**WILLIAM WARD,**

**Grievant,**

**v.** **Docket No. 96-DOH-184**

**DEPARTMENT OF TRANSPORTATION/**

**DIVISION OF HIGHWAYS,**

**Respondent.**

**D E C I S I O N**

Grievant, William Ward, grieves his non-selection for one of two Crew Leader positions posted for Division of Highways ("DOH"), District Three. (See footnote 1) He alleges DOH discriminated against him during the selection process. This grievance was denied at all lower levels. Grievant appealed to Level IV, and a hearing was held on October 1, 1996. This grievance became mature for decision on December 12, 1996, the date the parties' proposed findings of fact and conclusions of law were received by the Undersigned.

The Undersigned makes the following Findings of Fact in this grievance.

Findings of Fact

1. Grievant has been employed by DOH for approximately fifteen years. He is currently employed in District Three at the Wirt County Maintenance Headquarters.

2. On July 28, 1995, DOH posted two Crew Leader positions for Wirt County.

3. Grievant was one of four applicants for the positions. Two other employees from District Three, Joe Cunningham and Buddy Winnell, applied for the positions. Michael Shremshock, a bridge crew worker from another district, also applied for the positions. All applicants were qualified for the positions.

4. Grievant has approximately fifteen years of seniority, Mr. Cunningham has eighteen years, but the record does not reveal the seniority of Mr. Winnell.

5. The scores on the 1993 and 1994 evaluations of Grievant, Mr. Cunningham and Mr. Winnell were exactly the same; each received a satisfactory in all eight categories.

6. Robert Epler, District Three Engineer, instructed Mr. Alvin Engelke, the County Supervisor, to upgrade the applicants in his employ to assess their abilities to supervise.

7. Grievant, Mr. Cunningham, and Mr. Winnell were upgraded for varying periods of time. Mr. Cunningham was upgraded for less time than Mr. Winnell and Grievant.

8. All applicants received a safety warning during the time they served as Crew Leader.

9. Mr. Epler directed Mr. Engelke, Mr. Gerald Ball, the Maintenance Assistant and Mr. Engelke's direct supervisor, and Mr. George Shinsky, the Assistant District Engineer, to recommend the two Crew Leaders they wished to employ. He informed them he would not interfere with their choices, as they would be the people who would work closely with the employees. They initially recommended Mr. Cunningham and Mr. Shremshock. By this time, Mr. Shremshock had withdrawn his name from consideration. Their next choice was Mr. Winnell.

10. Mr. Epler signed off on these choices and forwarded the names to Charleston for final approval. Mr. Cunningham and Mr. Winnell were approved for promotion.

11. Grievant received a 10% permanent partial disability ("PPD") in 1991 for a prior work-related back injury. Mr. Engelke was unaware of Grievant's prior PPD award.

12. Mr. Engelke received negative comments from at least six of Grievant's co-workers during the time he was upgraded to Crew Leader. Mr. Epler also received negative comments about Grievant. Mr. Engelke did not write down these negative comments, but considered them when he made his recommendation. These comments dealt with Grievant's tendency to micro-manage his subordinates' work. (See footnote 2) Other comments indicated Grievant created personal problems, bad feelings, and hostility in the work place, and made comments about management's decisions. A mechanic, called out tofix Grievant's equipment, stated Grievant had intentionally broken his mower so he would not have to work. Mr. Ball stated Grievant had the ability to do the job but was not suitable for the position because of his disposition. A female worker complained Grievant had attempted to intimidate her because she was a female.

13. Mr. Engelke and Mr. Epler reported Grievant's work production during the time he was Crew Leader was low. Mr. Engelke explained it took Grievant an "awful long time to get the job accomplished." Level II Trans. at 27.

14. Mr. Engelke stated he did not have complaints about any of the other applicants.

15. During the Summer of 1995, Ms. Kim Freeman verbally complained to Mr. Engelke that

she was being sexually harassed by Mr. Winnell. No formal complaint was ever filed and Mr. Engelke was informed by Ms. Freeman, Mr. Winnell, and the co-worker who volunteered to counsel them, that the situation was resolved.

