

DIVISION OF HIGHWAYS, and
TERRA GOINS,
Petitioners,

v.

MICHAEL POWELL,
Respondent.

and

DIVISION OF HIGHWAYS,
Petitioner,

v.

MICHAEL POWELL,
Respondent.

REPLY BRIEF OF THE
WEST VIRGINIA DIVISION OF HIGHWAYS

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TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES ii

I. ARGUMENT1

 A. THE ADMINISTRATIVE LAW JUDGE CORRECTLY REJECTED MR. POWELL’S
 RELIANCE ON THE “DISCOVERY RULE” FOR TOLLING HIS GRIEVANCE
 DEADLINE2

 B. THE CIRCUIT COURT’S DECISION TO AWARD MR. POWELL THE HIGHWAY
 ENGINEER POSITION WAS VIOLATIVE OF WEST VIRGINIA CODE § 6C-2-5 AND
 WAS CONTRARY TO THE RECORD4

II. CONCLUSION5

TABLE OF AUTHORITIES

CASES

<i>Belcher v. Dynamic Energy, Inc.</i> , 240 W. Va. 391, 406, 813 S.E.2d 59 (2018).....	5
--	---

STATE RULES

West Virginia Code § 6C-2-2.....	3
West Virginia Code § 6C-2-3.....	1, 3, 5
West Virginia Code § 6C-2-4.....	1, 3, 5
West Virginia Code § 6C-2-5.....	1, 4, 5, 6

I. ARGUMENT

As the DOH stated in its opening brief, it hired Terra Goins as the Highway Engineer for District 10 in 2015, and her work is vital to the Roads-to-Prosperty projects that are ongoing in District 10. Mr. Powell was not chosen for the position and was notified of that fact. Four months later, Mr. Powell personally investigated Ms. Goins' work history and concluded that she did not meet the qualifications for that position.

Under the West Virginia Code, if a state agency takes an action against an employee that violates West Virginia law, that employee has 15 days to file a grievance. *See* W. Va. Code §§ 6C-2-3(a)(1) and 6C-2-4(a)(1). Administrative Law Judge McGinley correctly dismissed Mr. Powell's grievance because "the event giving rise to the grievance was the filling of the vacancy for Highways Engineer" – of which Mr. Powell was notified of approximately four months prior to filing his grievance. **AR Vol. I, 053.**

In his *Response*, Mr. Powell ignores the language of the West Virginia Code and argues that his grievance can be based on his conversation with Ms. Goins about her work history. The Code, however, is clear: a grievance must be based on an "event" which occurs between the employee (Mr. Powell) and the state agency (DOH). Mr. Powell's opinion that Ms. Goins was not qualified for the position simply cannot serve as the basis for a grievance.

Even if the ALJ erred in dismissing the grievance on statute of limitations grounds, the Circuit Court should have remanded the grievance to the ALJ for a decision on the merits. Additionally, the Circuit Court's decision to award the Highways Engineer position to Mr. Powell was contrary to the record because he was not the next-most qualified candidate.

A. THE ADMINISTRATIVE LAW JUDGE CORRECTLY REJECTED MR. POWELL'S RELIANCE ON THE "DISCOVERY RULE" FOR TOLLING HIS GRIEVANCE DEADLINE

Mr. Powell argues in his *Response* that the ALJ erred in holding that the "event" was his notification that he did not receive the Highways Engineer position. According to Mr. Powell, he was permitted to toll the deadline for filing a grievance while he investigated whether Mr. Goins' met this minimum qualifications for that position. Mr. Powell's argument is contrary to the West Virginia Code, which requires that grievances be based on events which occur between an employee and a state agency. Mr. Powell's background check of Ms. Goins simply cannot serve as the basis for a grievance.

Mr. Powell described the basis for his grievance at his Level Three grievance hearing, when he testified as follows:

Q What prompted you to file this grievance?

A Ms. Goins visited my field office one day, waiting to meet an employee. We discussed our careers. We actually had some college classes together. I found out that her experience was with ET Boggess Architects and Alliance Consulting. Upon that discovery, I proceeded to file a grievance.

...

Q Well, what was it about you learning that job history that prompted you to do that?

A Well, it's my opinion that ET Boggess Architects is an architectural firm...

...

Q And it was after this conversation with her that you – that the light went on and you realized – you discovered that, to your belief, she wasn't qualified; correct?

A Yes. I actually obtained the – I found out that ET Boggess was an architectural firm. I didn't know who ET Boggess was when I was speaking with her. I actually spoke with a co-worker, and they – we were just talking, and I had mentioned she had come by and a light went off when I found out that ET Boggess was an architectural firm.

AR Vol. II, 144-146.

Mr. Powell cites no statute or case law in support of his argument that a grievance can be based on an investigation into another employee's job qualifications. West Virginia Code § 6C-2-3(a)(1) states that "[a]n employee shall file a grievance within the time limits specified in this article." West Virginia Code § 6C-2-4(a)(1) states, in relevant part, that "[w]ithin 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 . . . an employee may file a written grievance[.]" (emphasis added). Under West Virginia Code § 6C-2-2(i)(1), "**Grievance**" means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements **applicable to the employee[.]**" (emphasis added). Under West Virginia Code § 6C-2-2(e)(1), "**Employee**" means any person hired for permanent employment by an employer for a probationary, full- or part-time position." (emphasis added).

