EVERETTE BAILEY,

Grievant,

v v.

Docket No. 02-DOH-350

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent,

and

CHRISTINE WEST,

Intervenor.

D E C I S I O N

Grievant, Everette Bailey, filed this grievance on December 11, 2001, against his employer, the Division of Highways ("DOH"), over his non-selection for an Administrative Services Manager I position. His Statement of Grievance reads:

> I am filing this grievance as a result of my non-selection to the position of Administrative Services Manager I, as advertised in DOH Vacancy Report Bulletin #518. I have been a career personnel division employee of the DOH and have actually performed essentially all of the duties advertised in the position announcement. (I have received training as far as duties listed that I have not actually performed.) My qualifications are superior to those of the successful applicant.
>
> Relief sought: Instatement to the position as advertised, with applicable pay, benefits and seniority effective the date I should have been hired.

This grievance was denied at all lower levels. (See footnote 1) Grievant appealed to Level IV on October 30, 2002. A Level IV hearing was scheduled for January 6, 2003, but was canceled after the parties agreed to submit the case on the record developed below. Thiscase became mature for

decision on February 10, 2003, after receipt of DOH's and Grievant's proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant asserts he was the most qualified for the position, had greater seniority, and he had been performing the majority of these duties in his prior position. DOH argued the successful applicant was selected because she had greater administrative experience applicable to the position, had a working relationship with elected officials, and Grievant did not perform well under pressure. (See footnote 3)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by DOH for thirty years. He began employment in 1972 as a Stock Clerk II; was promoted to a Stock Clerk IV in 1974; was promoted to an Accountant II in 1979; and was promoted to a District Comptroller in 1979. In 2000, he was reclassified to an Administrative Services Assistant III. His evaluations have been good to excellent. 2. On August 17, 2002, Respondent posted a new position in District 10 for an Administrative Services Manager I. (See footnote 4)

3. This posting identified the duties of the position as:

> Responsible for managing administrative services in a district of the Division of Highways. Ensure all human resource functions such as training, drug and alcohol testing, EEO & Affirmative action (sic), grievance administration, Workers['] Compensation, and others are administered appropriately. Direct and advise district and county managers on behalf of the district engineer to ensure the functions are applied consistently. Serve as a liaison with central office staff in administration of subject functions.

4. At the time of the posting, Grievant had been performing the majority of the duties identified in the posting in his current position for approximately ten years. Grievant was not the EEO officer for his area, but had attended training in this field.

5. Five candidates were interviewed for the position by District Engineer William Bennett and Mark Browning, the Director of Communications for DOH. The applicants were asked the same questions. Mr. Bennett had his set of questions and Mr. Browning had his. Three applicants were

found to be well qualified, Grievant, Christine West, and Barry Jenkins.

6. The successful applicant, Ms. West, had previously worked for DOH in District 10 as an Administrative Services Assistant II. She was hired in 1979 and retired in 1997. The focus of her work during the last ten years of her DOH employment was to administer the NICET program for District 10, including testing and certification. The successful applicant also processed WV-11's, was the District United Way Representative,and chaired the Equipment Committee, which investigated accidents. (See footnote 5) Ms. West also was the EEO representative for her area. At the time of application, she was employed as a substitute teacher with Mercer County Board of Education, as she has a Baccalaureate Degree in Business Education.

7. Ms. West also reported on her application that she had supervised 530 employees while she was at DOH. While Ms. West had contact with many employees during her tenure, the number of employees she usually supervised at any one time was two. (See footnote 6)

8. Prior to her employment with DOH, Ms. West had worked for two years as a Field Representative for Congressman Nick Rahall, doing public relations work.

9. After the interviews, the strong points of the applicants were assessed by Mr. Bennett and Mr. Browning. The strong points for Ms. West were: "Knowledge of DOH Operating Procedures, Public Relations, Working Relationships with Elected Officials." Her weak points were identified as "No Computer Skills, Limited Computer Knowledge." 10. Grievant's strong points were: "Knowledge of DOH Operating Procedures and Current Policies, Employee Relations, Loyalty to DOH." His weak points were identified as "Does Not Work Well Under Pressure."

11. This inability to work well under pressure was identified by Mr. Bennett at hearing as occurring only at "minor times when there [is] extreme pressure." Level III Tr. at 38.

12. Mr. Bennett selected Ms. West because Mr. Browning strongly recommended her, and he believed she had more years of applicable experience.

13. Mr. Browning selected Ms. West because Mr. Bennett said Grievant did not work well under pressure.

14. On February 19, 2002, after Ms. West was hired for the position, Mr. Bennett asked Grievant for a list of his duties, and then divided these duties between Grievant and Ms. West. This plan, in essence, divided the duties Grievant had held before Ms. West's hire, with the exception some informational duties assigned to Ms. West. Grievant now had the additional duty of being the

EEO representative. Additionally, Grievant asked to retain the School to Work Program and was allowed to do so.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19,1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

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 Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). This Grievance Board recognizes that selection decisions are largely the prerogative of management. While the individuals who are chosen should be qualified and able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. Skeens-Mihaliak v. Div. of Rehabilitation Serv., Docket No. 98-RS-126 (Aug. 3, 1998); Ashley v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR- 070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket Nos. 89- WCF-208/209 (Aug. 7, 1989). 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. Thibault, supra.

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). If the grievant can demonstrate the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion this Board can require the employer to review thequalifications of the grievant versus the successful applicant.

