

**DANIEL P. FINE,**

\_\_\_\_\_ **Grievant,**

**v.**

**Docket No. 99-DOH-259**

**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,**

**DIVISION OF HIGHWAYS,**

**Respondent.**

### **DECISION**

Daniel P. Fine (Grievant), a Transportation Worker IV employed by Respondent W. Va. Department of Transportation, Division of Highways, District 10 (DOH), filed a grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that the decision not to select him as Highway Equipment Supervisor II (HES II) was arbitrary and capricious. This grievance was denied at Level I by the successful applicant for the position, Bob Hudson (Hudson), on December 8, 1998. The grievance was denied at Level II by District Administrator Richard W. Boyd (Boyd) on December 11, 1998. A Level III grievance hearing was held on January 27, 1999, before Hearing Examiner Brenda Craig Ellis. Grievant was represented at this hearing by Lynn Belcher of the West Virginia State Employees Union and Jack Guill of District 10, and DOH was represented by Nedra Koval, Esq. By correspondence dated June 16, 1999, the grievance was denied at Level III by DOH Commissioner Samuel H. Beverage. By Motion dated August 2, 1999, DOH, through its counsel Krista L. Duncan, Esq., moved that this grievance be dismissed with prejudice. [\(See footnote 1\)](#) This Motion was denied by letter dated August 26, 1999. A Level IV hearing was held on November 10, 1999, at the Grievance Board's Beckley office, before the undersigned administrative law judge. The parties were given until December 3, 1999, to submit proposed findings of fact and conclusions of law, and this matter became mature for decision on that date.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

## **FINDINGS OF FACT**

Grievant is employed by DOH as a Transportation Worker IV.

2. On August 24, 1998, DOH posted a weekly vacancy report for a HES II position in the Equipment Division of the Princeton Office of District 10.

3. Grievant, successful applicant Hudson, and Thomas Turpin met the posted minimum qualifications for the position.

\_\_\_4.. The classification specification for HES II is as follows:

**Nature of Work:** Under administrative direction, at the Equipment Division and District level, performs advanced level work supervising employees and has responsibility for the repair and maintenance of vehicles or heavy equipment used in highway construction and maintenance; is accountable for the implementation of all safety policies; may serve as an equipment specialist/supervisor in the development and implementation of the Equipment Management System; or manage the procurement, inventory and distribution of all automotive/vehicle parts and supplies for the Division. Performs related work as required.

**Distinguishing Characteristics:** This class is distinguished from Equipment Supervisor I by having responsibility for interviewing, selecting, and evaluating employees; serving on Review Boards; and acting as liaison with district, county, and central offices on all equipment related administrative requirements.

**Examples of Work:** Supervises mechanics, equipment operators and other personnel in the repair, maintenance, and movement of vehicles and heavy equipment for use in the district and/or state. Ensures proper staffing needs are met through the monitoring of work schedules. Estimates damages and coordinates the repair of equipment between maintenance units and central Equipment Division. Supervises the disposal of shop waste in accordance with environmental protection standards. Supervises the procurement and inventory of parts and supplies for the District from vendors and the central Equipment Division warehouse. Makes recommendations for replacements. Ensures the effective operation of the Equipment Management and the Preventive Maintenance Systems. Assists in the development of equipment specifications, and approves equipment maintenance/overhaul schedules. Organizes and directs training programs. Reviews and signs payrolls, purchase orders, work orders and accident reports. Interviews applicants for employment, makes recommendation for hiring, and performs employee evaluations. Confers with area equipment supervisors and/or mechanics on equipment related priorities, repairs and maintenance.

5. The selection process consisted of an interview with District Administrator Boyd, who also considered the qualifications of the applicants.

6. Boyd ranked the qualified candidates, in order of their qualifications, as Hudson, Thomas Turpin, and Grievant.

7. Hudson was a Bridge Safety Inspector IV. His qualifications included some 20 years of service; some 15 years as supervisor in DOH's bridge department, supervising two crews of three Bridge Inspectors each in their inspection of some 750 bridges.