Under this statutory scheme, an employee's grievance against a state agency must be based on an event which constitutes the state agency's violation of a rule or policy as to that employee. Mr. Powell's grievance, however, is based on his conversation with Ms. Goins about her work history. Mr. Powell's investigation of Ms. Goins' work history is not an "event" between Mr. Powell and DOH. In other words, Mr. Powell cannot grieve from an interaction between himself and Ms. Goins.

As the ALJ correctly held, if Mr. Powell believed he was the most qualified applicant for the Highways Engineer position, he was required to file a grievance within 15 days of being "unequivocally notified that he was not selected for that position by written notice on June 29, 2015." **AR Vol. I, 053**. Because he failed to do so, his grievance filed on November 18, 2015, was untimely, and the ALJ correctly dismissed the grievance.

B. THE CIRCUIT COURT’S DECISION TO AWARD MR. POWELL THE HIGHWAY ENGINEER POSITION WAS VIOLATIVE OF WEST VIRGINIA CODE § 6C-2-5 AND WAS CONTRARY TO THE RECORD

Even if the ALJ erred in dismissing the grievance on statute of limitations grounds, the Circuit Court should have remanded the grievance to the ALJ for a decision on the merits – as required by West Virginia Code § 6C-2-5. Instead, the Circuit Court decided the grievance on the merits, and that decision was contrary to the record developed by the ALJ.

In his *Response*, Mr. Powell argues that the Circuit Court had no reason to remand the case to the ALJ because: (1) “[t]he extensive record clearly supports the Circuit Court’s conclusion that Grievant was qualified for and entitled to be placed in that position[.]” and (2) “he was the only candidate still seeking that position.” *Response* at 9 and 10. During the grievance hearing, Mr. Powell testified that he was the only applicant who filed a grievance and that, as far as he knew, he was the only person still seeking the Highways Engineer position. **AR Vol. II at 146**. In other words, Mr. Powell believes that he is entitled to the position simply because he filed a grievance. Mr. Powell cites no law in support this argument, and it flies in the face of the record developed by the ALJ.

As noted in DOH’s opening brief, Stephen Rumbaugh, the Deputy State Highway Engineer of Construction and Development, testified at the grievance hearing that Terra Goins and Josh Anderson were the “top two candidates” for the Highway Engineer position and were “basically equal[.]” **AR Vol. II at 126-127**. Josh Anderson is the current Bridge Engineer for District 10. **AR Vol. II, 0075**. While Josh Anderson was not made a party to this case, he clearly remains a candidate for the Highway Engineer position if that position is re-advertised.

The Circuit Court’s authority to review the ALJ’s decision is set forth in West Virginia Code § 6C-2-5(d): “[t]he court may reverse, vacate or modify the decision of the administrative

law judge, or may remand the grievance to the administrative law judge or the chief administrator for further proceedings.” Because the ALJ dismissed the grievance on statutory grounds and made no factual findings with regard to whether Mr. Powell was qualified or entitled to the Highways Engineer position, the Circuit Court was required to reverse and remand the grievance for the ALJ to make those determinations. *See Belcher v. Dynamic Energy, Inc.*, 240 W. Va. 391, 406, 813 S.E.2d 44, 59 (2018) (“the facts of which have not been fully developed before the circuit court and the merits of which have not been determined by that tribunal, we conclude that our consideration of and resolution of th[ese] issue[s] is premature at this time.”).

The Circuit Court’s decision to award Mr. Powell the Highway Engineer position was also contrary to the record because Josh Anderson was the most qualified candidate – after Ms. Goins. Josh Anderson is currently the Bridge Engineer for District 10, so he clearly remains a candidate for the Highways Engineer position if it is re-advertised. Thus, even assuming Ms. Goins is demoted from Construction Engineer to another position, the record does not support Mr. Powell being judicially awarded that position. Mr. Powell’s belief that he is entitled to the position instead of Mr. Anderson, simply because he filed a grievance, is neither supported by the record or law.

II. CONCLUSION

The Circuit Court erred in reversing the ALJ’s decision that Mr. Powell’s grievance was time-barred under West Virginia Code §§ 6C-2-3(a)(1) and 6C-2-4(a)(1). Mr. Powell’s grievance is based on a conversation between himself and Ms. Goins which occurred four months after the Highways Engineer position was filled, and grievances can only be based on “events” which occur between an employee and a state agency.

The Circuit Court also erred in awarding the Highways Engineer position to Mr. Powell, for two reasons. First, under West Virginia Code § 6C-2-5, the Circuit Court should have remanded the grievance to the ALJ for factual findings on the merits of Mr. Powell’s grievance,

instead of deciding the grievance in the first instance. The Circuit Court also erred in awarding the position to Mr. Powell because that decision was contrary to the record developed by the ALJ, which established that Josh Anderson was the second-most qualified candidate.

For all of these reasons, and those set forth below, this Court should reverse the Circuit Court's order.

Respectfully Submitted,

**Division of Highways
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