HAMILTON ROUSH and GREGORY FORBES,

Grievants,

v.

DOCKET NO. 01-DOH-573/561

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent,

and

ROBERT WATTERSON,

Intervenor.

D E C I S I O N

Grievants, Hamilton Roush and Gregory Forbes, filed separate grievances against their employer, the West Virginia Department of Transportation/Division of Highways ("DOH"), on November 8, 2001 and October 31, 2001, respectively. They are grieving their non-selection for the position of Highway Administrator III in Mason County, and seek instatement into the position, with all back pay, benefits, and interest. Robert Watterson was granted Intervenor status into the Forbes grievance by Order dated December 11, 2001, and the grievances were consolidated by Order dated January 31, 2002.

The grievances were denied at the lower levels of the grievance process, and following many continuances, a level four hearing was held in the Grievance Board's Charleston, West Virginia office on December 20, 2002. This matter became mature fordecision on January 31, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant Roush was represented by Christopher G. Moffatt, Esq., Grievant Forbes appeared by himself, DOH was represented by Belinda Jackson, Esq., and Intervenor Watterson was represented by James M.

Casey, Esq.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits (Forbes Hearing)

Ex. 1 -

One page from Greg Forbes' evaluations for calendar years 1986, 1989, 1990.

Ex. 2 -

Employee Evaluation of Greg Forbes for calendar year 1995.

Ex. 3 -

Employee Evaluation of Greg Forbes for calendar year 1992.

Ex. 4 -

Greg Forbes' General Employee Information Sheet.

Ex. 5 -

Robert Watterson's General Employee Information Sheet.

LIII DOH Exhibits (Forbes Hearing)

Ex. 1 -

Robert Watterson's Application for Employment, dated June 28, 2001.

Ex. 2 -

Greg Forbes' Application for Employment, dated July 8, 2001.

LIII Grievant's Exhibits (Roush Hearing)

Ex. 1 -

Sammons v. W. Va. Dept. of Transp., Docket No. 00-DOH-150 (Aug. 17, 2000).

Ex. 2 -

Statewide Weekly Vacancy Report, Bulletin #502, dated December 8, 2000.

Ex. 3 -

Statewide Weekly Vacancy Report, Bulletin #515, dated June 26, 2001.

Ex. 4 -

Hamilton Roush's Application for Employment, dated December 14, 2000.

Ex. 5 -

Hamilton Roush's Application for Employment, dated June 29, 2001.

Ex. 6 -

Robert Watterson's Application for Employment, dated June 28, 2001.

Ex. 7 -

Division of Personnel Administrative Rule, Section 16. Political Activities.

Ex. 8 -

Hamilton Roush's Resume, March 8, 1993.

Ex. 9 -

Statement of Hamilton Roush, dated June 29, 2001.

Ex. 10 -

Newspaper article; letter to the editor.

LIII DOH Exhibits

None.

LIV Grievant Forbes Exhibits

None.

LIV Grievant Roush Exhibits

Ex. 1 -

Handwritten notations of John Dawson.

LIV DOH Exhibits

Ex. 1 -

October 1, 2001 letter to Senator Rockefeller from Greg Forbes.

Testimony

Grievant Forbes testified in his own behalf, and DOH presented the testimony of John Dawson at level three. Grievant Roush testified in his own behalf, and presented the testimony of Jesse L. Haynes, Carl Thompson, John Dawson, and Greg Forbes at level three, and DOH presented no additional witnesses. At level four, Grievant Roush testified in his own behalf, and presented the testimony of John Dawson, Robert Kessler, Ernie Larzo, Dennis King, Robert Watterson, Greg Forbes, Joanne Watterson, and Jeff Black. Grievant Forbes, Intervenor Watterson, and DOH presented no additional witnesses.

Based upon a review of the record in its entirety, the testimony and exhibits, and post-hearing submissions, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant Roush has been employed by DOH since April, 1989. His current position is Assistant County Maintenance Administrator, a position he has held since first hired. Throughout his career at DOH, he has intermittently been temporarily upgraded to the position of County Highway Administrator, the job that is the subject of his grievance.

2. In his current position, Grievant Roush makes job assignments, orders materials, schedules overtime, performs evaluations, and performs highway maintenance duties. He supervises between 40 and 50 people. He has a high school education.

3. Grievant Forbes has been employed by DOH since February, 1980. His current position is

Crew Leader, which he has held for approximately ten years. 4. In his current position, Grievant Forbes takes care of daily usages of personnel, equipment and materials, and performs personnel evaluations. He occasionally operates equipment when needed, and supervises four or more individuals at one time. He has a high school education.

5. Intervenor Watterson has been employed by DOH since July, 1990. His current position is County Highway Administrator, which he has held since August 16, 2001, and which is the subject of this grievance. Prior to his selection for this position, Mr. Watterson was employed in the Materials Control, Soils and Testing Division as a Geologist, where his primary duties included performing laboratory tests on aggregate samples. He did not supervise any employees in this position. Mr. Watterson also ran a large dairy farm for twelve years, where he was responsible for the maintenance of approximately seven miles of road. His prior work experience includes four years as manager of a Southern States store where he supervised between 15 and 20 employees at any given time. He has a bachelor's degree from West Virginia University in geology.

6. In November 2000, a vacancy was created when Millard Donnelly resigned as County Highway Administrator in Mason County. The position was posted via Bulletin No. 502 on December 8, 2000, with a down date of December 21, 2000. Grievants Roush and Forbes, a Mr. Childers and Mike Stone applied for the position. The District Administrator, Jesse Haynes, conducted interviews for the position and recommended Grievant Roush be selected for the position. Grievant Roush was filling the position by temporary upgrade at the time. 7. DOH did not fill the County Highway Administrator position posted in Bulletin No. 502 because the agency was in a period of transition, and a hiring freeze had been implemented.

8. On June 26, 2001, the County Highway Administrator position in Mason County was posted again via Bulletin No. 515, with a down date of July 10, 2001. The applicants for the position included Grievants Roush and Forbes, Mr. Childers, and Mr. Watterson. The District Engineer, John Dawson, and Assistant District Engineer for Maintenance, Dennis King, conducted interviews, and again it was recommended that Grievant Roush be selected for the position.

9. The minimum qualifications for the County Highway Administrator position are:

> **Training**: Graduation from an accredited college or university with a degree in engineering, business or public administration, or related field.

Substitution: Experience as described below may be substituted for the required training on a year for year basis.

Experience: Five years of experience or equivalent part-time paid professional or managerial experience in business administration, public administration, transportation, construction, manufacturing, mining or the armed services.

Both Grievants and Mr. Watterson met the minimum qualifications for the position at the time Bulletin No. 515 was posted.

10. Mr. Watterson represented on his application that he supervised employees in his capacity of Geologist, but upon investigation, Mr. Dawson and Mr. King learned that he did not, which caused them concern about Mr. Watterson's qualifications overall. 11. Interviewing managers, and in this case, District Engineers, have authority to recommend selection of personnel, but their recommendation is subject to the final approval of the Assistant Commissioner of Highways.

12. Jack White was Assistant Commissioner of Highways at the time of the selection in this grievance. He is no longer employed at DOH. He talked extensively with Ernie Larzo, Employment and Benefits Manager, about the position. Mr. White placed an emphasis on education and the ability to communicate, and he wanted to bring in a DOH employee from outside the Mason County organization. Specifically, he wanted someone from Mason County who knew the citizens, but who was not currently working for DOH in the county. Mr. White wanted to elevate the function of the County Highway Administrator to a front-line contact in the county with the public and local government.

13. Mr. Watterson was a life-long resident of Mason County, and was employed by DOH, but not within the Mason County organization. Mr. White believed he was the best fit for the County Highway Administrator position.

14. Mr. White contacted Mr. Dawson and read off a list of people to be hired, including Mr. Watterson. The list was provided after the interviews were conducted for the County Highway Administrator position, but before interviews were conducted for other positions. Mr. White told Mr. Dawson to hire Mr. Watterson. Mr. Dawson disagreed with Mr. White, but Mr. White told him to change his recommendation, or he would find someone who would. Mr. Dawson recommended Mr. Watterson.

15.

Both Grievants and Mr. Watterson are registered Democrats. 16. Grievant Roush spoke to Governor Wise after the election and after he had applied for the position, and asked him for his support in his bid for the position. He also submitted his application to the Governor's Transition team following the election.

17. Grievant Forbes is also active in Mason County politics, and also spoke to Governor Wise about the position. He told the Governor he was unhappy about the selection, the county was not happy with the selection, and that it would show in the next election. Grievant Forbes wrote a letter to Senator Rockefeller after being passed over for the job, voicing his upset that his political efforts were overlooked.

