DELBERT A. MOWERY,

Grievant,

v. Docket No. 96-DNR-218

WEST VIRGINIA DEPARTMENT
OF NATURAL RESOURCES,

Respondent.

DECISION

On December 11, 1995, Delbert A. Mowery, Grievant, filed this grievance against Respondent, West Virginia Department of Natural Resources, alleging it was improper for Respondent to select a less senior employee for an Assistant Hatchery Manager position at Spring Run Hatchery. As relief, Grievant seeks to “be awarded the position in question, and any other way be made whole.”

This grievance was denied at Levels I, II, and III on December 13 and 28, 1995, and May 21, 1996, respectively. Grievant's appeal was received by the Grievance Board on June 6, 1996. At Level IV, the parties jointly continued a hearing scheduled for September 5, 1996. The Level IV evidentiary hearing was rescheduled, and held on October 30, 1996, at the Grievance Board's office in Elkins, West Virginia. The case became mature for decision on December 11, 1996, with receipt of Respondent's reply response.

The following findings of fact were derived from the record.

**FINDINGS OF FACT**

1. Grievant is a Hatchery Technician at the Reeds Creek Fish Hatchery. He has worked at that facility for over twenty years.

2. In October 1995, Respondent posted a position for an Assistant Hatchery Manager (AHM) at the Spring Run Fish Hatchery. Grievant and three other hatchery employees, Donald Ketterman, Jack Kimble, and Eric Hevener (the successful applicant), applied for the position. All four applicants were qualified for the position.

3. The AHM position had been vacant for approximately one year before it was posted, and filling it with an applicant that would need the least amount of training was an important factor to Mr. Richard Backus, Manager of the Spring Run Hatchery.

4. Mr. Backus conducted an interview of each applicant. During the interview, each applicant was asked to verbally respond to a list of scripted questions, which included the following "scenario" questions:

> 1) The hatchery manager tells you to have the rearing units cleaned and certain rearing units sampled on Monday (a full days work for your 4 men) then takes the day off. By mid morning four rearing units have heavy losses (100+) and another hatchery calls you for transfer assistance. You have paper work that must be done today, how do you proceed?
>
> 2) The hatchery manager gave you operating instructions for a project that must be done today. You are supervising a crew of four men on this project and one of the technicians wants to change a specification to save time and labor. You cannot contact the manager and this
>
> decision must be made now in order to complete the project on time, how do you proceed?
>
> 3) The hatchery manager gives you a paper work assignment that will take a full four hours to complete properly. He comes back two hours later with another project that will take you at least five hours to complete, any questions?

5. If they desired, after having answered the ten interview questions, each applicant was given an opportunity to volunteer other information concerning their qualifications.

6. Mr. Backus has never supervised Grievant, and Grievant has never worked at the Spring Run Hatchery.

7. At the time of application, Mr. Hevener had worked as a Hatchery Technician at Spring Run Hatchery for twelve years, had worked with Mr. Backus for the past five years at the hatchery, and had answered questions on occasion for Mr. Backus about the hatchery. Mr. Hevener is also knowledgeable about Spring Run Hatchery and its infrastructure.

8. Mr. Hevener is a certified electrician.

9. Mr. Backus has worked at three different hatcheries, and from his experience, believes

knowledge of the Spring Run Hatchery comprises 30% of the AHM position. It would take at least one year, probably two years, for Grievant to become a “major asset” at the hatchery. Mr. Hevener would not need any immediate training. 10. Mr. Backus recommended Mr. Hevener for the AHM position, and his recommendation was approved by Mr. Donald Phares, Assistant Chief in charge of Cold Water Management.

## DISCUSSION

Grievant asserts that since his qualifications are equal to those of Mr. Hevener, the successful applicant, he would have been the successful applicant for the AHM position based on W. Va. Code §29-6-10(4) because his greater seniority would have broken the tie in qualifications. Mr. Backus did not consider seniority. W. Va. Code §29-6-10(4) provides:

> 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.

Emphasis added.