\_\_\_ 8. The classification specification for Bridge Safety Inspector IV is as follows:

**Nature of Work:** Under limited supervision, an employee in this class performs advanced level bridge safety inspection and analysis work at the staff level or supervises the performance of two or more bridge safety inspection teams and coordinates the highway bridge safety inspection program within a district. May perform strenuous physical labor. Hazardous working conditions involve climbing on the superstructure and substructure of bridges. The work may involve exposure to severe weather conditions. Performs related work as required.

**Distinguishing Characteristics:** This classification is distinguished from the Bridge Safety Inspector III class by the assignment of advanced level staff responsibility or the supervision of two or more bridge safety inspection teams and the coordination of highway bridge safety inspection program within a district.

**Examples of Work:** Plans, and schedules the work of bridge safety inspection teams within the district. Supervises the work performed through the bridge safety inspection team supervisors. Reviews and edits draft inspection reports completed by inspectors for accuracy, completeness, and conformance to established guidelines. Performs preliminary technical analysis such as stress analysis. Reviews the quality of completed inspection work by comparing reported data with actual structural condition. Writes periodic progress reports on the bridge safety inspection program within a district as required. Works as an inspection team member or inspection team supervisor in the absence of other inspectors or supervisors.

9. Boyd had first hand knowledge of Hudson's qualifications because Hudson had worked with Boyd for some 18 years in DOH's Bridge Department. Boyd did not have a similar first hand knowledge of Grievant's qualifications.

10. Grievant's qualifications with DOH included some 30 years of service as a Transportation Worker/Mechanic II, III, or IV. His supervisory experience at DOH consisted mainly of supervising helpers who assisted him in his mechanic's duties.

\_\_\_ 11. The classification specification for Transportation Worker IV is as follows:

**Nature of Work:** Under limited supervision, at the advanced level performs specialized skilled work in the construction and maintenance of highways and related

buildings and structures. Positions assigned to this classification are reserved for employees/applicants having achieved the required certification established by the Department of Transportation. May be exposed to hazardous working conditions and inclement weather. Performs related work as required.

**Examples of Work:** Repairs or constructs bridges with fabricated steel by welding using electric metal arc welding equipment according to American Welding Society Standards (AWS). Repairs highway maintenance equipment and vehicles using gas and electrical welders, torches and other welding equipment. Welds or extend-welds metal re-bar or piling together to strengthen concrete forms or extend pilings in the erection of new bridges. Cuts and grinds structural steel using acetylene gas cutting torches and power grinders. Climbs high steel structures to perform welding tasks on metal bridge components. Separates weld seams using power hammers and hand hammers to prepare for rewelding. Adjusts pressure gauges on acetylene or gas cutting torches to assure proper operation for smooth cutting of metals. Lays out plans according to specifications for cutting metals used in repairing high steel structure bridges. Checks work area periodically for presence of volatile gases and toxic fumes. Maintains welding equipment, checks pressure gauges and valves to ensure adherence to safety procedures. Repairs equipment in the field by welding metal components together to allow continued operation of machinery. Inspects work for accuracy and completeness according to plans and specifications. Performs pre-operational check of equipment. Performs advanced level work in the complete maintenance, repair, and overhaul on a variety of heavy and light gasoline and diesel powered equipment. Performs necessary repairs to a variety of hydraulic systems. Troubleshoots manual, automatic or power shift transmissions. Trains and directs other mechanics in performing job duties. Maintains a safe and orderly work area. Evaluates and recommends equipment for future purchase.

