ORVILLE ELLIS, JR.,

Grievant,

v. **Docket No. 98-DMV-036**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF MOTOR VEHICLES,

Respondent.

D E C I S I O N

As authorized by W. Va. Code §§ 29-6A-1, et seq., Orville Ellis, Jr., (Grievant) filed this grievance against Respondent West Virginia Department of Transportation, Division of Motor Vehicles (DMV), on December 9, 1997. Grievant alleges he should have been selected for a posted Transportation Services Manager I vacancy in DMV's Logan Office. The grievance was advanced to Level III without resolution, and a Level III evidentiary hearing was conducted on January 28, 1998. The grievance was denied at Level III by Grievance Evaluator David Bolyard on February 4, 1998. Grievant appealed to Level IV, and a hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on April 27, 1998. (See footnote 1) **In accordance with a briefing schedule established at the conclusionof that hearing, this matter became mature for decision on June 23, 1998, upon receipt of Respondent's written proposals.** (See footnote 2)

Based upon a preponderance of the credible evidence of record, including the tran script of the Level III hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at both levels, the following Findings of Fact pertinent to resolution of this grievance are made.

FINDINGS OF FACT

1. Grievant is employed by the West Virginia Department of Transportation, Division of

Motor Vehicles (DMV), as a Supervisor II.

2. In August 1997, DMV advertised to fill a vacancy for a Transportation Services Manager I in its Logan Regional Office. See G Ex E at L IV.

3. Grievant and Clyde White were the only applicants for the position in question.

4. Mr. White was previously employed by the West Virginia Department of Human Services as a Social Worker from 1965 to 1967. In July 1997, he was reinstated to state employment with the West Virginia Department of Transportation, Division of Highways, as a Claims Investigator. See G Ex D at L IV. Mr. White was minimally qualified to fill the Transportation Services Manager I vacancy. See DMV Ex 1 at L III.

5. At the time of the selection decision at issue, Grievant had been serving as Acting Manager of DMV's Logan Office for approximately seven months. Grievant hadmore experience working for DMV, and greater job knowledge regarding operation of a Regional Office.

6. On August 23, 1996, Grievant was issued a written reprimand by D.P. Lake, DMV's Regional Office Coordinator, for failing to take appropriate corrective action regarding the attendance and punctuality of a subordinate employee. See R Ex 3 at L IV.

7. On September 25, 1996, Grievant received an employee evaluation as a probationary employee with an overall evaluation of "meets or exceeds expectations." See G Ex B at L IV.

8. On January 10, 1997, Grievant was orally counseled by Mr. Lake for an incident of sexual harassment. See R Ex 2 at L IV. This disciplinary action was not a significant factor in the decision to select Mr. White over Grievant for the vacant Transportation Services Manager I position.

9. On February 28, 1997, Grievant received an annual employee evaluation with an overall evaluation of "needs improvement." See R Ex 1 at L IV. The evaluation included a plan for improvement.

10. Mr. Lake conducted separate interviews of Grievant and Mr. White regarding their applications for the Transportation Services Manager I vacancy in the Logan Regional Office.

11. During the course of Mr. Lake's interview with Grievant, Grievant indicated that his brother was a very powerful man, that people were working for him to get the position in question, and there would be some "serious hell raised" if he did not get the position. He

mentioned that Sam Beverage, Tom Badgett, and a multi-millionaire in Logan County were supporting his application, that he considered the job to be his, and therewould be "big trouble" if he did not receive it. He also told Mr. Lake, that if he ever needed a favor sometime, to let him know. See R Ex 4

12. DMV Commissioner Joe Miller was informed of this conversation in the course of discussing the relative qualifications of the two applicants.