Although, there is no evidence that Respondent considered seniority, there was no need to do so as Grievant's and Mr. Hevener's qualifications were not “substantially equal or similar.” While Grievant met the minimum qualifications for the position, Respondent reasonably concluded Mr. Hevener was better qualified for the AHM position at Spring Run Hatchery.

Respondent considered hatchery and managerial experience pertinent to the AHM position. Mr. Backus rated Mr. Hevenerhigher on the interview questions designed to test the candidate's working knowledge of fish treatment at the Spring Run Hatchery, as well as general managerial skills. Mr. Hevener also volunteered to perform certain duties normally associated with the AHM position when the position was vacant, and performed those duties well. Mr. Backus also testified that the AHM position required a working knowledge of electricity, that Mr. Hevener is a certified electrician, and that Grievant does not hold that certification.

Because the AHM position had been vacant for approximately one year, filling it with an applicant

that would need the least amount of training was an important factor to Mr. Backus. It would take a new person who is unfamiliar with the Spring Run Hatchery, like Grievant, at least one year, and possibly two years, to become a “major asset” at the hatchery. Mr. Hevener has worked at the Spring Run Hatchery for over twelve years, and possessed a working knowledge of the entire facility. Finally, Mr. Backus testified that if he had not chosen Mr. Hevener, the new AHM would have been trained by Mr. Hevener.

Therefore, based on the record, Respondent's determination that Mr. Hevener was the best qualified applicant for the AHM position will not be disturbed. Mr. Backus testified, even after learning of Grievant's seniority, that he believed Mr. Hevener was the best qualified applicant.

During the Level IV hearing, Grievant also attempted to elaborate on his qualifications, which he failed to do during the interview with Mr. Backus. In non-selection cases, “the grievanceprocedure 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 or capricious or clearly wrong.” Thibault v. Div. of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994).

In an evaluation of whether the decision-maker acted in an arbitrary and capricious manner the question is not, “what are Grievant's abilities”, but rather, what did the decision-maker know of Grievant's abilities when deciding Grievant was not the best qualified candidate for the position. Further, while the decision- maker has “the obligation to act reasonable [sic] and to thoroughly and carefully consider the qualifications of the candidates ... so did Grievant bear the burden to be precise in detailing [his] qualifications for the position so that the [decision-maker] could make its determination. If Grievant possesses skills and abilities relating to the qualifications for the position which [he] sought, but which [he] did not effectively communicate to the [decision- maker], [he] failed to me[e]t [his] obligation to be persuasive.” Booth v. W. Va. Bd. of Trustees, Docket No. 94-BOT-066 (July 25, 1994), citing Merritt v. Kanawha County Bd. of Educ., Docket No. 91-20-439 (Feb. 5, 1992). See Cutright v. W. Va. Bd. of Trustees, Docket No. 95-BOT-090 (Nov. 3, 1995).

After Grievant answered the scripted questions (during the interview with Mr. Backus), he failed to inform Mr. Backus that onoccasion he had performed lead and AHM duties at Reedsville. Grievant also failed to elaborate upon his managerial experience, and his experience in diagnosing and treating ill fish. Therefore, since Grievant had a duty to inform Mr. Backus of his experience and

credentials pertinent to the AHM position, that failure cannot be considered a flaw in the selection process. See Worrell v. Mercer County Bd. of Educ., Docket No. 94-27-054 (Feb. 24, 1995); Green v. Mason County Bd. of Educ., Docket No. 91-26-176 (July 26, 1991); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

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

## CONCLUSIONS OF LAW

1. In nondisciplinary matters Grievant must prove all of the allegations constituting his grievance by a preponderance of the evidence. Rice v. W. Va. Dept. of Tax and Revenue, Docket No. 90-ABCC-452 (Jan. 23, 1992); Owens v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 90-ABCC-003 (Apr. 30, 1990).

2. Grievant failed to prove by a preponderance of the evidence that Respondent, West Virginia Department of Natural Resources, or any agent thereof, violated, misinterpreted or misapplied W. Va. Code §29-6-10(4), or abused its discretion, in the selection of Mr. Hevener for the Assistant Hatchery Manager position at the Spring Run Hatchery.

Accordingly, this 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: 5/30/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE