DEBRA MORRISON,

Grievant,

v. **DOCKET NO. 02-T&R-319**

DEPARTMENT OF TAX AND REVENUE/

DIVISION OF AUDITING,

Respondent.

DECISION

Grievant Debra Morrison is employed in the Division of Auditing of the Department of Tax and Revenue as a Tax and Revenue Auditor 2. She filed this Grievance on July 16, 2002, after she applied for a posted Tax and Revenue Auditor 3 position and was not selected. Her Statement of Grievance reads: "Having met all objective criteria; grievant denied promotion to TAUD020008." As relief, she seeks, "Promotion."

Her grievance was denied at all lower levels, and level four hearings were held in the Grievance Board's Charleston office on April 30, 2003, and August 27 and 28, 2003. Grievant was represented by Roger Thomas, and Respondent was represented by counsel, Joy M. Bolling. The parties agreed to submit their proposed findings of fact and conclusions of law by November 7, 2003, but when Ms. Bolling was replaced as Respondent's counsel by Esther T. Van Dall, the parties mutually agreed to extend the submission deadline to December 15, 2003, whereupon the matter became mature for decision. Based upon a preponderance of the evidence contained in the record and adduced at level four, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as a Tax and Revenue Auditor 2 ("Audtor 2"). She began work for Respondent as a Tax and Revenue Auditor 1 in 1995, doing field audits, and was promoted to Auditor 2 in October, 1998. Prior to her hire, she had eight years of experience with

accounting work.

2. Jim Tincher, Tax Supervisor 2, is Grievant's immediate supervisor. Tax and Revenue Manager Alice Hall is his direct supervisor.

3. On or about May 31, 2002, a Tax and Revenue Auditor 3 ("Audtor 3") position was posted within the Auditing Division, to perform field audits. Grievant, Audtor 2 David Fulmer, and others, applied for the position. Mr. Fulmer was ultimately selected.

4. Mr. Fulmer was originally hired as an Auditor 1 in January, 1997, as an in- house auditor. He did not actually perform audits, but checked and revised audits for the legal division and that came in from the field, among other related duties. He was promoted to Audtor 2 in June, 1999, and began doing field audits in July of that year. He had no previous work experience when he was hired.

5. Ms. Hall and Andrew Glancy, another Tax and Revenue Manager, reviewed the applications for the Audtor 3 position and recommended Mr. Fulmer for the promotion.

6. Respondent has developed the following set of objective criteria for use in filling auditor positions, and they were used by Ms. Hall and Mr. Glancy in reviewing the applicants for the position at issue:

a.

evaluation score (EP3) (See footnote 1) ; b. experience ranking;

c.

supervisors' recommendations;

d.

number of audits completed;

e.

one-year total dollar amount of assessments; and

f.

one-year average assessment amount.

7. Mr. Fulmer's most recent evaluation score, for the 01/01 - 01/02 rating period, was 2.30; Grievant's score for the same period was 2.22. Level four Respondent's Exhibit No. 5, Level three

Petitioner's Exhibit No. 6.

8. Grievant had about eight years of accounting experience prior to her hire with respondent, and approximately seven and one-half years of experience doing field audits since she was hired. Mr. Fulmer had no prior work experience, and less than four years of field auditing experience.

9. Mr. Tincher did not recommend Grievant, or any of his other supervisees, for the promotion, although he had recommended Grievant for an earlier promotion opportunity. He felt that in the intervening time, Grievant's work performance had deteriorated. Mr. Fulmer was highly recommended by his supervisor, Ralph Brown.

10. For the period February 13, 1995 to December 31, 2002, Grievant completed 523 audits, and Mr. Fulmer completed 159 audits. Between January 1, 2000 and April 30, 2002, Grievant completed 131 audits and Mr. Fulmer completed 96. Grievant's Exhibit No. 1.

11. For the period February 13, 1995 to December 31, 2002, Grievant's total amount assessed was $5,145,679, and Mr. Fulmer's total assessment was $2,415,557. For audits completed between January 1, 2000 and April 30, 2002, Grievant's total was $1,280,768 and Mr. Fulmer's total was $1,786,293. Grievant's Exhibit No. 1. 12. For the period February 13, 1995 to December 31, 2002, Grievant's average assessment was $6,665, and Mr. Fulmer's average assessment is $15,192. For audits completed between January 1, 2000 and April 30, 2002, Grievant's average was $9,777 and Mr. Fulmer's average was $18,607. Grievant's Exhibit No. 1.