18. Mr. Watterson campaigned for Governor Wise, and spoke on behalf of him at Democratic rallies. Mr. Watterson became aware the County Highway Administrator position was going to become available, and had several conversations with Mr. White about when it was going to be posted. He also talked to Mr. Dawson and Ernie Larzo about the position. Mr. Watterson testified he may have asked someone to put in a good word for him, but no one promised him a job.

19. Jeff Black, DOH Human Resources Director, sent Grievant Roush's application package back to Mr. Dawson at Assistant Commissioner White's request. Mr. White did not tell him why, although Mr. White had told him about his perceived need for change in direction within the agency.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). SeeW. Va. Code § 29-6A-6. The grievance procedure is intended to provide an analysis of the legal sufficiency of the interview and selection process at the time it occurred. Bourgeois v. Board of Trustees, Docket No. 93-BOT-268A (Mar. 29, 1994); Thibault v. Div. of Rehab. Svcs., Docket No. 93-RS-489 (July 29, 1994); Sheppard v. Dept. of Health and Human Resources, Docket No. 97-HHR-186/187 (Dec. 29, 1997).

A state agency's decision as to which candidate is the most qualified for a position will be upheld unless it is shown to be arbitrary, capricious or clearly wrong. Thibault, supra; Sheppard, supra; Sloan v. W. Va. Univ., Docket No. BOR-88-109 (Sept. 30, 1988). 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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dept. of Educ., No. 29066 (W. Va. 2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the agency. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Grievants contend the selection process in this case was arbitrary and capricious and clearly wrong because the successful applicant was awarded the position based solely on his political affiliation. W. Va. Code § 29-6-1 mandates that "[a]ll appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness." W. Va. Code § 29-6-10(4) states:

> (4) For promotions within the classified service [rules shall be developed] which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination, when such examination is practicable. An advancement in rank or grade or an increase in salary beyond the maximum fixed for the class shall constitute a promotion. When any benefit such as a promotion, wage increase or transfer is to be awarded, . . . and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, 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 benefit or have the benefit withdrawn, as the case may be.

W. Va. Code §29-6-20(a) provides in part that "[n]o person shall be appointed or promoted to ... any position in the classified service or in any way favored ... because of his political ... affiliations." These provisions of the civil service law were intended to insure that political affiliation would not influence employment decisions. Frantz and DeVaul v. W. Va. Dept. of Empl. Security, Docket No. 89-ES-050 (July 25, 1989).

Moreover, the West Virginia Division of Personnel ("DOP") Administrative Rule, Section 11.1,

Method of Making Promotions provides in relevant part:

> (a) In filling vacancies, appointing authorities shall make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. Whenever practical and in the best interest of the service, an appointing authority may fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the classified service based on demonstrated capacity and quality and length of service.

The DOP Administrative Rule also prohibits political activities relating to the filling of positions. Section 16 provides:

> (a) An appointing authority shall not appoint, promote, demote, or dismiss any person in the classified service or in any way favor or discriminate against any person with respect to such employment because of his or her political or religious opinion or affiliation or race....
>
> (b) No person shall seek or attempt to use any political endorsement in connection with any appointment in the classified service.
>
> (c) No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any position for the purpose of influencing the vote or political action of any person, or for any consideration.

This Grievance Board has previously noted that the County Maintenance Supervisor position is a classified service position, and not one in which politics can determine who will be placed in the position. (See footnote 1) Lowther v. W. Va. Dept. of Transp., Docket No. 01-DOH- 589 (Mar. 27, 2002). As explained in Lowther:

> Historically, the CMS positions had been political appointments, and the incumbents were replaced whenever a new administration took office. W. Va. Code § 29-6-4(d)(1989) listed certain positions where political affiliation was deemed essential to effective performance, and as an appropriate hiring requirement. The CMS positions were included in that list. However, the West Virginia Supreme Court of Appeals, in Akers v. W. Va. Dept. of Highways, 188 W. Va. 698, 425 S.E.2d 840 (1992), held that the position of CMS did not require its holder to share the same political affiliation or association as the governor, to effectively perform the duties attendant to such position. Akers, 425 S.E.2d at 846.

