

**DAVID F. CURREY,**

**Grievant,**

**v. DOCKET NO. 95-DOH-579**

**WEST VIRGINIA DEPARTMENT OF  
TRANSPORTATION/DIVISION OF HIGHWAYS,**

**Respondent.**

**DECISION**

Mr. David F. Currey, Grievant, filed this grievance against the West Virginia Department of Highways, Respondent, on February 18, 1995. Grievant's "statement of grievance" is reproduced below:

Grievant David F. Currey is a twenty year employee of the Division of Highways. Grievant applied for the position of Storekeeper II, Bulletin #339 and was rejected for the position. Grievant contends that a substantial motivating factor in denying him the position was his handicapping [sic] condition.

As relief, Grievant seeks "[a]ppointment to the position of Storekeeper II or a comparable position, back pay, benefits and attorney fees."

Grievant was denied relief at Levels I and II on February 1, 1995, and February 16, 1995, respectively. Grievant appealed to Level III on February 23, 1995. At Level III, a hearing was held on August 22, 1995. In an undated decision, the grievance was denied by a three member panel.

On December 22, 1995, the Grievance Board received Grievant's appeal, dated December 21, 1995. At Level IV, the grievance was originally scheduled for hearing on February 6, 1996, but was continued for good cause on Respondent's motion. By agreement of the parties, an evidentiary hearing was held at the Grievance Board's Elkins office on April 4, 1996. The case became mature on May 8, 1996, upon receipt of the parties' post-hearing submissions.

The following findings of fact are derived from the record.

### **FINDINGS OF FACT**

1. In 1987, Grievant suffered a back injury during the course of his employment.
2. The back injury became progressively worse between 1987 and 1990.
3. Grievant had back surgery in 1990, and was off work until 1991.
4. Grievant returned to work in 1991, and worked as an Equipment Operator.
5. Grievant's back injury became progressively worse until July, 1993, when he was again off work, and received a 10% permanent partial disability award.
6. Respondent posted the position of Storekeeper II in the "Weekly Vacancy Report." ([See footnote 1\)](#)
7. The minimum qualifications specified on the Storekeeper II job description are reproduced below:

TRAINING Graduation from a standard high school or the equivalent.

EXPERIENCE Three years of full-time or equivalent part- time paid experience as a stock clerk, or in a clerical capacity in connection with large-scale warehouse operations, or in handling materials.

8. Grievant applied for the Storekeeper II position in question, and was considered by Respondent to be a qualified applicant. However, Grievant was not selected for the position.
9. Grievant's application does not show any gaps in employment, any time away from the job for any reason, or list a disability.
10. Grievant's application reveals the following work history:
  - (A) Grievant completed twelve years of secondary education, and attended Salem College from September 1974, to December 1976.
  - (B) Grievant has a "CDL" license.
  - (C) Grievant was in the U.S. Army from December, 1971, until December 1973, when he was honorably discharged.
  - (D) Grievant was a member of the U.S. Army National Guard and Reserve from January 1975, to December 1990. Grievant reported that he "[m]aintained military equipment and supervised maintenance personnel in the Army Reserve and Army National Guard for 15 years."
  - (E) Grievant was employed by Respondent from July 1974, to April 1981, as an Equipment Operator III. Grievant reported that he "[o]perated [a] gradall within Dist. 4[.]

Operated gas house - worked in warehouse distributing parts to counties & Dist 4 shop employees, stocked parts in warehouse. Also worked as parts Expediter ordering & purchasing parts for eqpt. [sic] within the District for a period of 5 yrs[.] I worked in the Dist. 4 warehouse & in the part's expediter [sic] position!"

(F) Grievant was employed by Respondent from April 1981, to January 1985, as a "HE Operator III" at Lost Creek. Grievant reported that he "[r]epaired road surface & base - plowed & treatd [sic] road surface during SRIC Season, maintained guardrail. Helped to maintain traffic control during road maintenance[,] assisted at shop to maintain equipment [sic] (worked at Meadowbrook Rest Area's) -Drove Courtesy Car[.]"

