PAT G. LUSHER,

Grievant,

v. **Docket No. 97-DOH-033**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Pat G. Lusher (Grievant) filed this grievance against Respondent West Virginia Department of Transportation, Division of Highways (DOH), on December 15, 1995, alleging he should have received a posted Transportation Worker II - Equipment Operator position at the employer's Chelyan Substation. The grievance was denied at Levels I and II, and Grievant appealed to Level III on January 16, 1996. A hearing was conducted on November 22, 1996, (See footnote 1) and a Level III decision issued by Commissioner of Highways Fred VanKirk on January 14, 1997. Grievant appealed to Level IV on January 21, 1997. Following a continuance for good cause shown, a Level IV hearing was held in this Board'soffice in Charleston, West Virginia, on March 21, 1997. The parties made oral closing arguments and this matter became mature for decision at that time.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level III hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at Level III.

FINDINGS OF FACT

1. Grievant is employed by the West Virginia Department of Transportation, Division of Highways, as a Transportation Worker II in the Materials Control, Soils and Testing Division in Charleston, West Virginia.

2. On October 6, 1995, DOH posted three vacancies for Transportation Worker II - Equipment Operators (TW2EO) at its Chelyan Substation.

3. The posting at issue contained the following "brief sketch of job duties:"

> An employee in this class operates a variety of medium size equipment such as rubber tire endloader, roller or culvert cleaner. Drives dump truck, flat bed or tandem axle truck. May be exposed to hazardous working conditions and inclement weather. CDL license required.

4. Grievant timely applied for one of the posted TW2EO positions at Chelyan.

5. At the time Grievant applied for the position at issue he held a valid West Virginia class B commercial drivers license (CDL) with a tanker endorsement.

6. The Transportation Worker II job specification provides that "[a] valid class A or B Commercial Driver's License is required in the area of assignment of Equipment Operation." 7. Grievant was not selected for any of the three vacant positions. Two of the successful applicants were not currently employed by DOH, but had previously held temporary positions in DOH. The third successful applicant was a current DOH employee with greater seniority than Grievant.

8. All three successful applicants had a class A CDL at the time they applied for the vacant positions at issue. Laura Conley-Rinehart interviewed Grievant and the three successful applicants. She determined that because the outside applicants already had Class A licenses with tanker and hazardous endorsements, this would provide greater flexibility to management in making work assignments.

9. Since approximately 1995, a substantial majority of the applicants selected for position vacancies at the Chelyan Substation were not DOH employees at the time they were selected.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Initially, DOH suggests that Grievant did not meet the minimum requirements for the position at issue, because he did not hold a class A CDL. Grievant argues that he complied with the minimum requirements stated in the posting as he held a class B CDL, and the posting did not specify that a class A was required. The West Virginia Division ofPersonnel's Administrative Rule requires that the

posting notice of a job opening "shall include . . . the minimum qualifications of the position . . . ." 143 C.S.R. 1 § 9.07(b) (1995).

Certainly, DOH can require a TW2EO to hold a class A CDL, if it is reasonably ant icipated that an employee will be operating equipment requiring such a license. Indeed, the job specification for this classification states that either a class A or B CDL may be a minimum requirement for the position. W. Va. Code § 17E-1-12(a)(1) provides that a class A CDL is required to operate a combination of vehicles with a gross vehicle weight of 26,001 pounds or more, where the gross vehicle weight of the vehicle being towed is in excess of 10,000 pounds. A class B CDL authorizes operation of any single vehicle with a gross vehicle weight of 26,001 pounds or more, and any such vehicle towing a vehicle not in excess of 10,000 pounds. W. Va. Code § 17E-1-12(a)(2).

The brief job description in the posting describes these TW2EO positions as involving operation of "medium size equipment." None of the specified examples in the posting, illustrating equipment to be operated, indicate that the position involves towing trailers in excess of a 10,000 pound gross vehicle weight rating. Accordingly, DOH has not demonstrated that Grievant failed to meet the minimum qualifications for the position. See Weirick v. W. Va. Bd. of Rehabilitation, Docket No. 92-RS-189 (Jan. 26, 1993).

Grievant argues that as a minimally qualified incumbent employee, DOH should have selected him for one of the three vacant TW2EO positions at Chelyan, rather than selecting two applicants who were not then employed by DOH. (Grievant concedes that the other successful applicant, a current DOH employee with greater seniority than Grievant, was properly awarded one of the positions.) The DOH and Division of Personnel regulations governing filling of job vacancies discuss the "goal" of "striking a balance"between internal advancement of current employees and hiring from outside. W. Va. Dept. of Highways Administrative Operating Procedures, Vol. IX, Chap. 23 (Apr. 14, 1989) (A Ex 1 at L III); W. Va. Div. of Personnel Administrative Rule, 143 C.S.R. 1 § 11.01(a) (1995).

Grievant contends that DOH has violated these rules generally, and in this instance specifically, by filling a disproportionate number of position vacancies at Chelyan from outside the agency. However, the language in the rule does not specifically limit management's discretion to select either an internal or external applicant, so long as it reasonably applies the "best qualified" standard to fill the vacancy. See Flint v. W. Va. Dept. of Transp., Docket No. 92-DOH-119 (Sept. 23, 1992).

In any event, the selected employees exceeded the minimum qualifications for the positions at

issue as each held a class A CDL at time of his application. The mere fact that a class B CDL meets the minimum requirements in the posting does not preclude the employer from considering the fact that an applicant has a higher class of license that could provide greater flexibility in assigning work. Grievant did not establish that his qualifications were significantly superior to those of any of the successful applicants. See Ashley v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995). In these circumstances, Grievant has not demonstrated that DOH violated any statute, policy, rule, regulation, or written agreement in its selection of applicants for the TW2EO positions at issue. See Mowery v. W. Va. Dept. of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997); Thibault v. Div. of Rehab. Serv., Docket No. 93-RS-489 (July 29, 1994); Terry v. W. Va. Dept. of Transp., Docket No. 92-DOH-437 (Apr. 19, 1993).

In addition to the foregoing, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Grievant failed to establish by a preponderance of the evidence that he was better qualified for the position of TW2EO than any of the three applicants selected. See Ashley v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995); Flint v. W. Va. Dept. of Transp., Docket No. 92-DOH-119 (Sept. 23, 1992).

3. Grievant failed to establish by a preponderance of the evidence that Respondent DOH violated any statute, policy, rule, regulation, or written agreement by failing to select him for one of three vacant TW2EO positions at its Chelyan Substation. See Mowery v. W. Va. Dept. of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997); Thibault v. Div. of Rehab. Serv., Docket No. 93-RS-489 (July 29, 1994); Terry v. W. Va. Dept. of Transp., Docket No. 92-DOH-437 (Apr. 19, 1993).

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 StateEmployees 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: July 28, 1997

Footnote: 1

The record does not indicate why so much time elapsed between Grievant's appeal and the Level III hearing.