12. Grievant's duties do not include evaluating or disciplining DOH employees.

13. Of the three qualified applicants, only Grievant is a veteran. He is a 40% disabled Vietnam era, Desert Shield and Desert Storm veteran, and has extensive military experience, including serving full-time and part-time from 1974 to 1995 as an Operations Master Sergeant in a military police company of the Army Reserve, where he supervised teams of up to 16 people; serving part-time from 1989 to 1993 as a Sergeant First Class in a military police company of the Army Reserve, where he led military police platoons of up to 30 people; serving part-time from 1977 to 1989 as a Staff Sergeant in a military police company of the Army Reserve, where he supervised teams of up to eight people; serving full-time and part-time from 1976 to 1977 as an Assistant Squad Leader Sergeant in a military police company of the Army Reserve, where he supervised teams of up to eight people; serving full-time and part-time in 1974 as a Senior Security Guard in a military police company of the Army Reserve, where he supervised varied numbers of lower ranked individuals; and serving full-time from 1960 to 1968 as an Aircraft Mechanic Crew Chief in the Air Force, where he supervised varied numbers of lower ranked individuals.

14. Grievant has also completed at least 40 training courses relevant to his employment with DOH, and has received numerous awards, certificates, and promotions, in the course of his military service.

15. Boyd considered Grievant's military experience as part of the selection process.

16. Boyd felt that the HES II position required a mix of some 75% - 80% supervisory and management skills, and a reciprocal percentage of mechanical skills.

17. Boyd concluded that Hudson had superior supervisory skills, and Grievant had superior mechanical skills.

18. Boyd selected Hudson for the position based on his superior supervisory skills.

19. On July 1, 1998, West Virginia Department of Transportation Secretary Samuel G. Bonasso issued an "Equal Employment Opportunity Policy Statement/Disabled Veterans and Vietnam Era Veterans." It states, in pertinent part:

It is the policy of the West Virginia Department of Transportation to take affirmative action to employ and advance in employment, qualified disabled veterans and veterans of the Vietnam era at all levels of employment. This policy applies to all employment practices including recruitment, selection, compensation and benefits, promotion, demotion, transfer, layoff, termination[,] training and other terms, conditions and privileges of employment.

## **DISCUSSION**

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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

\_\_\_Grievant contends that the decision not to select him as HES II was arbitrary and capricious. [\(See footnote 2\)](#) He argues that he was more qualified for the position than the successful applicant; that he should have been awarded the position under DOH's affirmative action program for veterans; and

that his non-selection was the product of “home cooking” by DOH. He seeks reinstatement into the position effective the date it was awarded to Hudson, and in any other way to be made whole.

In applying the “arbitrary and capricious” standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, *supra* at 286; Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). Furthermore, in matters of non-selection, the grievance process is not that of a “super-interview,” but rather serves as a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). 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).

Grievant's argument, that he was more qualified for the position than the successful applicant, must fail. The HES II position is clearly, from its title, classification specification, and Boyd's description of it, primarily a supervisory one. Grievant argues that he has exhibited an ability to supervise, through his supervision at DOH of helpers who assisted him in his mechanic's duties, and through his extensive supervisory experience in the military. However, Grievant did not accrue supervisory experience at DOH.

A similar situation was recently addressed by this Grievance Board in Workman v. Dep't of Transp./Div. of Highways, Docket No. 99-DOH-350 (Dec. 17, 1999). In Workman, the administrative law judge cited Della Mae v. W. Va. Div. of Natural Resources, Docket No. 98-DNR-204 (Feb. 29, 1999), which held that for an employee's experience to have been in a supervisory capacity, 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 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).

The evidence clearly shows that Grievant's duties do not include evaluating or disciplining DOH employees. No evidence was submitted showing that he approved leave requests, recommended salary increases, or responded to Level I grievances.

Although the classification specification for Transportation Worker IV states that such an employee "trains and directs other mechanics in performing job duties[,]" formal supervision of lower level employees is not contemplated as part of the duties of a Transportation Worker IV.

