DONALD E. LUZADDER,

Grievant,

v. **Docket No. 02-DOH-025D**

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

DECISION

___Donald Luzadder ("Grievant") filed a level one grievance on January 17, 2002, alleging entitlement to a promotion to an Equipment Operator III position. He seeks as relief to be placed in the position, with back pay. Grievant alleged a default occurred at level one of the grievance procedure. After a level four hearing on the issue of default was held on March 20, 2002, this Grievance Board issued an Order Granting Default dated April 8, 2002. Thereafter, a hearing was conducted in the Grievance Board's office in Westover, West Virginia, on June 14, 2002, for the purpose of determining whether the remedy requested by Grievant is clearly wrong or contrary to law. Grievant represented himself at that hearing, and Respondent was represented by counsel, Barbara Baxter. This matter became mature for consideration upon receipt of the parties' final fact/law proposals on July 25, 2002.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") for almost 22 years. He is currently classified as a Transportation Worker II, Equipment Operator ("TWII").

2. Grievant has numerous years of experience with DOH performing all aspects of road repair and construction with various pieces of equipment. He has state certifications to operate a gradall and backhoe. Although he has completed the training courses and on-the-job use of a grader, Grievant has not yet taken the certification test for that machine, due to scheduling conflicts.

3. Grievant is assigned to the Mannington substation, where the primary equipment used

consists of a grader, backhoe, and gradall. The grader is used there more than the other equipment. Grievant has operated all three pieces of equipment on a regular basis. When he operates the grader, he is temporarily upgraded to a Transportation Worker III ("TWIII").

4. In September of 2001, DOH advertised an opening for a TWIII in Marion County.

5. Grievant, Jeffrey Pethtel, and Robert Wheeler applied for the position.

6. Mr. Pethtel had been employed by DOH for approximately two years at the time he applied for the TWIII position. He was working as a TWII, Equipment Operator, with certifications for gradall and grader. He is not certified to operate a backhoe. Prior to working for DOH, Mr. Pethtel was employed as a grocery store meat cutter and meat department manager, and as a department store stock boy.

7. Mr. Pethtel was selected for the TWIII position, because he was the only applicant certified to operate a grader. 8. TWIIIs do not have to be certified to operate equipment such as graders, backhoes, and gradalls. Since being hired for the position, Mr. Pethtel has operated the backhoe without certification.

Discussion

Because Grievant is presumed to have prevailed by default, the burden of proof is upon Respondent to prove by clear and convincing evidence that the relief requested by Grievant is clearly wrong or contrary to law. This standard requires the party with the burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

Respondent contends that it has proven by clear and convincing evidence that Mr. Pethtel was the most qualified applicant for the position, and it would be clearly wrong to award the TWIII position to Grievant. 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). When any benefit such as a promotion, wage increase or transfer is to be awarded, and a choice is required between two or more employees in the classified service, and if some or all of the eligible employees have substantially equal or 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. W. Va. Code § 29-6-10(4). Of course, seniority is merely a factor to be considered, and is not determinative. An employer certainly retains the discretion to select a less-senior applicantwith greater qualifications. Lewis v. W. Va. Dep't of Administration, Docket No. 96-DOA-027 (June 7, 1996).

The individuals who interviewed the applicants and made the selection decision at issue testified that Grievant was seriously considered and that the choice was clearly between him and Mr. Pethtel. However, the “deciding factor” was Mr. Pethtel's grader certification, which Grievant does not have. Nevertheless, these same individuals admitted that, once an employee like Mr. Pethtel is promoted to TWIII, certifications are unnecessary for performance of his job duties. In fact, Mr. Pethtel, who does not have a backhoe certification, has been operating that machine since his promotion. Similarly, Grievant has been operating the grader without certification and is temporarily upgraded to TWIII when performing that work.

The evidence submitted by DOH fails to meet the clear and convincing standard for establishing that placement of Grievant in this position would be contrary to law or clearly wrong. Regardless of his lack of grader certification, Grievant has over 20 years with DOH and is, by Respondent's own admission, qualified to perform the duties of the position. Respondent viewed Grievant's and Mr. Pethtel's qualifications as similar, which is simply not supported by the evidence. Mr. Pethtel has only worked for DOH, and in the highway construction area, for approximately two years. It is nonsensical to equate his two years of experience as similar to Grievant's 20-plus years. This experience would certainly make Grievant far more familiar with DOH's operations and procedures, which is a large portion of the job duties of a TWIII. Even if their qualifications were similar, Grievant's far greater seniority would entitle him to selection under Code § 29-6-10(4). It appears that his seniority was not even considered. As to the certification issue, even if certification were required to perform the job duties of a TWIII, DOH agreed that Grievant has completed all requirements for obtaining the grader certification and only needs to take the state examination, which could easily be accomplished. Accordingly, the undersigned finds that it would not be clearly wrong or contrary to law to grant Grievant the requested remedy of placement in the TWIII position. Respondent shall award Grievant all applicable back pay and benefits to the date Mr. Pethtel was placed in the position.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Once a Grievant is presumed to have prevailed by default, the burden of proof is upon Respondent to prove by clear and convincing evidence that the relief requested by Grievant is clearly wrong or contrary to law. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

2. When any benefit such as a promotion, wage increase or transfer is to be awarded, and a choice is required between two or more employees in the classified service, and if some or all of the eligible employees have substantially equal or 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. W. Va. Code § 29-6-10(4).

3. Respondent has failed to prove by clear and convincing evidence that granting Grievant the requested remedy of placement in the Transportation Worker III position would be contrary to law or clearly wrong.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to place Grievant in the Transportation Worker III position, with applicable back pay and benefits.

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: August 12, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge