EDDIE MANN,

Grievant,

v. **DOCKET NO. 04-DOH-297**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

On January 29, 2004, Grievant filed a grievance against Respondent alleging favoritism and political patronage in the filling of a Transportation Worker/Equipment Operator 3 position. As relief, Grievant seeks to be placed in the position.

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Beckley office on November 16, 2004. Grievant was represented by E. L. “Red” Whited. Respondent was represented by counsel, Barbara Baxter. The matter became mature for decision on at the close of the hearing, both parties declining the opportunity to submit proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent in District 9 (Greenbrier County) as an Equipment Operator, classified as a Transportation Worker 2. He has been employed byRespondent for approximately sixteen years. Grievant was certified to operate a Gradeall (See footnote 1) on November 1, 1991.

2. On September 24, 2003, Respondent posted a position opening for an Transportation Worker 3/ Equipment Operator assigned to the District 9 Disforce based in Lewisburg. The posting stated the position duties as: “Operates a variety of heavy equipment used in the maintenance and

repair of highways. Equipment may include power graders, bulldozer and backhoe. May be exposed to inclement weather. Performs related work as required. [Commercial Driver's License (CDL)] required." Although not specified in the posting, the position would be primarily assigned to operate a Gradeall.

3. Grievant, Carl Cutlip and two other persons applied for the position, and all were interviewed by Disforce (See footnote 2) 9 Construction Superintendent Jim Childers and District 9 Personnel Director Don Beals. Mr. Cutlip was awarded the position in February, 2004.

4. At the time of the selection, Mr. Cutlip had been employed by Respondent for about five years, and was classified as a Transportation Worker 2.

5. Both Grievant and Mr. Cutlip were qualified for the position, and Mr. Cutlip was selected on the strength of his interview.

6. Mr. Beals and Mr. Cutlip completed an "Applicant Evaluation Record" for the applicants at or after the interview. The evaluation rates each applicant on things such as education, relevant experience, interpersonal skills and presentability, in a range from "does not meet expectations" to "exceeds expectations." The records for Grievant and Mr. Cutlip were completed identically (all items in the "meets" column). 7. Respondent also uses a standard set of interview questions, and the interviewers write down the answers on prepared sheets. The answers written down on Grievant's and Mr. Cutlip's sheets are almost identical, except Grievant stated he had 25 years of related experience versus Mr. Cutlip's 16 or 17 years. Both have a CDL and trained in the use of the Gradeall, albeit through different training programs, though Grievant's training conferred certification.

8. The applications of Grievant and Mr. Cutlip also reveal some differences: Grievant has a high-school diploma, but Mr. Cutlip only completed through the 10th grade. The only employment Grievant listed was his DOH employment since 1988. Mr. Cutlip's earliest listed employment began eight years later.

DISCUSSION

Since this grievance does not challenge a disciplinary action, Grievant's claims must be proven by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claims are more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). In a selection case, the

grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994). An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. *Id*. Grievant's burden is to demonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Surbaugh v. Dep't of Health and Human Serv*., Docket No. 97-HHR-235 (Sept. 29, 1997). Grievant alleged in his Grievance that Mr. Cutlip was selected based on favoritism and political patronage. No evidence was presented that bears on the political patronage claim, so it is deemed abandoned and will not be addressed. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h). Favoritism is not a particularly useful test in selection cases where one person is necessarily singled out from a group of similarly-situated candidates, but it will be addressed since Grievant raised the issue. The test to determine whether Grievant has established a *prima facie* case of favoritism requires a grievant to establish by a preponderance of the evidence:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,
>
> (c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Kincaid v. Division of Corrections, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (Jan. 28, 1990).

Grievant and Mr. Cutlip were similarly situated in that they were both Transportation Workers 2 who applied for the same position. Grievant was treated differently in that he was not selected for the Transportation Worker 3 position. Grievant has met his burden of proving there was no known justification for the difference in treatment.

Grievant testified that his sole basis for believing he is more qualified than Mr. Cutlip is his sixteen years of experience as compared to Mr. Cutlip's five years. Lvl. 3 Trans., p. 26. West Virginia Code § 29-6-10(4) does state,

> [w]hen 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 theclassified service as to who will receive the benefit . . . and if some or all of the 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[.]

