EDWARD WORKMAN,

Grievant,

v. **DOCKET NO. 99-DOH-350**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS, and
DIVISION OF PERSONNEL,

Respondents.

DECISION

Edward Workman (Grievant) challenges the Division of Highways' (DOH) selection of another employee for the position of County Highway Maintenance Assistant II (CHMA II). He seeks placement in the position. The grievance was initiated on January 26, 1998, and denied by Grievant's immediate supervisor on February 3, 1998. Upon appeal to level two, the grievance was denied in a written decision dated February 17, 1998. A level three hearing was conducted on January 27, 1999[1], followed by a decision denying the grievance dated August 10, 1999. Grievant appealed to level four on August 18, 1999. After one continuance granted for good cause shown, a level four hearing was held on November 19, 1999, in the Elkins, West Virginia, office of the Grievance Board. Grievant represented himself, and DOH was represented by counsel, Krista Duncan.[2] This matter became mature for consideration on December 7, 1999, upon receipt of Respondent's fact/law proposals.[3]

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[1]The reason for the lengthy delay between levels two and three is unknown.

[2]The Division of Personnel declined to participate in the level four hearing.

[3]Grievant declined to submit post-hearing proposals.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by DOH since 1986 as a Transportation Crew Chief. His duties consist mainly of supervising other employees.

2. In late 1997, DOH advertised a CHMA II position in District Eight.

3. Five applicants, including Grievant, were deemed by the Division of Personnel to meet the minimum qualifications for the CHMA II position.

4. The classification specification for CHMA II states, in pertinent part, as follows:

> Minimum Qualifications:
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> Experience:
> Four years of full-time paid experience in highway construction or maintenance, surface mining, or site development, **two years of which must have been in a supervisory capacity.**

(Emphasis added.)

5. The CHMA II position was awarded to Sam McPaters, who was classified as a Transportation Worker III, Equipment Operator, and had been employed by DOH for approximately 20 years.

6. Mr. McPaters has never been employed as a supervisor.

7. As a Transportation Worker III, Mr. McPaters served as a crew leader, providing assistance and direction to lower-classified employees. Mr. McPaters would often coordinate workers and determine the equipment and manpower needed to perform DOH projects.

8. Mr. McPaters has never been responsible for evaluating or disciplining other employees, and has not been formally assigned the responsibility of reviewing or approving their work.

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.

Grievant contends that Mr. McPaters did not meet the minimum qualifications for the posted position, because he had never served as a supervisor of other employees. He further contends that he was more qualified than Mr. McPaters for the position. DOH contends that both Grievant and Mr. McPaters met the minimum qualifications for the position, but that Mr. McPaters was a “better fit” for the job.

As to Mr. McPaters’ supervisory experience, Respondent argues that, although not officially employed in a supervisory role, he has exhibited an ability to supervise, through his coordination, leadership, and assistance to the members of his crew. According to his own testimony, Mr. McPaters was not an official supervisor, but “made sure the workers did what needed to be done” and gave them direction. Although Mr. McPaters did not decide what work would be done each day, he had the authority to direct the other workers regarding the manner in which the work was to be accomplished.

It is well settled that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See Parsons v. W. Va. Dep't of Transp., Docket No.

97-DOH-289 (Oct. 30, 1997); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995); Bailey v. W. Va. Dep't of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994). Moreover, an agency may not interpret its policies in a manner which is inconsistent with the common meaning of the language contained therein. See Watts v. W. Va. Dep't of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 877 (1995). However, where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). See generally W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

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. Ward v. Dep't of Transp., Docket No. 96-DOH-184 (July 24, 1997); Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). See also Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 16, 1989). In order to obtain relief on the basis of an alleged error in a promotion action, a grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different if the selection had been conducted correctly. See Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998).

The outcome of this grievance hinges on the meaning of the terms "in a supervisory capacity" as it relates to the experience requirements set forth in the classification specification for the CHMA II position. A similar situation was recently addressed by this Grievance Board in Della Mae v. W. Va. Div. of Natural Resources, Docket No. 98-DNR-204 (Feb. 29, 1999). In determining whether an employee's experience has been "in a supervisory capacity," the administrative law judge took administrative notice that, consistent with the Division of Personnel's stance in prior grievances:

> an employee must be formally delegated responsibility for planning, assigning, reviewing and approving the work of full-time employees, as well as initiating disciplinary action, approving requests for sick and annual leave, conducting performance evaluations, recommending salary increases, and serving as the first step in the grievance procedure, in order to be considered a 'supervisor' for classification purposes. See, e.g., Lawhun v. W. Va. Bureau of Employment Programs, Docket No. 92-BEP-442 (Feb. 4, 1993); Cline v. W. Va. Div. of Human Serv., Docket No. 90-DHS-288 (Oct. 16, 1990). This interpretation is consistent with the expected attributes of a supervisor in an employment context. See Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). See also 29 U.S.C. § 152(11).

