JOSEPH MERCER, JR.,

Grievant,

v. **Docket No. 01-DOH-604**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Joseph Mercer, Jr. (Grievant), employed by the Division of Highways (DOH or Respondent) as a Transportation Worker II in District Six, Wetzel County, filed a level one grievance on September 14, 2001, in which he alleged:

It is my belief that the choice the State made for the position of T.C.C. Main (Pine Grove) was wrong. The person chosen did not meet the minimum qualifications. It is also my belief that the appointment was politicaly [sic] motivated. I think I had more experience and qualifications than the person selected.

For relief, Grievant requested instatement and back pay to August 16, 2001.

Randy Rush, Highway Administrator II, lacked authority to resolve the matter at level one. After the grievance was denied at levels two and three, appeal to level four was made on December 11, 2001. A hearing was conducted on February 27, 2002, at which time Grievant appeared pro se, and DOH was represented by Belinda B. Jackson, Esq. The parties waived the opportunity to file proposed findings of fact and conclusions of law, and the grievance became mature for decision at the close of the hearing.

The following facts, derived from the record in its entirety, are undisputed.

Findings of Fact

1. Grievant has been employed by Respondent since November 17, 1997, and has held the classification of Transportation Worker II - Equipment Operator at all times pertinent to this grievance. 2. By posting dated January 12, 2001, Respondent advertised a vacancy for a Transportation Crew Chief (T.C.C.) - Maintenance for the Pine Grove substation in Wetzel County.

3. Six DOH employees applied for the position, including Grievant and Walter Fiber, the successful applicant.

4. Mr. Fiber has been employed by DOH since February 2, 1995, and was classified as a Transportation Worker III - Mechanic in January 2001.

5. Lloyd Adams, Maintenance Engineer, and Mr. Rush conducted interviews of all six applicants on Friday, July 13, 2001. Following the last interview, they ranked the candidates in order of preference with Grievant as their top applicant. Mr. Fiber was ranked fifth.

6. DOH Assistant Commissioner Jack White notified District Engineer Robert Whipp that Mr. Fiber would be placed as T.C.C.

7. On Monday, July 16, 2001, at 9:45 a.m., Mr. Whipp notified Mr. Adams by e-mail that he was to complete the necessary paperwork to submit Mr. Fiber for the T.C.C. position.

Discussion

At level four, Grievant argues that the selection of Mr. Fiber was predetermined and politically motivated. Respondent denies any wrongdoing, noting that Mr. Fiber met the minimum qualifications for the position, and asserts that because Grievant relies upon rumor and opinions he has failed to meet his burden of proof. In support of his claim, Grievant offered the testimony of Messrs. Rush, Adams, and Whipp, all of whom stated that Grievant was their first choice for the position, and opined that Harlan Miller, Chairman of the Wetzel County Democratic Party, had influenced the decision. While none of the witnesses had direct knowledge of any activity by Mr. Miller to influence the selection of the successful applicant, all indicated a general understanding of his participation. Grievant further noted that the directive to place Mr. Fiber in the position came within a matter of actual work hours from the time the interviews were concluded, and before the committee's recommendation was even made to Charleston. Finally, Grievant established that Mr. Fiber had not submitted a fully completed application prior to his appointment, and was required to complete a “beefed up” application after his appointment.

Assistant Commissioner White is no longer employed by Respondent, and Ernest Larzo, Manager of the DOH Employment and Benefits Section, testified regarding the filling of the position in question. Mr. Larzo recalled that Mr. White had inquired if a vacancy existed in Wetzel County,

stating that he had received inquiries from concerned individuals. Mr. Larzo indicated that he was not certain of the identities of these concerned individuals, but that Mr. White had advised him there might be a predetermined candidate for a vacancy, that individual being Grievant. Mr. White expressed his desire that there be a "level playing field," and asked for background information on both Grievant and Mr. Fiber, whom he identified as the two leading candidates. Finding that Mr. Fiber had longer tenure, was in a higher pay grade, had supervisory experience, and better evaluations than Grievant during the past two years, Mr. White advised Mr. Whipp that Mr. Fiber was the best qualified applicant. Consistent with state and federal authority, the Grievance Board has previously held that employees may not be discharged or have other significant employment actions taken because of their political affiliations. W. Va. Code § 29-6-1 mandates that "[a]ll appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness." W. Va. Code § 29_6-20(a) provides in part that "[n]o person shall be appointed or promoted to . . . any position in the classified service or in any way favored . . . because of his political . . . affiliations." These provisions of the civil service law were intended to ensure that political affiliation would not influence employment decisions. Frantz and DeVaul v. W. Va. Dep't of Employment Security, Docket No. 89-ES- 050 (July 25, 1989).