However, when a grievant and a successful applicant meet the minimum qualifications for the job, but one applicant is more qualified than the grievant, the qualifications are not substantially equal, and seniority need not be considered. *Mowery v. W. Va. Dep't of Natural Res*., Docket No. 96-DNR-218 (May 30, 1997). "The employer retains the discretion to discern whether one candidate has superior qualifications than another, without regard to seniority as a factor." *Lewis v. W. Va. Dep't of Admin*., Docket No. 96-DOA-027 (June 7, 1996). *See Board v. Dep't of Health & Human Res*., Docket No. 99-HHR-329 (Feb. 2, 1999).

Grievant has a valid argument. Mr. Childers testified he and Mr. Beals conducted the interviews and made a mutual decision. Mr. Childers knew all four applicants and considered them to be good employees. He stated, “It was a tough decision and I make no bones about it. . . . I think Mr. Cutlip just kind of had a cut above the edge on the other three that were interviewed[.]” Lvl. 3 Trans, p. 33. The decision took time and in the end the interviewers decided on Mr. Cutlip because “he was very sincere about the position and seemed very sincere about wanting to move on.” Id. Mr. Childers added at the level four hearing that Mr. Cutlip had used a Gradeall more recently than Grievant, but he hadn't operated one to any significant extent.

It is easy to see how Grievant inferred from the circumstances that there was an underlying improper motive to Mr. Cutlip's hiring. An objective look at the relative qualifications and experience of Grievant and Mr. Cutlip does not explain Respondent'sindecisiveness. Grievant is more qualified than Mr. Cutlip in education, experience and training. Even without his clearly superior qualifications, Respondent's evidence shows the candidates were so closely matched, in the interviewer's minds, that the decision came down to sincerity. If that were the case, the law provides a better tie breaker _ seniority. When that is considered, again it is obvious Grievant should have been awarded the position, and Respondent was clearly wrong in selecting Mr. Cutlip.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. Since this grievance does not challenge a disciplinary action, Grievant bears the burden of proving a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which he works. His claim must be proven by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claims are more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Boylan v. W. Va. Dep't of Transportation*, Docket No. 94-DOH-211 (Oct. 25, 1994); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. In a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994). An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. *Id*. Grievant's burden is todemonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Surbaugh v. Dep't of Health and Human Serv*., Docket No. 97-HHR-235 (Sept. 29, 1997). *See Jones v. Bd. of Trustees/W. Va. Univ.*, Docket No. 90-BOT-283 (Mar. 28, 1991).

3. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h). The test to determine whether Grievant has established a *prima facie* case of favoritism requires a grievant to establish by a preponderance of the evidence:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
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> (c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Kincaid v. Division of Corrections, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (Jan. 28, 1990).

4. Seniority is a factor when candidates are equally qualified. *See* W. Va. Code § 29-6-10(4). When a grievant and a successful applicant meet the minimum qualifications for the job, but one applicant is more qualified than the grievant, the qualifications are not substantially equal, and

seniority need not be considered. *Mowery v. W. Va. Dep't of Natural Res*., Docket No. 96-DNR-218 (May 30, 1997). "The employer retains the discretion to discern whether one candidate has superior qualifications than another, without regard to seniority as a factor." *Lewis v. W. Va. Dep't of Admin*., Docket No. 96-DOA-027 (June 7, 1996). *See Board v. Dep't of Health & Human Res*., Docket No. 99-HHR-329 (Feb. 2, 1999).

5. Grievant met his burden of proving he was more qualified and more senior than the successful candidate for the position in question, and but for the favoritism afforded the successful candidate, he would have been awarded the position.

For the foregoing reasons, this grievance is **GRANTED**. Respondent is **ORDERED** to instate Grievant into the Transportation Worker 3/ Equipment Operator position assigned to the District 9 Disforce, to compensate him for any back-pay (with interest), and to grant him any seniority and other benefits to which he would have been entitled had he been originally placed in the position.

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: December 21, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

A Gradeall is a type of excavator.

Footnote: 2

A Disforce is a unit of employees who are not assigned to a particular county in the district, but operate heavy equipment on special jobs throughout the district, rather than routine highway maintenance.