This Grievance Board has previously held that employees may not be discharged or have other

significant employment actions taken because of their political affiliations. In selection cases where political motivation is alleged, the grievant must offer sufficient evidence to permit a finding that the selection was substantially motivated by political considerations. The requisite political motivation, as with any state of mind, can be proven by circumstantial evidence, as it is commonly the only kind available for this purpose. Mercer v. W. Va. Dept. of Highways, Docket No. 01-DOH-604 (Mar. 20, 2002); Wiley v. W. Va. Dept. of Highways, Docket No. 99-DOH-109 (Aug. 3, 1999).

An exception to this general rule exists when the employer can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved or can prove that even if the action was motivated in part by political consideration, it would have been taken in any event for reasons unrelated to political affiliation. Mercer, supra; Wiley, supra. See e.g., Anthony v. Sundlen, 952 F.2d 603, 605- 06 (1st Cir. 1991)(holding that proof of political motivation in patronage case not confined to "(relatively rare) instances in which a 'smoking gun' can be produced" and commenting that "circumstantial evidence alone can support a finding of political discrimination"); Cygnar v. City of Chicago, 865 F.2d 827, 844-45 (7th Cir. 1989)(holding that evidence that patronage targets' names were known by defendant to be on Democratic Party contributors' list sufficient to support finding that defendant knew, despite his denial, of their political affiliations). Lowther, supra.

Initially, it is obvious that both Grievants could not have been selected for the position of County Highway Administrator, and even if it is proven that political affiliation was the substantial motivation behind Mr. Watterson's hire, only one of them can win. The preponderance of the evidence demonstrates that Grievant Roush would have received the position based upon the recommendations of his superiors, Mr. Dawson and Mr. King,and also due to his greater seniority with the Department, all other things being equal. Therefore, the remainder of the discussion will focus of the selection process as it affected Grievant Roush, and Mr. Forbes' request to be instated into the position is **DENIED**.

The remaining issue then is whether the evidence is sufficient to support a rational finding that Assistant Commissioner Jack White, for politically-motivated reasons, caused Grievant Roush not to be selected. Grievant Roush has established that he was the first choice of Mr. Haynes in the first posting, and Messrs. Dawson and King in the second posting. He has also established that Assistant Commissioner White directed that Mr. Watterson be awarded the assignment prior to receiving the recommendation, or any other input, from the county administrators. Finally, Grievant Roush

established that Mr. Watterson embellished his supervisory experience with DOH on his application, and had no road maintenance experience, save for his own private roadway.

Mr. Larzo's explanation that Mr. White envisioned a County Highway Administrator who lived in Mason County, was an employee of DOH, but was not affiliated with the Mason County organization, is so specific that it lends credibility to Grievant's supposition that Mr. White already had a person, Mr. Watterson, in mind for the position. The selection of Mr. Watterson as a top candidate is particularly interesting since Mr. Dawson and Mr. King were concerned about his qualifications, and his representation that he supervised employees in his position at DOH, when he did not. Finally, Mr. Dawson and Mr. King's testimony that Assistant Commissioner White had a “list” of individuals to be hired, including Mr. Watterson, and that he ordered Mr. Dawson to recommend Mr. Watterson for the position is conclusive evidence that something was going on outside the usual selection process. The foregoing evidence establishes that more likely than not, the recommendation of the local administrators would have been followed, and Grievant Roush would have been appointed to the position, if the Assistant Commissioner had not intervened and made the selection himself. Although there is no direct evidence of communications between the Assistant Commissioner and any local politician, and Mr. Larzo stated that the decision had been made using objective criteria, the totality of the circumstances surrounding the appointment of Mr. Watterson compels a finding that the appointment was improperly made for political reasons.

CONCLUSIONS OF LAW

1. The preponderance of the evidence establishes that Mr. Watterson was considered and appointed to the County Highway Administrator in Mason County based upon political considerations and not on the basis of merit and fitness.
2. Grievant Forbes has failed to prove he would have been selected for the position but for the intervention of Mr. White.
3. Grievant Roush has proven that as the first choice of the county selection team, he would have been awarded the position but for the improper intervention of Mr. White.

Accordingly, this grievance is **GRANTED** , and DOH is hereby **ORDERED** to place Grievant Roush into the County Highway Administrator of Mason County position effective August 16, 2001, with back pay, interest, and all benefits to which he is entitled.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: February 28, 2003

Footnote: 1

The County Maintenance Supervisor is the same position as the County Highway Administrator.