Employers are obligated to select applicants who qualify under the terms established by Division of Personnel 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). Accordingly, although Grievant clearly performed very well as a Transportation Worker IV, he had not been a supervisor at DOH as that term is applied in the context of state employment. See Della Mae, *supra*.

However, Grievant has extensive military supervisory experience, as set forth in Finding of Fact 13. This experience will be considered in addressing Grievant's claim that DOH failed to apply its affirmative action policy.

As noted in Finding of Fact 19, DOH is required by Department of Transportation policy to take affirmative action to employ veterans and advance them in employment. 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); White v. W. Va. Div. of Corrections/Anthony Correctional Center, Docket No. 98-CORR-423 (Feb. 3, 1999).

Given the record in this grievance, the undersigned cannot conclude that DOH violated its affirmative action policy. Grievant did not produce, and the undersigned has been unable to discover, any authority explaining what would constitute an "affirmative action" to advance a veteran in state employment.

The record reflects that Boyd reviewed DOH's affirmative action policy and considered it as part of the selection process; that Boyd considered Grievant's veteran status and extensive military supervisory experience; and that Grievant would have been awarded the position had his qualifications been equal to Hudson's. While this would certainly seem to be the most minimal "action" possible under a policy that requires "action," the undersigned cannot, without more, conclude that

Boyd's review of the policy and consideration of Grievant's veteran status and military supervisory experience was insufficient under DOH's affirmative action policy for veterans.

Finally, Grievant's argument that the selection of Hudson was a result of "home cooking," because Boyd was intimately familiar with Hudson's qualifications due to their 18 years of working together, is also rejected. Grievant has failed to point to any rule, policy, regulation, or statute forbidding an official conducting a selection process from having foreknowledge of one candidate's qualifications.

Grievant has failed to establish, by a preponderance of the evidence, 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, Hoffman, supra, or that the selection process for the HES II position was not legally sufficient. Thibault, supra.

The following conclusions of law support the decision reached.

### **CONCLUSIONS OF LAW**

1. 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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W.Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

2. Unless proven arbitrary or capricious, or clearly wrong, an agency decision made by appropriate personnel as to which candidate is most qualified for selection or promotion will be upheld. Shull v. Dep't of Health & Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998); Ashley v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995).

3. In applying the "arbitrary and capricious" standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra at 286. Hill and Cyrus v.



Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). In matters of non-selection, the grievance process is not that of a "super-interview," but rather serves as review of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). 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. Thibault, supra.

4. 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).

5. For an employee's experience to have been in a supervisory capacity, 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. Workman v. Dep't of Transp., Div. Of Highways, Docket No. 99-DOH-350 (Dec. 17, 1999); Della Mae v. W. Va. Div. of Natural Resources, Docket No. 98-DNR-204 (Feb. 29, 1999).

6. Grievant did not accrue supervisory experience in his work as a Transportation Worker IV.

7. Grievant failed to prove, by a preponderance of the evidence, that DOH's failure to select him for the position of Highway Equipment Supervisor II was arbitrary and capricious.

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 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.

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**ANDREW MAIER**

ADMINISTRATIVE LAW JUDGE

Dated February 1, 2000

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[Footnote: 1](#)

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*Respondent argued that Shull v. W. Va. Dep't of Health & Human Resources/Huntington Hospital, Docket No. 97-HHR-417 (Jan. 26, 1998) stood for the proposition that any selection decision that was based on observations and job duties, and was explained logically, could not, as a matter of law, be arbitrary and capricious. That decision does not so hold.*

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[Footnote: 2](#)

2     Grievant also argued, for the first time at Level IV, that he was the victim of favoritism. As this claim was not raised or developed at the lower levels, it can not be considered. Hess v. W. Va. Dept. of Health and Human Resources, 189 W. Va. 357, 432 S.E.2d 27 (1993); Nebel v. Bd. of Trustees/W. Va. Univ., Docket No. 97-BOT-422 (May 8, 1998).