The West Virginia Division of Personnel (DOP)Administrative Rule, Section 11.1, Method of Making Promotions provides, in relevant part:

(a) In filling vacancies, appointing authorities shall make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. Whenever practical and in the best interest of the service, an appointing authority may fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the classified service based on demonstrated capacity and quality and length of service.

The DOP Administrative Rule also prohibits political activities relating to the filling of positions. Section 16.1 provides:

(a) An appointing authority shall not appoint, promote, demote, or dismiss any person in the classified service or in any way favor or discriminate against any person with respect to such employment because of his or her political or religious opinion or affiliations or race. . . .

(b) No person shall seek or attempt to use any political endorsement in connection with any appointment in the classified service.

(c) No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any position, for the purpose of influencing the vote or political action of any person, or for any consideration.

An exception to this general rule exists when the employer can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved, or can prove that even if the action was motivated in part by political considerations, it would have been taken in any event for reasons unrelated to political affiliations.

In selection cases where political motivation is alleged, Grievant must offer sufficient evidence to permit a finding that the selection was substantially motivated by political considerations. The requisite political motivation, as any state of mind, can be proved by circumstantial evidence as it is commonly the only kind available for this purpose. (See footnote 1)

The issue then is whether the evidence is sufficient to support a rational finding that Assistant Commissioner Jack White, for politically-motivated reasons, caused Grievant not to be selected. Grievant has established that he was the first choice of the County Superintendent, Assistant District Engineer, and District Engineer, for the T.C.C. position. He has also established that Assistant Commissioner White directed that Mr. Fiber be awarded the assignment prior to receiving the recommendation, or any other input, fromthe county administrators. Finally, Grievant provided the incomplete and unsigned application originally filed by Mr. Fiber, as well as the second application, which is not only completed, but also includes a copy of his welder qualification card and certificates earned for the completion of five NAPA Institute of Automotive Technology courses.

Mr. Larzo's testimony that Mr. White had received information that Grievant had been predetermined to be the successful applicant supports a finding of some activity outside the usual selection process. Unfortunately, Mr. Larzo provided no insight into what information Mr. White had received, or from whom, to indicate a preselection of Grievant, or why the Assistant Commissioner determined Grievant and Mr. Fiber to be the two top candidates. The selection of Mr. Fiber as a top candidate is particularly interesting since the interview team had ranked him fifth of six applicants. With no evidence of any preselection of Grievant, Mr. White's selection of Mr. Fiber for the T.C.C.

position, without benefit of reviewing the remaining applications and interview results, leads to the inference that someone had intervened on his behalf.

Finally, notwithstanding Respondent's assertion that Mr. Fiber had simply completed his application after his appointment, the record clearly shows that many additional certificates and his welder's license were included to support his qualifications. Certainly, Mr. Larzo has an interest in protecting the integrity of the decision made by Mr. White on behalf of Respondent. His testimony was forthright and truthful, as evidenced by the fact that some of the information he provided was beneficial to Grievant. However, his testimony was seriously impaired in that he lacked specific knowledge of certain facts known only to Mr. White, and/or did not provide certain information he may have had, such as how the two top candidates were determined. The foregoing evidence establishes that more likely than not, the recommendation of the local administrators would have been followed and Grievant would have been appointed to the position if the Assistant Commissioner had not intervened and made the selection himself. Although there is no direct evidence of communications between the Assistant Commissioner and any local politician, and Mr. Larzo stated that the decision had been made using objective criteria, the totality of the circumstances surrounding the appointment of Mr. Fiber point to the conclusion that the appointment was improperly made for political reasons.

CONCLUSIONS OF LAW

1. The preponderance of the evidence establishes that Mr. Fiber was considered and appointed to the T.C.C. position based upon political considerations and not on the basis of merit and fitness.

2. Grievant has proven that as the first choice of the county selection team, he would have been awarded the position but for the intervention of Mr. White. Accordingly, this grievance is **GRANTED**, and DOH is hereby ORDERED to place Grievant into the T.C.C. position effective August 16, 2001, with all back pay and benefits to which he is entitled.

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 EmployeesGrievance 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 §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: March 20, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

For a more detailed discussion of political favoritism with citations, see Wiley v. Dep't of Highways, Docket No. 99-DOH-109 (Aug. 3, 1999).