16. Ms. Freeman knew her rights under the sexual harassment policy and had been informed by the DOH, EEO worker to call back if her supervisor was unable to resolve the problem. At the Level IV hearing, Ms. Freeman indicated the problem continued after the group meeting, but she filed no formal complaint, only hinted to Mr. Engelke that the problem remained, and did not recontact the EEO worker.

17. Mr. Engelke was unsure sexual harassment had occurred and believed that Ms. Freeman's behavior of showing her co-workers hertattoo, telling dirty jokes, dressing provocatively, and using sexually explicit language, contributed to a misunderstanding.

18. Mr. Cunningham may be distantly related to Mr. Epler, but if he is, neither one of them was aware of it until informed by Mr. Engelke, a dabbler in genealogy.

19. The evaluations for the applicants were not reviewed immediately prior to filling the position.

## Issues

Grievant's argument has changed as it has proceeded through the grievance procedure. Initially, he argued he was discriminated against because of his disability, the 10% PPD received in 1991. Later, he argued DOH was required to review the evaluations and applications (See footnote 3) of the candidates, and this was not done. He also argued the sexual harassment charges against Mr. Winnell proved he could not work with others, and he should not have been promoted. Grievant also argued that Mr. Neil Reed's (See footnote 4) opinion was the only correct one, as he stated Grievant was the most qualified after reviewing the applications and participating in the applicant'sinterviews. DOH argues the successful applicants were qualified for the positions, and its selections did not violate any rules or regulations, nor was it arbitrary or capricious.

## Discussion

It must first be noted that in grievances of this nature the grievant has the burden of proof. W. Va. Code § 29-6A-6. "[A]n agency's decision as to which candidate is most qualified will be upheld unless

shown to be arbitrary and capricious or clearly wrong." Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95- T&R-576 (Apr. 4, 1996), citing Thibault v. Div. of Rehabilation Serv., Docket No. 93-RS-489 (July 7, 1994). "The grievance procedure in W. Va. Code §§ 29-6A-1, et seq., is not intended to be a `super interview' for unsuccessful job applicants, rather, in this context it allows review of the legal sufficiency of the selection process." Thibault, supra, citing Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Thus, Grievant's burden is to demonstrate DOH violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision.

Grievant's claim of discrimination will be discussed first. W. Va. Code § 29-6A-2(d) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." (See footnote 5) It is clear Grievant does not have the evidence to support his case. To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant has failed to establish a prima facie case. There is no evidence that anyone considered Grievant's 10% PPD in any way when selecting the successful candidates for the positions. Mr. Engelke testified he did not know Grievant had any type of disability or PPD. Thus, Grievant has failed to demonstrate DOH engaged in discrimination.

Grievant's argument about the failure of DOH to review the evaluations and applications prior to selection must also fail. Rule 16 of the Division of Personnel Rules states:

> The appointing authority shall consider performance evaluations in determining salary advancements and in making promotions, demotions, and dismissals.

This Rule does not require the appointing authority or recommenders/selectors to review the evaluations at the time of the recommendation, it requires the recommenders/selectors to "consider" the evaluations. The three men involved in selecting the successful applicants were the same three men who signed off on the candidates' prior evaluations. Mr. Engelke wrote the evaluations, and as previously stated in Finding of Fact 5, the evaluations were all equal. Surely, the evaluators were aware of this information. Additionally, the key period to evaluate and assess was the period the candidates were upgraded. This time period was not included on the 1993 and 1994 evaluations, the ones that had been completed at the time of the selection. Thus, the failure of these individuals to review the 1993 and 1994 evaluations immediately prior to selection is not a violation of this Rule. (See footnote 6)

Grievant's third argument relates to W. Va. Code § 29-6-10(4), and the seniority of the candidates. This Code Section states:

> For promotion within the classified service [the employer] shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination when such is practical. . . . 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 similarqualifications, 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 first factor to address is whether the candidates were "substantially equal" or had "similar qualifications". The record demonstrates there were numerous complaints about Grievant's performance while he was upgraded to the Crew Leader position from all levels of employees. Co-workers requested he not be placed in the position, and supervisors found him to be unsuitable for a supervisory role and to have low production as a Crew Leader. (See footnote 7) Obviously, Grievant job performance, as a Crew Leader, was not "substantially equal" to the other candidates.

