PAUL COLLINS,

Grievant,

v. **DOCKET NO. 99-DOE-083**

DEPARTMENT OF EDUCATION/CEDAR LAKES,

Respondent.

D E C I S I O N

This grievance was filed by Grievant Paul Collins against Respondent Department of Education/Cedar Lakes on or about August 13, 1998, alleging he should have been selected for the posted position of Maintenance Supervisor I at Cedar Lakes. As relief he sought instatement to the position, backpay and interest. (See footnote 1)

The following Findings of Fact are made based upon the record developed at Levels II and IV.

Findings of Fact

1. Grievant has been employed full-time by the Department of Education ("DOE") at Cedar Lakes Conference Center since August 1986, in various positions. He was first employed as a food service helper, then a security guard, as faculty coordinator, and a building maintenance mechanic. He was employed for nine months as the Maintenance Supervisor I, the position at issue in this grievance.

2. A grievance was filed over Grievant's selection, due to the fact that his brother-in-law, Tim Lowry, the Maintenance Supervisor II, participated in the selection process. Mr. Lowry supervises the Maintenance Supervisor I position. The grievance evaluator found the selection process flawed, in that objective measures for determining job related abilities were not utilized, and Mr. Lowry was not excluded from the interview process; and ordered DOE to re-post the position and conduct the selection process again using objective measures.

3. In June or July 1998, DOE posted the Maintenance Supervisor I position a second time.

Grievant, Thomas Waybright, and James Kammerer, all employees of Cedar Lakes, applied for this position. DOE excluded Mr. Lowry from the selection process the second time the position was posted.

4. The qualifications listed on the posting were a high school diploma or equivalent, with a college degree preferred; five years experience in a maintenance position preferred; "must be able to withstand physical labor, lift and carry objects, and work in the out of doors"; leadership potential; working knowledge of earthmoving equipment, power tools, carpentry equipment, grounds beautification equipment,heating and cooling equipment, electricity, water and sewer treatment, and swimming pool operation; and ability to supervise maintenance personnel and work with Maintenance Supervisor II to organize effective maintenance operations.

5. The job expectations listed were that the employee would perform the responsibilities and duties outlined; work effectively as a team member, exhibiting mutual respect and tolerance; be ethical and demonstrate good work habits such as punctuality and attendance; and demonstrate an ability to work effectively with other employees and other state and local agencies.

6. The duties listed in the job posting were: assist the Maintenance Supervisor II in supervision of personnel and new construction, and assume his duties in his absence; work closely with the Maintenance Supervisor II in maintenance of buildings, grounds, and equipment, and planning remodeling and construction; monitor employee time records; schedule, supervise, and evaluate employees; take care of urgent problems; maintain inventory; and work with maintenance crew in making needed repairs. Also listed under duties was the statement, "must be able to interpret blueprints."

7. An interview panel was formed by the Assistant State Superintendent of Schools. The chair was Dr. Stanley Hopkins, DOE's Assistant Division Chief for Technical and Adult Education Services. The other members of the panel were Mike Williams, Building Maintenance Millwright Instructor at the Roane Jackson Technical Center, and Lisa Mahon, General Manager at Cedar Lakes. 8. Dr. Hopkins developed a test, based upon the skills needed for the position, using many of the test questions from the state competency test used for maintenance supervisors employed by county boards of education. Mr. Williams looked at the test and suggested changes, which were made. The test was administered to the applicants. Grievant and Mr. Waybright scored the same on the test.

9. Dr. Hopkins prepared interview questions designed to determine which applicant was better

qualified to perform the job duties. Dr. Hopkins did not go over the questions with Ms. Mahon, and she did not ask any questions during the interview. Dr. Hopkins and Mr. Williams asked questions of the applicants, and asked each applicant the same questions. Grievant and Mr. Waybright demonstrated equal ability to respond to the technical questions asked.

10. Dr. Hopkins and Mr. Williams discussed the applicants. Ms. Mahon did not join in the discussion, nor did the other two members solicit her opinion.

11. Ms. Mahon was aware of the applicants' work records at Cedar Lakes, but this information was not solicited by the other panel members. She told the other panel members Grievant's past performance was superior to Mr. Waybright's. (See footnote 2) She did not inform the other two panel members of the attendance records of the applicants, nor did they inquire about such matters. 12. Grievant is always punctual. Mr. Waybright has had a problem with being on time for work, and has been verbally warned by his supervisor. Grievant has a better attendance record at Cedar Lakes than Mr. Waybright.

13. Dr. Hopkins and Mr. Williams did not consider which applicant was more of a team player.

14. Dr. Hopkins and Mr. Williams thought the qualifications of Grievant and Mr. Waybright for the position were nearly identical. They both, at the same time, told Ms. Mahon they believed Mr. Waybright was the best qualified for the job. They selected him because he was more articulate in the interview and he held certification in Class I waste water and package (sewage treatment) plant, which Grievant did not have. Mr. Waybright performed better in the interview.

15. Dr. Hopkins and Mr. Williams did not know how much time is spent by the Maintenance Supervisor I on package sewage treatment plant maintenance at Cedar Lakes. The Maintenance Supervisor I does not perform maintenance on the package sewage treatment plant, but supervises the employee who performs this work. The package sewage treatment plant is small and portable, and little time is spent on maintenance of the plant.

16. Ms. Mahon thought Grievant was better qualified than Mr. Waybright. She expressed to the other panel members in an unclear manner that she believed Grievant was better qualified than Mr. Waybright.

