PAUL GULLETT

v. **Docket No. 95-DOH-147**

WEST VIRGINIA DEPARTMENT OF HIGHWAYS/

DIVISION OF TRANSPORTATION

DECISION

The grievant, Paul Gullett, is employed by the West Virginia Department of Highways (DOH) as an Equipment Operator III (EOIII) assigned to the Iaeger area in McDowell County. He filed this grievance at Level I June 3, 1994, protesting his non-selection for the position of "Havaco Lot" Crew Leader II position. The grievance was denied at Levels I through III and proper appeal to Level IV was made April 12, 1995. (See footnote 1) The parties subsequently agreed to submit the case for decision on the record developed at the lower levels. Proposed findings of fact and conclusions of law were received by June 1, 1995.

There is little if any dispute over the facts of the case. On May 13, 1994, DOH posted the position in issue. The dutiesassociated with the post were briefly described as, "Assigns crew members to daily tasks, assists in performance of road maintenance, oversees crew and keeps records of time, materials, and equipment used on project. Trains crew members on individual tasks on road repair." The grievant, a nineteen year employee, Steve Toth, a seventeen year EOIII and Cecil Runyon (See footnote 2) all applied and met the announced minimum qualifications.

Clarence Shelton, DOH's McDowell County Supervisor and Charles Lane, Assistant Supervisor conducted May 31, 1994 interviews of the applicants and reviewed their application materials. Both administrators were familiar with the DOH employment backgrounds of the three candidates. Mr. Shelton and Mr. Lane ultimately concluded that while both the grievant and Mr. Toth were strong candidates, Mr. Toth's greater supervisory experience, gained during ten years' service in the National Guard Reserves, gave him "the edge." Mr. Toth was appointed to the position effective June 19, 1994. (See footnote 3)

The grievant advances three arguments for reversal of DOH's decision to appoint Mr. Toth to the post. First he alleges that he was more qualified for the position than Mr. Toth and appears to argue

that he should be instated for that reason alone. Second, he contends that Mr. Toth was awarded the post because of his personal ties with Mr. Shelton. Finally, the grievant maintains he wasrejected because he was the only EOIII in the Iaeger area and DOH wanted to keep him there.

DOH asserts that the decision was made in compliance with all applicable agency and West Virginia Division of Personnel (Personnel) policies and that Mr. Shelton conducted a fair and impartial assessment of the candidates. DOH maintains the grievant was rejected solely on the basis of Mr. Shelton's determination that Mr. Toth had greater supervisory experience and that the grievant has failed to prove otherwise.

The only evidence of record regarding Mr. Shelton's personal ties to Mr. Toth was Mr. Shelton's concession, during his Level III testimony, that he and Mr. Toth, "hunted together and everything like that," and Mechanic Jimmy Hall's testimony that "they hunt and fish some together." There was no further inquiry into the matter. Obviously, these statements alone cannot support a conclusion that Mr. Shelton slanted or thwarted the selection process in some manner in order to favor Mr. Toth.

On the issue of DOH's alleged reluctance to transfer the grievant from the Iaeger worksite, the grievant testified that, shortly after the position was filled, Mr. Shelton told him that he "would have to shut the place down" if he, the grievant, were moved. Mr. Shelton conceded that he made a statement to the effect that a transfer might "hinder the operation," but asserted that he advised the grievant at the same time that his decision had been based on Mr. Toth's resume. He denied that the prospect of having to find a replacement for the grievant was a factor in his decisionto hire Mr. Toth. There was no other evidence presented on the issue.

Again, the brief testimony of the two witnesses cannot support a conclusion that the hiring decision was wholly or even partly based on Mr. Shelton's desire to avoid the inconvenience of a vacancy in the grievant's position. (See footnote 4) It is entirely plausible, and the record does not contradict, that Mr. Shelton was being consolatory.

Finally, the grievant's assertion that he should be found more qualified than Mr. Toth misconstrues the standard of review in such cases and, in any event, is not supported by the evidence. A thorough examination of the qualifications of the applicants for a contested position is necessarily part of the review, but its purpose is limited. As a rule, the credentials of the candidates, in and of themselves, are relevant only to the extent that they may reveal some irregularity in the overall selection process. It is not the role of the Administrative Law Judge to assess the evidence

regarding the qualifications of the applicants independent of the remainder of the record and then, if need be, substitute his judgment for that of the agency's administrators. Thibault v. Div. of Rehab. Services, Docket No. 93-RS-489 (July 29, 1994).

Here, the assessment reveals no irregularities. Both the grievant and Mr. Toth have had extensive experience with a varietyof road maintenance equipment. As noted, both met the certification requirements for the position and were close in terms of years of service with DOH. Their backgrounds are similar in a great many respects. In short, all evidence of record related to the qualifications of the two applicants supports DOH's determination that they were close.

The record also fully supports that DOH did not err in its determination that Mr. Toth had more experience directing the work of other employees than the grievant. The undersigned finds no abuse of discretion in Mr. Shelton's decision to appoint Mr. Toth on that basis.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision 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. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: August 29, 1995

Footnote: 1The grievant mistakenly filed at Level IV on August 26, 1994, shortly after he had received a Level II decision. The case was subsequently remanded to Level III with directions to hold the statutorily required hearing at that level. It appears that the hearing was not held until February 2, 1995.

Footnote: 2The record does not contain any background information on Mr. Runyon.

Footnote: 3Apparently, the decision was announced earlier. As previously noted, the complaint was filed June 3, 1994.

Footnote: 4The record is unclear as to whether Mr. Toth's promotion would create a vacancy which Mr. Shelton would be required to fill. There is some evidence of record which suggests that Mr. Toth was assigned to a different district.