13. Audits are assigned by the auditors' supervisors. Auditors do not have discretion to choose which companies they audit, or where they must go, in state or out of state, to audit a company assigned to them.

14. Although Grievant's prior supervisors found her to be professional and highly competent, a certain amount of animosity has arisen between Mr. Tincher and Grievant, that largely obstructs a professional working relationship. Grievant is not receptive to his guidance as a superior; he does not listen to anything she says.

15. To choose the successful candidate for a promotion to Audtor 3 after a posting six months prior to the one in question, Respondent found Grievant to be tied with another candidate, and chose the other candidate by using his greater seniority as a tie breaker.

16. Respondent has received some complaints about Grievant from taxpayers she worked with, including one whom Grievant told was going to get a refund, but in actuality was assessed for

taxes due.

Discussion

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 she works. Her claim must be proven by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claims are more likely valid than not. *See*Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant claims she was the most qualified candidate for the position, and should have been chosen. Although not explicitly set out in her Statement of Grievance, a subtext of her argument is that her supervisor, through some prejudice against her, sabotaged her promotion through inappropriate criticism of her work. Respondent contends it made the proper choice of candidates through a largely objective evaluation of their work performance.

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). 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*.

"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. " 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 ex 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* .

Respondent developed a set of six criteria to be used in making promotional choices: evaluation score, experience ranking, strength of supervisors' recommendation, number of audits completed, one-year total dollar amount of assessments, and one-year average assessment amount. While Respondent views these as largely objective, the evidence suggests otherwise. Both the evaluation score and supervisor's recommendation are almost entirely subjective, as are the last two criteria, which are entirely outside the control of the auditor and are used not as valid indicators of performance but instead to control the attitude of the auditors. In any event, Grievant scored higher than Mr. Fulmer on three of the six criteria, so the result of the supposedly objective review was a tie from an empirical standpoint. Introducing a further subjective element, Ms. Hall and Mr. Glancy resolved the tie by adjusting the weight they gave each criteria, not by relying on seniority as the tie breaker as they had in a previous promotion decision, again to the exclusion of Grievant.

The criteria of total amount assessed and average assessment amount are unreliable indicators of performance and should have no place in the evaluation of the candidates. Ms. Hall herself testified at level three that a principal reason for using these criteria is to keep people from objecting to being sent on out of state audits, which are likely to result in higher assessments. However, auditors cannot choose whether to go or not, so the criteria is used as a motivator just to reduce complaints and give the appearance of greater morale. She also testified they were used as criteria in order to encourage the auditors to pursue tax issues such as unreported income or untaxed sales. However,similar results could come from simply auditing a larger company. Again, the criteria does not relate to the adequate performance of the auditor *per se*, but instead is simply a motivational tool. (See footnote 2) Both of these criteria are found to be arbitrary.

With the last two factors removed from the equation, Grievant and Mr. Fulmer are still tied based on simply ranking the remaining criteria. In past promotional decisions, Respondent used seniority as a tie breaker. This is an entirely valid way to make the decision. "When two or more employees of the classified service make application for a position and are found to be similarly qualified, 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 position. W. Va. Code § 29-6-10(4)." Napolitano v Div. of Highways, Docket No. 02-DOH-398 (May 12, 2003). However, an employer always retains the discretion to select a less-senior applicant with greater qualifications. Bartlett v. Div. of Highways, Docket No, 03-DOH-138 (Aug. 6, 2003); Lewis v. W. Va. Dep't of Administration, Docket No. 96-

DOA-027 (June 7, 1996). Again, this discretion must be exercised reasonably, and not arbitrarily and capriciously.

At first blush, Respondent's failure to consider Grievant's much greater seniority as the deciding factor in this hiring decision appears to be discriminatory. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."W. Va. Code § 29-6A-2(d). A grievant, seeking to establish a *prima facie* case of discrimination under W. Va. Code §§ 29-6A-2(d) must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Grievant met this burden easily, as only six months earlier she missed out on a promotion to Audtor 3 when she was tied with another applicant and Respondent used seniority to break the tie, but failed to give her greater seniority the same consideration in this case. Once a grievant establishes a *prima facie* case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. *See* Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

Respondent, in this case, did demonstrate legitimate reasons for failing to choose Grievant. Grievant's poor working relationship with her supervisor was the key to most of these reasons, but so were the complaints Respondent had received from several taxpayers Grievant worked with. Grievant clearly exhibits a number of insubordinate behaviors, which, although they are understandable given her Supervisor's attitude toward her, are nevertheless not excusable. Although her supervisor did recommend Grievant be promoted just six months earlier, his opinion changed and he did not recommend her for this promotion. He testified her performance deteriorated and gave as an example of her "insubordinate" behavior a time when they had a difference of opinion and Grievant offered to show him in the regulations why he was wrong. Clearly, Mr. Tincher and Grievant do not work well together. Both find the other hostile for unknown reasons. Mr. Tincher is unreceptive to Grievant's professional opinion, and she is unreceptive to his constructive criticism. When the two

have differing opinions on how to address a given situation, Grievant resists doing as she is told. Although Grievant is highly experienced and capable, she is not free to override her supervisor, who has ultimate responsibility for the results of his employees. The record is rife with specific examples of what Grievant considers bad supervision, but "[e]mployees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). As a rule, the prudent employee complies first and expresses her disagreement later. *See* Maxey v. W. Va. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). Further, Grievant provided no evidence of a motive for what she perceived as Mr. Tincher's persecution of her, other than Grievant's frequently telling him he was wrong, and her unsupported belief he treats females differently than males.

The problems between Grievant and her supervisor “trickled up” to his supervisor, Ms. Hall, who was one of the two people who picked the successful candidate. Ms. Hall was frequently called upon to mediate their disputes or looked to by Grievant to override Mr. Tincher's direct orders. Thus, she had first hand, personal knowledge of Grievant's professional performance, and good reason to doubt her fitness for promotion. There was no evidence of similar behavior on Mr. Fulmer's part.

Respondent presented legitimate reasons for choosing Mr. Fulmer over Grievant, and Grievant presented no evidence the reasons were mere pretext. She, in fact, cited the same disagreements as Respondent, albeit from a different perspective. But while the impression a supervisor makes on a supervisee has little relevance to a promotiondecision, the reverse is not true. Respondent had good reason to believe Mr. Fulmer would make the better Audtor 3, compared to Grievant's track record of disagreement and difficulty with her superiors.

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 she works. Her claim must be proven by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her 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 Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her 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). 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*.

3. "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 ex 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 [his] judgment for that of [the agency]. *See generally* , Harrison v. Ginsberg, [168 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, *supra* .

4. "When two or more employees of the classified service make application for a position and are found to be similarly qualified, 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 position. W.

Va. Code § 29-6-10(4)." Napolitano v Div. of Highways, Docket No. 02-DOH-398 (May 12, 2003). However, an employer always retainsthe discretion to select a less-senior applicant with greater qualifications. Bartlett v. Div. of Highways, Docket No, 03-DOH-138 (Aug. 6, 2003); Lewis v. W. Va. Dep't of Administration, Docket No. 96-DOA-027 (June 7, 1996).

5. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."W. Va. Code § 29-6A-2(d).

6. A grievant, seeking to establish a *prima facie* case of discrimination and/or favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

7. Once a grievant establishes a *prima facie* case of discrimination and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. *See* Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995); Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981);

8. While Grievant make a *prima facie* showing of discrimination, Respondent demonstrated legitimate reasons for its actions. 9. Grievant did not show Respondent's choice of candidates for the Audtor 3 promotion was, overall, arbitrary and capricious.

Based on the forgoing analysis, this grievance is hereby **DENIED**.

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 30, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The "EP3" designation was not explained.

Footnote: 2

It would also appear that such a criteria may have a prejudicial effect on audit outcomes, as they presume an audit that finds the taxpayer is in error is a better audit than one that finds the taxpayer is correct or the tax department is in error.