

GEORGE LEWIS,

Grievant,

v.

DOCKET NO. 96-DOA-027

**WEST VIRGINIA DEPARTMENT OF
ADMINISTRATION,**

Respondent.

D E C I S I O N

Grievant, George Lewis, filed this grievance on July 26, 1995, as follows:

W.V. Code 29-6-10 Position of Supervisor II was posted on 6-15-95. I bid on position and did not receive it in violation of WVCode 29-6-10 and Governors Executive Order #9-93.

Grievant seeks instatement into the position with back pay and full benefits.

Following adverse decisions at the lower levels, Grievant appealed to Level IV on January 19, 1996. The parties agreed to submit the case on the record developed below, and following receipt of Respondent's Proposed Findings of Fact and Conclusions of Law, this case became mature for decision on April 30, 1996.

Background

Grievant has been employed by Respondent Department of Administration's General Services Division for approximately 18 years, 11 of which have been at the Governor's Mansion. Grievant's duties at the Mansion include taking out the trash on a daily basis, checking the lights, boiler and air conditioning, and fulfilling requests from the Mansion Director. Grievant also coordinates with crews and contractors regarding work to be done at the Mansion. Grievant does not have a supervisor located at the Mansion, but reported to Bob Plantz until his retirement, and thereafter Jim Casto, who

served temporarily as the Building Maintenance Supervisor, until the position was posted.

A career opportunity was posted on or about June 15, 1995, for Building Maintenance Supervisor II, the same position held by Mr. Casto. Grievant, Mr. Casto, and another employee applied and were interviewed for the position. Mr. Doug Koenig, Director of General Services, conducted the interviews. He testified he found both Grievant and Mr. Casto, the successful applicant, met the minimum qualifications of the position. However, he believed Mr. Casto to be the best qualified candidate based upon his experience and quality of service.

Mr. Casto had been serving in the Building Maintenance Supervisor II position on a temporary basis for approximately 6 months prior to the posting, and Mr. Koenig had an opportunity to observe his performance on a first-hand basis during that time. Mr. Casto had many years of supervisory experience, and the building crew had told Mr. Koenig that things had substantially improved under the direction of Mr. Casto during the time he served in the temporary position.

Discussion

Grievant claims Respondent violated W. Va. Code § 29-6-10 and Governor's Executive Order No. 2-93, in selecting Mr. Casto for the position, because Grievant had the greater seniority of the two. W. Va. Code § 29-6-10 states, in pertinent part:

The board shall have the authority to promulgate, amend or repeal rules, according to chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, to implement the provisions of this article:

. . .

(4) For promotions within the classified service which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination, when such examination is practicable. An advancement in rank or grade or an increase in salary beyond the maximum fixed for the class shall constitute a promotion. When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit or have the benefit withdrawn, as the case may be. . . .

Governor's Executive Order #2-93 provides, in part:

WHEREAS, on July 10, 1992, I appointed the West Virginia Blue Ribbon Personnel Commission ("Commission") to study and make recommendations regarding these and other related issues affecting state employees; and

WHEREAS, the Commission's December 17, 1992, "Report to the Governor" expressed concerns about certain personnel practices and procedures, and recommended numerous actions.

NOW, THEREFORE, I, GASTON CAPERTON, GOVERNOR of the State of West Virginia, pursuant to the authority vested in me by Article Seven, Section Five of the Constitution of West Virginia, do hereby ORDER and DIRECT the following:

. . .

2. That my Director of Operations, in consultation with the cabinet secretaries, develop by September 1, 1993, uniform policies and procedures to be applied to all state agencies that are designed to establish the following:

- a. uniform mechanisms for employee recruitment, hiring, transfer (upward, downward, and lateral), and discharge;
- b. a uniform job posting policy applicable to all state agencies that requires adequate, fair, and simultaneous notice of available jobs to all state employees;
- c. guidelines to ensure that employees who perform well, as measured by objective standards, receive preference for transfer or promotion, and that employees will not be promoted if their last performance appraisal was below standard.

Grievant alleges Respondent violated the above Code Section when it selected Mr. Casto for the position, because Grievant has more seniority than Mr. Casto. Further, Grievant alleges Respondent has violated the Governor' Executive Order because it has not promulgated rules and regulations in

compliance with the Order regarding employee recruitment, hiring, transfer and discharge.

Respondent contends that Code § 29-6-10 merely provides that seniority be considered as a factor in making selection determinations when the candidates' qualifications are substantially equal or similar. Respondent contends Mr. Casto's qualifications were superior to Grievant's and thus, it was not necessary to take Grievant's seniority into consideration.

Grievant interprets W. Va. Code § 29-6-10 to mandate that if two candidates meet the minimum qualifications for a posted position, then seniority must be used as the determinative factor in filling the position. This is too restrictive an interpretation of that statute, which says ". . . if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit. . . .". The statute says nothing about "minimum" qualifications, but speaks to whether candidates have substantially equal or similar qualifications. The employer retains the discretion to discern whether one candidate has superior qualifications than another, without regard to seniority as a factor. That is what happened in this instance: Mr. Casto was found to have qualifications superior to those of the Grievant. Seniority was not considered by the agency in hiring Mr. Casto, nor did it need to be, once it was decided Mr. Casto was better qualified for the position.

Grievant also argues that the Chief of Operations and the Cabinet Secretaries have not complied with the Governor's Executive Order and have failed to promulgate guidelines to ensure promotion for qualified employees. Indeed, Grievant's representative asserts they have done nothing to fulfill this obligation. This simply is not true. Grievant's own Exhibit No. 7, a memorandum from the Chief of Operations to the Cabinet Secretaries, dated June 8, 1994, demonstrates that steps were being taken at that time to comply with the Order in the form of several draft policies and guidelines.

Grievant failed to establish through evidence or testimony that policies or procedures have not been put into place to effectuate the Governor's Order. Thecla McGuire, Deputy Secretary for the Department of Administration, testified that there is no one policy which addresses the Governor's Order, but many policies which have been promulgated by the Division of Personnel. Grievant's representative questioned Ms. McGuire as to whether there was a policy entitled "Uniform Guidelines for Promotion" and she responded that she was not aware of one, but that it would be within the purview of the Division of Personnel, nonetheless. However, just because there may not a specific document with that title does not mean that guidelines on that subject have not been developed.

Yvonne Wilhem, Manager of the Internal Employee Placement Unit of the Division of Personnel, testified the guidelines she follows in determining whether employees are eligible for internal promotion are set forth in the Division of Personnel's Administrative Rules. West Virginia Division of Personnel Administrative Rule 11.01 states:

Whenever practical and in the best interest of the service, an appointing authority will fill a vacancy 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, appointing authorities should make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees.

Grievant apparently does not believe this is enough to comply with the Executive Order. Grievant opines that the Executive Order and W. Va. Code § 29-6-10 call for rules and regulations setting forth criteria by which points can be assigned or some other methodology developed to include seniority as a factor, by which employees applying for promotions can be ranked. While Grievant may believe this is a better way to evaluate candidates, the Executive Order and statute simply do not provide for such a detailed evaluation process, but leave those decisions to the discretion of the hiring authority. Certainly, if the Legislature intended for such an exhaustive evaluation process it could have provided one, as evidenced by the detailed processes set forth in the statutes dealing with state education employees. See e.g., W. Va. Code §§ 18A-2-1, et seq.

In a non-disciplinary matter, it is incumbent upon the Grievant to prove his allegations by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996). 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. Furthermore, an agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary and capricious. Lilly, supra; Thibault v. Div. of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994).

Respondent's determination that Mr. Casto was the best qualified candidate for the subject position will not be disturbed. Mr. Koenig testified that he believed Mr. Casto to be the best qualified "based on his work experience, his past history, experience as a supervisor, his experience in the craft crew." Also, "he had done an outstanding job while he was the temporary supervisor for about a six-month period prior to the selection."

While Grievant met the minimum qualifications for the position, Mr. Casto had been working with the crew he would supervising for eight or nine years on a day-to-day basis, was well respected by the crew, and had more supervisory experience than Grievant.

Based upon the evidence and foregoing discussion it is appropriate to make the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant has been employed by Respondent's General Services Division for 18 years.
2. Grievant has been assigned to the Governor's Mansion for the past 11 years, is responsible for the day-to-day maintenance of the Mansion, and fulfills requests made by the Mansion Director.
3. Grievant does not have a supervisor located at the Governor's Mansion.
4. Jim Casto has been employed by the General Services Division of Respondent for approximately 10 years.
5. Mr. Casto was assigned to the position of Building Maintenance Supervisor II on a temporary basis when the incumbent retired.
6. Respondent posted the position of Building Maintenance Supervisor II on or about June 15, 1995.
7. Three candidates, including Grievant and Mr. Casto, applied for the position and were interviewed by Doug Koenig, Director of General Services Division.
8. Mr. Koenig determined that Mr. Casto was better qualified for the position than the other two candidates and selected him for the position, based upon his supervisory experience and excellent work history.
9. Governor Gaston Caperton issued an Executive Order on March 23, 1993, directing, among other things, that his Director of Operations, in consultation with the cabinet secretaries, develop by September 1, 1993, uniform policies and procedures to be applied to all state agencies that establish "uniform mechanisms for employee recruitment, hiring, transfer (upward, downward, and lateral), and discharge; . . .".

Conclusions of Law

1. Grievant bears the burden of proving his charges by a preponderance of the evidence. Lilly

v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996). 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. Furthermore, an agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary and capricious. Thibault v. Div. of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994).

3. "When any benefit such as a promotion, wage increase or transfer is to be awarded, . . . and a choice is required between two or more employees in the classified service as to who will receive the benefit . . . , and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit. . . ". W. Va. Code § 29-6-10(4).

4. "Whenever practical and in the best interest of the service, an appointing authority will fill a vacancy 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. . . ". W. Va. Administrative Rule, Section 11.01 (6/95).

5. Grievant has failed to prove by a preponderance of the evidence that he was more qualified than the successful candidate, Mr. Casto, for the position of Building Maintenance Supervisor II.

6. Grievant has failed to prove by a preponderance of the evidence that Respondent has failed to comply with the Governor's Executive Order 2-93, W. Va. Code § 29-6-10, or West Virginia Administrative Rule 11.01, in filling the position of Building Maintenance Supervisor II. Further, Grievant has failed to prove that any failure to promulgate uniform policies would entitle him to the position he seeks.

Accordingly, this 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.

MARY JO SWARTZ

Administrative Law Judge

Dated: June 7, 1996