The second factor to address is whether Grievant has more seniority. The evidence of record

demonstrates Mr. Cunningham is more senior than Grievant. (See footnote 8) It is unknown what Mr. Winnell's seniority date is as this fact was not made a part of the record. Thus, Grievant has failed to demonstrate he should have had the position on the basis of seniority.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In a non-disciplinary grievance, the grievant has the burden of proving his case by a preponderance of the evidence. W. Va. Code § 29-6A-6.

2. "[A]n agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary and capricious or clearly wrong." Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 4, 1996), citing Thibault v. Div. of Rehabilation Serv., Docket No. 93-RS-489 (July 7, 1994).

3. "The grievance procedure in W. Va. Code §§ 29-6A-1, et seq. is not intended to be a "super interview" for unsuccessful job applicants, rather, in this context it allows review of the legal sufficiency of the selection process." Thibault, supra, citing Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

4. Grievant failed to establish a prima facie case of discrimination.

5. Grievant did not demonstrate DOH failed to consider his evaluations, both of his prior work and of his work as Crew Leader.

6. Grievant failed to demonstrate his qualifications were "substantially equal", or that he had "similar qualifications" to the other two candidates. 7. Grievant did not prove he was more senior than either candidate.

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.

---

**JANIS I. REYNOLDS**

**Administrative Law Judge**

**Dated: July 24, 1997**

---

Footnote: 1

*At the Level IV hearing, Grievant asked to withdraw his grievance relating to a prior posting of this position. Thus, this grievance, Docket No. 96-DOH-223 was dismissed by agreement of the parties at the October 1, 1996 hearing.*

---

Footnote: 2

*Mr. Engelke explained many of his employees had performed their duties for a long time without supervision, and they knew what to do.*

---

Footnote: 3

*No evidence was submitted to demonstrate Mr. Engelke did not review the applications, or even what material the applications contained. It is unknown if the applicants merely indicated their interest in the positions or were required to fill out an extensive form detailing their qualifications for the positions. Mr. Shinsky stated he did not review the applications. Mr. Ball was not asked about the applications.*

---

Footnote: 4

*Mr. Reed is the Acting Administrative Assistant and Maintenance Assistant for Jackson County in District Three. He does not and has not worked with Grievant. He stated the employees' complaints had no effect on his decision to recommend Grievant, because the other candidates may not be making the employees work "hard enough."*

---

Footnote: 5

*There was no indication that Grievant was alleging any type of discrimination under W. Va. Code § 23-5A-1, a Code Section dealing with Workers' Compensation laws.*

---

Footnote: 6

*As stated in footnote 3, it was not proven that Mr. Engelke and Mr. Ball did not review the applications.*

---

Footnote: 7

*Grievant argued that Mr. Winnell cannot be considered suitable for the position because of the sexual harassment complaint filed against him. This is incorrect, no complaint was filed against Mr. Winnell. Although Ms. Freeman testified at Level IV that Mr. Winnell sexually harassed her while he was Crew Leader, she also testified she did not file a formal complaint and did not tell Mr. Engelke the problem continued. It would be unfair to hold this allegation against Mr. Winnell*

*in the context of this promotion without a formal complaint, and without a chance to respond to the charges. Even if the undersigned were to assume the sexual harassment charges were true, this would be one incidence of supervisory difficulty. Grievant had multiple complaints about his performance, one of which was intentional intimidation of a female employee. At hearing, Grievant did not speak to the allegations of this employee.*

---

*Footnote: 8*

*Grievant stated during his hearing that his seniority should have been calculated differently upon his return from Workers' Compensation. This issue was not explained in any detail, and was not a part of the grievance before the Undersigned.*