13. Commissioner Miller made the decision to hire Mr. White based upon Grievant's attempt to subvert the merit system, and the unsatisfactory attitude Grievant portrayed by his comments to Mr. Lake during his promotion interview.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

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, it provides an opportunity to review the legal sufficiency of the selection process. Shull v. Dep't of Health & Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998); Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). See Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Moreover, an agency's decision as to who is the most qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Sheppard v. W. Va. of Health & Human Resources, Docket Nos. 97-HHR-186/187 (Dec. 29, 1997). See Ashley v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995); Thibault, supra. W. Va. Code § 29-6-1 provides that "[a]ll appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness . . . ." Respondent argues that Grievant's attempt to assert political influence in obtaining the position at issue is inconsistent with the merit system. Respondent is correct. Grievant neither denied nor rebutted Mr. Lake's recollection of the job interview.

Although Grievant had some blemishes (See footnote 3) on his relatively brief work record as a Supervisor II, Mr. Lake acknowledged that he had generally been doing a "good job"

while serving as the acting manager of the Logan Regional Office. Thus, Mr. Lake rated Grievant ahead of Mr. White in such areas as relevant experience and job knowledge. Nonetheless, Commissioner Miller was understandably concerned that an employee who found it necessary to assert his personal or political connections to obtain a promotion might just as easily conclude that he was serving at the pleasure of his benefactors, rather than the citizens of the State of West Virginia. In these circumstances, the Commissioner's determination that Grievant was unsuitable for promotion to a managerial position with greater responsibility than his current assignment as a Supervisor II was not shown to be arbitrary and capricious, or based upon any factor other than sound management considerations.

Grievant contends that DMV failed to give proper consideration to his seniority when it selected Mr. White. W. Va. Code § 29-6-10(4), provides that when "any benefit such asa promotion . . . 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 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 . . . ." In prior decisions interpreting Code § 29-6- 10(4), this Grievance Board has determined that where the grievant and the successful applicant meet the minimum qualifications for the position, but one applicant is more qualified than the grievant, their qualifications are not substantially equal or similar. Therefore, seniority need not be specifically considered in the selection process. Barth v. Bureau of Employment Programs, Docket No. 97-BEP-552 (May 29, 1998); Sheppard, supra; Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). See Lewis v. W. Va. Dep't of Admin., Docket No. 96-DOA-027 (June 7, 1996). Under the circumstances presented in this grievance, Grievant's overall qualifications for the position at issue were not equal to or superior to those of the other applicant. In this context, Grievant has not demonstrated that DMV violated W. Va Code § 29-6-10(4), or any other statute, policy, rule, regulation, or written agreement in its selection of Mr. White for the Transportation Services Manager I position at issue. See Lusher v. W. Va. Dep't of Transp., Docket No. 97-DOH-033 (July 28, 1997); Mowery, supra; Thibault, supra; Terry v. W. Va. Dep't 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 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. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. The seniority preference set forth in W. Va. Code § 29-6-10(4) is applicable only when the applicants' qualifications are substantially equal or similar. Barth v. Bureau of Employment Programs, Docket No. 97-BEP-552 (May 29, 1998). In the circumstances presented by this grievance, Grievant failed to establish by a preponderance of the evidence that he was equally as qualified for the position at issue as the successful applicant.

3. Grievant failed to establish by a preponderance of the evidence that Respondent DMV violated any statute, policy, rule, regulation, or written agreement by failing to select him for a vacant Transportation Services Manager I position in its Logan Office. See Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997); Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994); Terry v. W. Va. Dep't of Transp., Docket No. 92-DOH-437 (Apr. 19, 1993).

Accordingly, this grievance is DENIED.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of thisdecision. W. Va. Code § 29-6A-7 (1998). 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: July 21, 1998

Footnote: 1

Grievant was represented by Barry Holder with the West Virginia State Employees Union. Respondent was represented by Senior Assistant Attorney General Jacquelyn I. Custer.

Footnote: 2

Grievant did not submit a post-hearing argument.

Footnote: 3

Grievant may not litigate the merits of these prior actions in the current grievance proceeding. See Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96- HHR-371 (Oct. 30, 1996); Stamper v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-144 (Mar. 20, 1996); Womack v. Dep't of Admin., Docket No. 93-ADMN-430 (Mar. 30, 1994). See generally W. Va. Code § 29-6A-3(j); W. Va. Dep't of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993).