(G) Grievant was employed by Respondent from January 1985, to September 1994, Present, as a "HE Operator II" at Tunnel Hill. Grievant reported that he "Repaired road surface & base (maintained equipment) [sic] [.] Plowed & treated road surface during SRIC season[.] Operated Mowers during mowing seasons[.] Maintained guard rails[.] Maintained traffic control during road maintenance[.] Assisted at the shop in Maintenance and Inventoring [sic].

11. Gary St. Clair, Acting Equipment Supervisor for District Four, interviewed four applicants for the Storekeeper II position.

12. Mr. St. Clair recommended the person he felt was the best qualified applicant. Mr. Thomas was recommended, and was the successful applicant.

13. Grievant's back injury was not a factor in his decision not to select Grievant for the position. (Level III, Trans. 87).

14. At the time of the interview, Mr. Thomas was the only applicant working under Mr. St. Clair's supervision. (Level III, Trans. 93).

15. At the time of the interview, Mr. St. Clair believed Grievant was actually and actively working for Respondent. (Level III, Trans. 96).

16. Mr. St. Clair did not know any extensive details of Grievant's back injuries. Grievant orally informed Mr. St. Clair of his back injury only at the end of the interview.

### **DISCUSSION**

The Supreme Court of Appeals of West Virginia held in Syl. Pt. 1 of Vest V. Bd. of Educ. County of Nicholas, \_\_\_ W.Va. \_\_\_, 455 S.E.2d 781 (W.Va. 1995):

The West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, W.Va. Code, §5- 11-1, et seq.; nevertheless, the Grievance Board's Authority to provide relief to employees for "discrimination," favoritism," and "harassment," as those terms are defined in W.Va. Code, 18-29-2 (1992), includes jurisdiction to remedy discrimination that also would violate the Human Rights Act.

The Grievance Board has previously addressed the issue of a person alleging discrimination based on handicap. See Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept 25, 1995). Even though Vest and Keatley are education cases, the same principles and analysis are applicable in a state case such this one.

Therefore, the analysis must be whether Respondent discriminated against Grievant in violation of W.Va. Code §29-6A- 2(d). That section defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

The only issue that must be decided in this case is whether Grievant proved by a preponderance of the evidence that he was not hired for the position in question because of his back injury, and related permanent partial disability. That issue must be decided against Grievant. Grievant introduced no evidence that his medical impairment was a factor in the hiring decision. Grievant did not allege or attempt to prove that he was better qualified for the position than the successful applicant, or that the selection was flawed in any manner, or that the hiring decision was arbitrary or capricious. See Hopkins v. Fayette County Bd. of Educ., Docket No. 95-10-486 (Mar. 15, 1996); Cutright v. Bd. of Trustees\W. Va. Univ., Docket No. 95-BOT-090 (Nov. 2, 1995); Thibault v. Div. of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994); Booth v. W.Va. Bd. of Trustees at Marshall Univ., Docket No. 94- BOT-066 (July 25, 1994).

From all that appears of record, Respondent selected the applicant it reasonably believed was best qualified for the position. The evidence falls well short of establishing that Respondent violated W.Va. Code §29-6A-2(d).

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

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### **CONCLUSIONS OF LAW**

1. In nondisciplinary matters the grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH- 287 (Jan. 22, 1996).

2. Discrimination is defined in W.Va. Code §29-6A-2(d) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees".

3. Grievant failed to prove by a preponderance of the evidence that he was discriminated against in violation of W.Va. Code §29-6A-2(d).

Accordingly, the grievance is **DENIED**.

Any party 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.

Dated: August 6, 1996 \_\_\_\_\_

JEFFREY N. WEATHERHOLT  
ADMINISTRATIVE LAW JUDGE

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[Footnote: 1](#)

*The record is unclear as to the exact date of the posting.*