Della Mae, supra.

By Mr. McPaters' own testimony, he has never been employed as a supervisor. Moreover, Mr. McPaters explained that, when he was a Transportation Worker III, his supervisor, Mr. McCoy, normally decided what projects needed to be worked on each day, and he directed Mr. McPaters to take a crew to accomplish the work. Although Mr. McPaters may have had some authority in deciding how the work was to be accomplished, the "planning, assigning, reviewing and approving" of the work was Mr. McCoy's responsibility, not his. Additionally, Mr. McPaters had no formal responsibilities for the discipline, leave requests, evaluations, and other supervisory matters for the members of

his crew. The classification specification for Transportation Worker III further supports this interpretation, in that such employees are to "lead and train other lower level workers" and may serve as a shop leader in a county garage. However, formal supervision of lower level employees is not contemplated as part of the duties of a Transportation Worker III.

Although Mr. McPaters clearly performed very well as a crew leader, he had not been a supervisor as that term is applied in the context of state employment. See Della Mae, supra. An employer has considerable discretion in determining the minimum qualifications for holding a particular position or classification of employment. See, e.g., Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999); Holmes v. W. Va. Dep't of Transp., Docket No. 97-DOH-553 (June 30, 1998); Carovillano v. W. Va. Div. of Envtl. Protection, Docket No. 93-EP-343 (Dec. 14, 1993). Unfortunately, in the instant case, DOH relied on the obviously erroneous decision by DOP that Mr. McPaters was minimally qualified for this position. Nevertheless, employers are obligated to select applicants who qualify under the terms established by DOP classification specifications. See Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-546 (June 24, 1998); Edwards v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-426 (May 7, 1998). In the instant case, the successful applicant simply did not meet those qualifications. Accordingly, Grievant has established that, due to DOH's reliance on DOP's erroneous conclusion that Mr. McPaters was minimally qualified for the position, his promotion to the CHMA II position was improper.

Although Grievant has established that, if DOH had followed the classification

specification for CHMA II, a different result would have occurred, he has not demonstrated that he was the best qualified of the remaining candidates for the position. In fact, at least one other applicant received a higher rating during the selection process than Grievant. However, there is no evidence of record which indicates whether or not the next highest rated applicant after Mr. McPaters had the appropriate qualifications to meet the minimum requirements of the position. In addition, it is unclear whether Grievant's "supervisory duties" have encompassed the responsibilities described in DellaMae, supra. Accordingly, DOH will be required to reconsider the applicants for the CHMA II position, and exclude from consideration all applicants, including Mr. McPaters, who did not meet the minimum qualifications for the position.

Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate.

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. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See Parsons v. W. Va. Dep't of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995); Bailey v. W. Va. Dep't of Transp., Docket No. 94-DOH-389

(Dec. 20, 1994).

3. An agency may not interpret its policies in a manner which is inconsistent with the common meaning of the language contained therein. See Watts v. W. Va. Dep't of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 877 (1995). However, where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). See generally W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

4. 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. Ward v. Dep't of Transp., Docket No. 96-DOH-184 (July 24, 1997); Thibault v. Div. of Rehabilitation Serv.,Docket No. 93-RS-489 (July 29, 1994). See also Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 16, 1989).

5. In order to obtain relief on the basis of an alleged error in a promotion action, a grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different if the selection had been conducted correctly. See Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998).

6. Respondent DOP misapplied or misinterpreted the classification specification

for County Highway Maintenance Assistant when it found Mr. McPaters to be minimally qualified for the position.

Accordingly, this grievance is **GRANTED, IN PART**. Respondent DOH is hereby **ORDERED** to reconsider Grievant's application for the CHMA II position, and to exclude from consideration, consistent with this opinion, those applicants who did not then meet the minimum qualifications for the position. Should Grievant be selected for the CHMA II position, he will be entitled to back pay, with interest, from the date the position was filled. All other relief 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, and such appeal must be filed within thirty (30) days of receipt of this Decision. 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: December 17, 1999

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DENISE M. SPATAFORE
Administrative Law Judge