17. The panel members did not check any applicant's references, nor did they discuss the applicants' qualifications or work record with Mr. Lowry. 18. Mr. Waybright has been employed at Cedar Lakes four months less than Grievant, and is qualified for the position.

19. Cedar Lakes employs many people who are related to one another. It does not have an anti-nepotism policy.

20. Dr. Hopkins and Mr. Williams did not know which applicant was related to Mr. Lowry.

Discussion

Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997).

DOE is not subject to the Code provisions governing the selection of school personnel by county boards of education. See W. Va. Code §§ 18A-4-17(c) and 18A- 1-1(a); See Canfield v. W. Va. Dep't of Educ., Docket No. 97-DOE-508 (Mar. 31, 1998). The selection process by DOE is reviewed using the same standard applicable to state agencies. Thus, the decision as to who is the most qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). The arbitrary and capricious standard of review of personnel decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the agency. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersignedcannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Thibault, supra.

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). If a grievant can demonstrate that the selection process was so significantly flawed that he might reasonably have been the successful applicant if the process had been conducted in a proper fashion, the employer will be required to compare the qualifications of the grievant to the successful applicant. Thibault, supra.

Grievant asserted he should have been selected instead of Mr. Waybright, as he believed he was the better qualified applicant. He argued the decision of the interview panel was arbitrary and capricious because the members did not rely on criteria which were intended to be considered; more

particularly, the panel did not consider punctuality or whether the applicants were team players, and both are listed in the job posting as job expectations; the panel considered the certifications held by Mr. Waybright in waste water and package sewage treatment plant, when such certifications were not required or listed on the posting as preferred; and the panel considered that Mr. Waybright was more articulate when this was not a job requirement or expectation. Grievant further complained that the panel erred in failingto contact references. DOE argued the successful applicant was more qualified than Grievant.

While the interview panel did not consider every single factor possible, they administered a test and asked pertinent interview questions designed to determine whether the applicants were qualified for the position. The answers they received demonstrated Grievant and Mr. Waybright were both quite capable of carrying out the duties of the position, and either could have been chosen. The job posting does indeed list punctuality, good attendance, and team work as job expectations, but not minimum requirements, and it would have been appropriate to consider the applicants' past work history in these areas; but the interview panel was not required to base its decision upon how Grievant and Mr. Waybright stacked up in these areas.

Likewise, it was not wrong to break the tie between the two by looking to Mr. Waybright's certifications and how he performed in the interview. While only a working knowledge of the package sewage treatment plant was required, certainly having the training to obtain certification would be beneficial to someone charged with supervising the person performing the work on the plant.

Further, since both Grievant and Mr. Waybright were long-term employees of Cedar Lakes, it was reasonable to assume that it was not necessary to check their references.

The undersigned finds it odd that Dr. Hopkins and Mr. Williams would not have taken steps to make sure they understood Ms. Mahon's opinion regarding the two applicants, particularly given the fact that they found the two equally well qualified,and knew she was familiar with their work at Cedar Lakes. In fact, one would think Ms. Mahon's opinion would have been extremely helpful, and should have carried substantial weight in these circumstances. Nonetheless, the undersigned cannot find the process used to be clearly wrong or arbitrary and capricious.

Grievant also argued the interview panel members had not properly reviewed the applicants' qualifications, as he believed the evidence demonstrated Mr. Williams and Dr. Hopkins had not reviewed his application. He based this upon the fact that neither of them was aware he had been

serving in the posted position, even though his application listed he was employed at Cedar Lakes as the "Assistant Maintenance Supervisor." He did not list Mr. Lowry as his supervisor. Inasmuch as the job was posted as a Maintenance Supervisor I, and neither Dr. Hopkins nor Mr. Williams was intimately familiar with Cedar Lakes, the fact they did not know Grievant had been serving in the posted position can be attributed to the terminology used by Grievant on his application.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. The State Department of Education is not subject to the Code provisions governing the selection of school personnel by county boards of education. See W. Va. Code §§ 18A-4-17(c) and 18A-1-1(a); See Canfield v. W. Va. Dep't of Educ.,Docket No. 97-DOE-508 (Mar. 31, 1998). The applicable standard is whether the decision reached as to who is the most qualified applicant was arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

3. The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. However, if a grievant can demonstrate that the selection process was so significantly flawed that he might reasonably have been the successful applicant if the process had been conducted in a proper fashion, the employer will be required to compare the qualifications of the grievant to the successful applicant. Thibault, supra.

4. While it may not have been the best choice, it was not arbitrary and capricious for the interview panel to consider the successful applicant's certifications in waste water and package sewage treatment plant, and not consider punctuality, attendance, or past history as a team player, in breaking the tie in the qualifications of Grievant and the successful applicant.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court

of Jackson County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: June 25, 1999

Footnote: 1

The Level I response made on August 18, 1998, was that the supervisor was without authority to provide the relief requested. Grievant appealed to Level II, where a hearing was held on January 25, 1999. A Level II decision denying the grievance was issued on February 19, 1999. Grievant elected to bypass Level III, appealing to Level IV on February 23, 1999. A Level IV hearing was held on April 21, 1999. Grievant was represented by Perry Bryant, and Respondent was represented by Katherine L. Dooley, Esquire. This matter became mature for decision on May 10, 1999, upon receipt of the parties' post-hearing written argument.

Footnote: 2

Dr. Hopkins did not recall that Ms. Mahon had provided this insight.