

JOYCE HALL,

Grievant,

v.

DOCKET NO. 96-DOH-494

**WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION/DIVISION OF HIGHWAYS,**

Respondent.

D E C I S I O N

Grievant, Joyce Hall, filed this grievance against her employer, the West Virginia Department of Transportation/Division of Highways ("DOH") on December 19, 1995:

Grievant was most qualified applicant for the position of Permit Supervisor for District Seven. Grievant was denied position due to sexual discrimination, retaliation, harassment and favoritism. [\(See footnote 1\)](#)

Relief sought: Placement into position, back pay, with interest, attorney's fees, costs, general damages and any other appropriate relief.

The grievance was denied at level one by Donald L. Williams, Office Planning and Design Engineer, on January 12, 1996. Grievant appealed to level three, by agreement of the parties, and a level three hearing was held on February 26, 1996. The level three panel of evaluators recommended the grievance be denied, and that recommendation was accepted by Fred VanKirk, Secretary-Commissioner of Highways, on April 8, 1996. Grievant appealed to level four on or about October 9, 1996. By agreement of the parties, this matter was held in abeyance until March 2, 2000, when the parties agreed to submit the grievance on the record developed at levels one and three.

This matter became mature for decision on April 6, 2000, the deadline for the parties' submission of proposed findings of fact and conclusions of law. [\(See footnote 2\)](#) Grievant was represented at level three by Kathryn Allen, Esq., West and Jones, and at level four by Basil R. Legg, Esq. DOH was represented at level three by Mr. Leo T. Catsonis, and at level four by Anthony Halkias, Esq., Highways Legal Division.

SUMMARY OF EVIDENCE

Joint Exhibit

Ex. 1 -

Application for Examination of Joyce L. Hall.

Grievant's Exhibits

Ex. 1 -

Application for Examination of Ronald Henry.

Ex. 2 -

National Institute for Certification in Engineering Technologies, Technician Personal Recommendation Form for Joyce L. Tannous.

Ex. 3 -

July 20, 1995 memorandum from Joseph Shelton to Division Directors, District Engineers re: Affirmative Action Goals.

Ex. 4 -

November 9, 1995, Interview Questions for Joyce L. Hall.

Ex. 5 -

March 27, 1995 Employee Evaluation of Joyce L. Tannous.

Ex. 6 -

Application for Examination of Joyce L. Hall.

Ex. 7 -

West Virginia Department of Highways Hauling Permit Procedures Review, dated January 20, 1990.

Ex. 8 -

September 12, 1994 Employment History Addendum of Joyce L. Tannous.

DOH Exhibits

Ex. 1 -

October 13, 1995, Weekly Vacancy Report.

Ex. 2 -

Classification Specification for Engineering Technician. Ex. 3 -
National Institute for Certification in Engineering Technologies,
Engineering Technician for Joyce L. Hall.

Ex. 4 -

West Virginia Division of Highways Transaction Form for Ronald Henry.

Ex. 5 -

Facsimile memorandum from John D. Antrim to Joe Deneault.

Testimony

Grievant presented the testimony of Donald Williams, Richard Davis, and Marvin Murphy. DOH presented no witnesses.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is currently employed by DOH in its Permit Section in Weston, West Virginia. There is one other permanent employee in that office.
2. On October 13, 1995, a position of ETMAIN (Engineering Technician), or Permit Supervisor, was posted for organization 0780 (Maintenance) in District Seven. DOH Ex. 1.

3. Grievant was one of five employees interviewed during November 1995, for the position of District Seven Permit Supervisor.
4. Grievant was the only female or minority interviewed for the position.
5. One of the minimum requirements for the position of Engineering Technician (Permit Supervisor) is that the employee hold a Level Three certification from the National Institute for the Certification of Engineering Technicians (NICET). LIII DOH Ex. 2.
6. At the time of the interviews, on November 9, 1995, Grievant did not hold a Level Three NICET certification. The other four candidates interviewed for the position had Level Three NICET certification.
7. Mr. Donald L. Williams, Office Planning and Design Engineer, conducted the interviews of the applicants and selected Mr. Ronald Henry for the Permit Supervisor position.
8. Mr. Williams forwarded the GL-5 personnel form to his supervisor for processing on November 13, 1995. DOH Ex. 4.
9. During the interview, Grievant informed Mr. Williams that she had passed the necessary testing for the Level Three NICET, and expected to receive her certification within six weeks.
10. DOH was notified that Grievant would be approved for a Level Three NICET on November 16, 1995, after the paperwork had been submitted for hiring Mr. Henry as Permit Supervisor, and she did receive such certification. DOH Ex. 3.
11. DOH has specified goals for women and minorities in non-traditional positions. District 7 falls short of meeting the established goals. G Ex. 3.

DISCUSSION

In a non-disciplinary grievance, the burden of proof lies with the Grievant to prove the elements of her 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); Ward v. W. Va. Regional Jail and Correctional Facility Auth., Docket No. 95- RJA-410 (Feb. 20, 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 alleges she was the most qualified applicant for the Permit Supervisor position, and DOH's selection of Mr. Henry was arbitrary and capricious. DOH argues that its selection was not arbitrary and capricious, and that Grievant did not hold the necessary minimum requirements for the position at the time of selection.

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, allows for a review of the legal sufficiency of the selection process. Brown v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-027 (June 2, 1999); Lilly v. W. Va. Dep't of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996).

The West Virginia Division of Personnel is charged with establishing classification plans for state employees, pursuant to the provisions of Code §§ 29-6-1 et seq. Parsons v. W. Va. Bur. of Employment Programs, 189 W. Va. 107, 428 S.E.2d 528 (1993). The Division of Personnel is also vested with the authority to determine the minimum qualifications for each job class. A Level Three NICET certification is stated in the minimum qualifications for the Engineering Technician (Permit Supervisor) position. LIII DOH Ex. 2. Grievant did not possess the Level Three NICET certification at the time the selection was made. Furthermore, Grievant has offered no evidence which would indicate that this requirement is the result of any improper motive or action. In general, an agency's determination of matters within its expertise is entitled to substantial weight. PrincetonCommunity Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985); Sharifpour v. W. Va. Dep't of Transp., Docket No. 98-DOH-162 (Nov. 13, 1998).

CONCLUSION OF LAW

Without possessing the necessary Level Three NICET certification, Grievant was not minimally qualified for the Permit Supervisor position when the selection took place. Grievant has failed to demonstrate that her non-selection was arbitrary and capricious, or in violation of any law, statute, or regulation under which DOH operates.

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.

MARY JO SWARTZ

Administrative Law Judge

Dated: May 4, 2000

[Footnote: 1](#)

Grievant's claims of sexual discrimination, retaliation, harassment and favoritism were not pursued at the level three hearing, and are deemed abandoned.

[Footnote: 2](#)

Neither party submitted fact/law proposals.