Thibault, supra; Jones v. Bd. of Trustees/W. Va. Univ., Docket No. 90-BOT-283 (Mar. 28, 1991).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State excellence rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). " While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

This case presents a very odd set of facts. First, a higher level management position was posted that Mr. Bennett said he did not need filled because the duties were already being done in an acceptable manner by Grievant. The position was posted anyway. Although the classification was a higher one than the position Grievant held, the majority of the duties identified in the posting were the ones Grievant was successfullyperforming. Grievant, of course, applied for the position. He was certainly well qualified and met all of the requirements of the position.

Although it is not mentioned anywhere in the posting, Mr. Browning testified the main focus for the position was public relations. The class specification for the Administrative Services Manager I position does not speak to public relations work, and the facts reveal the position has engaged in only limited work in this area. One of the main reasons Ms. West was selected for the position was her past work in public relations and relationships with elected officials.

Another troubling area is the credit Ms. West was given for her many years in personnel work. While she did work in this area for more years than Grievant, this experience was six years ago, and her duties did not cover the range of the duties expected in the position. Grievant's experience, while of a somewhat shorter duration, was much more in keeping with the duties to be performed by the

Administrative Services Manager I, and his experience and training were recent. Additionally, it appears Ms. West was given credit for experience for she did not actually possess, such as her work with the grievance process. Further, some of the information on Ms. West's application and her answers to the interview questions appear to have been incorrect or exaggerations. (See footnote 7) Finally, Grievant had thirty years of seniority, while Ms. West was currently not an employee and had only eighteen years of service with DOH.

All these factors raise questions and present issues for the undersigned Administrative Law Judge about the legal sufficiency of the selection, and whether it wasarbitrary and capricious. It is difficult to understand how Grievant was not the most qualified applicant for the position. He possessed the most applicable and most recent experience and training for the position, and he had, for many years, been performing the duties that would be expected of the position.

The selection of Ms. West might have been explained if Grievant had not received good to excellent evaluations, but the evidence demonstrated Grievant was doing most of the duties of the posted position satisfactorily. The excuse that he did not work well under pressure as the reason for his non-selection did not stand up under scrutiny on cross examination. Mr. Bennett stated this was a "minor" problem occurring during extreme stress. This assessment could be applied to any worker, and obviously did not affect his evaluations. The need for some type of working relationship with elected officials appears to have been a major factor in Ms. West's selection, but this factor was not identified by the posting or the class specification.

These problems with the selection are real, even without examining the effect on morale of DOH's decision to select someone to fulfill the basic duties of Grievant's position after it was posted at a higher pay grade. There was little rebuttal to Grievant's testimony that the majority of the duties of the position were the ones he had been doing for years, and he had received training in the others. Indeed, the EEO duties in which Ms. West had experience and Grievant only had training, and which were specified in the posting as part of the new position, were given to Grievant when the duties were divided.

After consideration of all the factors and issues, and within this specific set of facts and unique circumstances, the undersigned Administrative Law Judge finds the selection of Ms. West for the position was arbitrary and capricious. Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to place Grievant in the Administrative Services Manager I position.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its 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 Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

3. This Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. Skeens-Mihaliak v. Div. of Rehabilitation Serv., Docket No. 98-RS-126 (Aug. 3, 1998); Ashley v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket Nos. 89-WCF-208/209 (Aug. 7, 1989).

4. 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. Thibault, supra.

5. 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). See Jones v. Bd. of Trustees/W. Va. Univ., Docket No. 90-BOT-283 (Mar. 28, 1991).

6. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the

evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State excellence rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). " While a searching inquiry into thefacts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

7. Given this specific set of facts and unique circumstances, the undersigned Administrative Law Judge finds this selection decision to be arbitrary and capricious.

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to instate Grievant into the Administrative Services Manager I position with back pay and interest from the day Ms. West was placed into 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." 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 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: March 31, 2003

Footnote: 1

The Level III hearing was conducted on April 30, 2002, and the Level III Decision was not issued until October 22, 2002. The parties had agreed to an extension of the timelines.

Footnote: 2

Grievant was represented by Attorney J. W. Feuchtenberger, and Respondent DOH was represented at Level IV by Attorney Belinda Jackson. The successful applicant asked to intervene at Level IV, and her attorney, Fred Holyroyd, was sent notice of the due date for his proposals, but apparently elected not to submit these proposals.

Footnote: 3

There was limited mention that the successful applicant was a female and that may have played some part in the selection process. The questioning did not reveal gender actually played a part in this selection.

Footnote: 4

The District Engineer had informed his supervisors in Charleston he had no need for this position to be filled, as the duties of the position were being done.

Footnote: 5

Intervenor stated in her interview that she had chaired the Grievance Board. During questioning at the Level III hearing, Grievant stated that when she had first started work, the grievance procedure was called the Equipment Review Board. Ms. West then clarified this statement by stating this Board dealt with accidents within the District. Additionally, she noted she had worked little with the grievance process, as problems were usually solved before grievances were filed.

Footnote: 6

Ms. West did not appear to understand the typical state personnel meaning of the term supervisor. At times Ms. West's testimony was confusing and non-responsive to the questions asked. As this case was submitted on the record, it was at times unclear just what Ms. West's duties had been in her past tenure with DOH.

Footnote: 7

See Finding of Fact 7 and note 5, infra.