory experience.

On the contrary, Personnel determined that he had met the qualifications of the position. In consideration of these factors and the record in its entirety, Grievant has failed to prove that the selection of Mr. Weber was significantly flawed or that he was otherwise entitled to the position.

In addition to the foregoing facts and narration it isappropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In non-disciplinary matters the grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989).

2. The grievance procedure set forth in W.Va. Code §§29-6A-1, et seq., is not intended to be a "super interview," but rather, allows for a review of the legal sufficiency of the selection process. Further, an agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary or capricious or clearly wrong. Thibault v. Div. of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994).

3. Grievant has failed to prove that Respondent's selection of Intervenor for the position of Building Maintenance Supervisor II was in violation of Division of Personnel Rules, Sections 2 or 11.01.

4. Grievant has failed to prove discrimination or favoritism as contemplated by W.Va. Code §29-6A-2 (d) and (h), or any or any other basis for which to grant the relief requested in this case.

Accordingly, the grievance is DENIED.

DATED 10/31/95 SUE KELLER, SENIOR ADMN. LAW JUDGE

Footnote: 1Grievant explained the more than two month delay in filing this grievance by stating that he was not aware that Mr. Weber had been formally appointed as Supervisor of the five-man section until October.

Footnote: 2In the "Statement of Grievance," Grievant complains that he was "discriminated against" and that the "successful applicant received favored treatment." Absent any evidence directly relating to discrimination or

favoritism, these issues warrant no additional consideration.