

**JONATHAN D. HATHAWAY,**

**Grievant,**

**v.**

**Docket No. 99-MCHD-399**

**MONONGALIA COUNTY**

**HEALTH DEPARTMENT,**

**Respondent.**

### **DECISION**

Jonathan Hathaway (Grievant) challenges the decision of his employer, the Monongalia County Health Department (MCHD), in selecting another applicant for a Sanitarian Supervisor position. He seeks placement in the position, along with back pay and interest. The grievance was initiated at level one on August 2, 1999, and his immediate supervisor was without authority to grant relief. The parties agreed to waive level two, and Grievant appealed to level three, where a hearing was held on September 2, 1999. The grievance was subsequently denied at that level on September 8, 1999. Grievant appealed to level four on September 16, 1999. After a continuance granted for good cause shown, a level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on December 3, 1999. Grievant was represented by counsel, Patricia Stiller, and MCHD was represented by counsel, Philip Magro. This matter became mature for decision on December 22, 1999, the deadline for submission of the parties' fact/law 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 MCHD for sixteen years, and he has worked as a sanitarian for approximately fifteen years. As a sanitarian, Grievant has obtained extensive experience inspecting sewage and septic systems, along with restaurants. He also investigates communicable disease outbreaks and has obtained specialized training in epidemiology. Over the years of his employment with MCHD, Grievant has attended training in various areas, such as epidemiology, diseases, sewage system design, playground safety, and FDA food service training.

2. On June 22, 1999, MCHD posted a position vacancy for a Sanitarian Supervisor, whose duties would encompass “complex supervisory duties to assure that environmental health programs are of high quality and are completed effectively.” Duties also would include planning, assigning, reviewing, approving, and initiating “environmental health activities to assure that excellent environmental health services are consistently delivered throughout Monongalia County.” L IV, Resp. Ex. 2, Job Posting.

3. Three individuals--Grievant, Terri Berton, and Todd Powroznik--met the minimum qualifications for the Sanitarian Supervisor position.

4. Ms. Berton has been employed by MCHD as a sanitarian for approximately six years. Throughout her employment, Ms. Berton has performed duties similar to those of Grievant, except that she has limited experience in the epidemiology area. Also, she has been in charge of overseeing the radon inspection program for Monongalia County and has supervised a training program for food service workers in the county administered by MCHD.

5. The three applicants were interviewed and rated by Arthur Adams, Program Manager for MCHD. 6. Mr. Adams rated the applicants based upon their resumes, interview responses, past performance evaluations, and his personal knowledge of their qualifications.

7. Ms. Berton was selected to fill the Sanitarian Supervisor position.

8. Ms. Berton had an unblemished employment record with MCHD, and she excelled in the areas of planning and organization. Level IV, Testimony of Arthur Adams and Robert White. She had also shown excellent supervisory skills in managing the radon program and in training food managers. During her employment with MCHD, Ms. Berton received better performance evaluations than Grievant and Mr. Powroznik.

9. Throughout his employment with MCHD, Grievant has had a problem with tardiness on an “on and off” basis. Level IV testimony of Grievant, Arthur Adams, and Robert White.

10. Over the years since he has been employed as a sanitarian, Grievant has had personality “clashes” with members of the public, which has led to some complaints being made to MCHD administrators. Grievant's tendency to “talk down to people” has also caused some personality difficulties with his co-employees at MCHD. Level III and Level IV testimony of Arthur Adams; Level IV, Resp. Ex. 2; Level IV testimony of Robert White.

11. Mr. Adams selected Ms. Berton for the position, based upon her demonstrated supervisory abilities, her organizational skills, and her ability to get along with coworkers.

### **Decision**

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. W. Va. 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 Dep't 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 . . . ." Grievant argues that he was at least as qualified as Ms. Berton for this position and that the sole reason for his non-selection was Mr. Adams' bias against him. Indeed, Mr. Adams testified quite frankly that he and Grievant have had some personality clashes in the past. However, he provided an extensive explanation of his selection process, both at the level three and level four hearings. Despite Grievant having more years of experience than Ms. Berton, Mr. Adams found her to be the most qualified of the three candidates, based upon her demonstrated skills in organizing projects and supervising other employees. The most important aspect of the Sanitarian Supervisor's job duties is supervision of other employees, and Ms. Berton had shown superior skills in that area, while Grievant had not. On the contrary, as both Mr. Adams and Mr. White, Grievant's former supervisor, explained, Grievant had a tendency to "talk down" to other employees, causing some personality difficulties between him and his coworkers in the past. The evidence submitted demonstrates that Mr. Adams conducted a careful and fair selection process, and Grievant has not shown that the decision to select Ms. Berton was arbitrary

and capricious, or based upon any factor other than sound management considerations.

Grievant contends that MCHD failed to give proper consideration to his seniority when it selected Ms. Berton. W. Va. Code § 29-6-10(4), provides:

[when] any benefit such as a 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. W. Va. 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. Experience alone does not qualify an individual for a supervisory position. In this context, Grievant has not demonstrated that MCHD violated W. Va Code § 29-6-10(4), or any other statute, policy, rule, regulation, or written agreement in its selection of Ms. Berton for the 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).

Consistent with 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, or that Respondent's selection was arbitrary and capricious.

3. Grievant failed to establish by a preponderance of the evidence that Respondent violated any statute, policy, rule, regulation, or written agreement by failing to select him for Sanitarian Supervisor position. 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, 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: February 7, 2000** \_\_\_\_\_

**DENISE M. SPATAFORE**

**Administrative Law Judge**