

EXHIBIT  
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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

MICHAEL POWELL,

Appellant,

v.

Civil Action No. 17-AA-15  
Judge Joanna I. Tabit

DIVISION OF HIGHWAYS,

Appellee,

v.

TERRA GOINS,

Intervenor/Appellee.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER GRANTING  
APPEAL FROM DECISION OF GRIEVANCE BOARD**

On June 28, 2017 came the Appellant, Michael Powell, by counsel, Paul M. Stroebel pursuant to West Virginia Code §6C-2-5 to appeal the decision of the Administrative Law Judge for the West Virginia Public Employees Grievance Board which held that Appellant did not file his grievance within the mandatory time limits in connection with the grievance styled Michael Andy Powell v. Division of Highways, Docket No. 2016-0870-DOT. The Appellee, Division of Highways, appeared through counsel, Kevin A. Cox, Esquire, and Terra Goins, Intervenor/Appellee, appeared *pro se*.

After reviewing the briefs submitted by the parties and after hearing oral argument for and against the petition, this Court makes the following Findings of Fact and Conclusions of Law, and hereby **GRANTS** the Appeal of Appellant and **ORDERS** that he be awarded the position of Highway Engineer.

## FINDINGS OF FACT

1. Appellant, Michael Powell, filed a grievance alleging that the successful applicant for posting DPT50137 did not meet the minimum requirements set forth in the posting and job description for Highway Engineer. On October 14, 2016, a level three grievance hearing was held. On February 8, 2017, the Administrative Law Judge entered a dismissal order which held that Mr. Powell did not timely file his grievance.

2. Appellant asserts in his appeal that the Administrative Law Judge was in error on the grounds that the decision:

- (1) Was contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) And was clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

3. Appellant asserts that his grievance was timely filed as a result of the discovery exception set forth in W.Va. Code §6C-2-4(a)(1) that identifies the time lines for filing a grievance and states as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . .

4. Testimony of the Department of Highway's representatives conceded that Appellant had a reasonable expectation in relying on their duty to perform the evaluation and vetting procedure properly for all candidates applying for the position of Highway Engineer. Testimony of Shrewsbury and Rumbaugh.

5. Appellant, Michael Powell, testified that he filed his grievance promptly upon learning of Terra Goins', the successful applicant, failure to meet the minimum qualifications for

the position of Highway Engineer. This was learned through a discussion with Intervenor/Appellee Goins. Testimony of Powell.

6. The Administrative Law Judge did not give proper consideration to the testimony of Appellant and the Division of Highways personnel in respect to the statutory language that addresses the time for filing grievances.

7. Appellant established through testimony and documentation that he was properly qualified for the position of Highway Engineer.

8. Appellant established that Intervenor/Appellee, Terra Goins, was not properly qualified for the position of Highway Engineer and should not have been awarded the position.

9. As a result of Appellant establishing his qualifications for the position of Highway Engineer and because the evidence further supports Appellant's position that the Intervenor/Appellee did not meet the minimum qualifications, this Court **FINDS** that Michael Powell was improperly denied the position of Highway Engineer and **ORDERS** that he should be awarded this position.

#### ADDITIONAL FINDINGS, CONCLUSIONS OF LAW AND COURT'S ORDERS

1. W.Va. Code §6C-2-3(a)(1) requires an employee to file a grievance within the time limits specified in this article. W.Va. Code §6C-2-4(a)(1) identifies the time lines for filing a grievance and states as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . .

2. W.Va. Code §6C-2-4(a)(1) clearly states that a grievance must be filed within fifteen days of the date upon which the event became known. Evidence was introduced at the

grievance proceeding that Appellant had a reasonable expectation in relying upon the Division of Highways' employees to properly perform their duties of evaluating and vetting applicants for the position. In applying the plainly worded statute, this Court concludes that Appellant was justified in filing his grievance within fifteen days of learning from the Intervenor/Appellee herself that she did not meet the minimum qualifications.

3. Under the "discovery rule exception," the time in which "to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Syl. Pt. 1, Spahr v. Preston County Bd. of Educ., 182 W.Va. 726, 391 S.E.2d 739 (1990). The facts giving rise to the underlying grievance fall within the discovery rule exception set forth in W.Va. Code §6C-2-4(a)(1).

4. This Court further **FINDS AND CONCLUDES** that Appellant established his qualifications for the position of Highway Engineer and established the lack of qualifications by Intervenor/Appellee Terra Goins.

5. As a result, this Court **CONCLUDES** that Appellant was improperly denied the position of Highway Engineer, and he should be awarded this position as soon as is practicable in accordance with this Order.

6. This Court further **ORDERS** that this matter be remanded to the Administrative Law Judge for a calculation of Appellant's back pay and an award of attorney fees, if any, to which Appellant is entitled.

7. Lastly, this Court **CONCLUDES** that the Administrative Law Judge failed to apply the facts/evidence to the statutory law as set forth in West Virginia Code §6C-2-4(a)(1), and therefore was clearly in error and in contradiction of the law by dismissing Appellant's Grievance for failure to file in a timely manner. Moreover, this Court further **CONCLUDES**

that the ruling below was arbitrary and capricious in light of the Appellee's own representatives' testimony.

WHEREFORE, it is hereby ORDERED that Appellant Michael Powell be promoted to and awarded the position of Highway Engineer and that this case be remanded to the West Virginia Public Employees Grievance Board for a further determination on the calculation of back pay and an award of attorney fees. The Court notes the exceptions and objections of all parties aggrieved by this Order. The Court FURTHER ORDERS that the Clerk provide certified copies of this Order to all parties or counsel of record as follows:

- (1) Paul M. Stroebel, Esq., Stroebel & Johnson, PLLC, P.O. Box 2582, Charleston, WV 25329;
- (2) Keith A. Cox, Esq., WV Division of Highways, Legal Division, Building 5, Room 517, Charleston, WV 25305;
- (3) Terra Goins, HC 78, Box 11E, Hinton, WV 25951;
- (4) West Virginia Public Employees Grievance Board, 1596 Kanawha Boulevard, East, Charleston, WV 25311.

Entered this 19<sup>th</sup> day of September, 2018.

  
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THE HONORABLE JOANNA I. TABIT

Presented by: *(Entered as Modified by the Court)*

Paul M. Stroebel (WV BAR 5758)  
Stroebel & Johnson, PLLC  
P.O. Box 2582  
Charleston, WV 25329

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 19  
DAY OF September, 2018. CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA