CLARENCE GUNNOE,

Grievant,

v. **DOCKET NO. 04-DOH-157**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

On September 25, 2003, Grievant Clarence Gun

noe filed a grievance against his employer, the Division of Highways ("Respondent"), claiming:

> I had been at this position for 10 months and 0998 supervision were not asked for my job performance or for applicant selected. In knowledge skills and abilities I have did [sic] all but selection does not. Selection doesn't weld or operate [any] equipment used in highway and bridge maintenance and repair.

As relief, Grievant seeks, "Back pay to Sept 16 2003 and position of Transportation Crew Supervisor I in Bridge Department ORG 0998 that was listed in Bulletin # 542 and posted May 8, 2003 through May 21, 2003."

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on July 22, 2004. Grievant was self-represented. Respondent was represented by Assistant Attorney General Barbara Baxter. The matterbecame mature for decision on September 3, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant has been employed by Respondent since November, 1997 and is currently classified as a Transportation Worker 3 (“TW3") assigned to the District Nine Bridge Construction Department.

2. As of September 14, 2003, Grievant had been assigned on a temporary basis to the position of Transportation Crew Supervisor 1 for ten months; for six months of that time his classification was upgraded, and he worked the remaining four months of that job without a temporary upgrade.

3. On May 8, 2003, Respondent posted a position opening for a Transportation Crew Supervisor 1, the same position Grievant was, at the time, filling on a temporary basis. Grievant and three other employees applied for the position. All the applicants met the minimum qualifications for the position.

4. All four applicants were interviewed by Administrative Services Manager Donald Beals, District Bridge Engineer John Elswick, and District Engineer Jim Lagos.

5. Mr. Lagos asked all the applicants the same standard set of questions, while Mr. Beals recorded the answers. Mr. Elswick observed, but did not participate.

6. After the interviews were concluded, the interview team discussed the interviews and the written applications of the candidates, and selected David Morgan onthe sole basis that he had the best supervisory experience. Mr. Beals testified that Grievant was the second choice.

7. The interview team did not contact the references listed in the applicants' applications, and did not talk to their current or past DOH supervisors.

8. Mr. Morgan had been employed by DOH since August, 2002 as a Transportation Worker II in the bridge maintenance department.

9. Mr. Morgan's application listed twenty-eight jobs he has held since February, 1973. He supervised other employees on five of those jobs, most recently one bookkeeper for four months in 1989. He supervised eleven plumbing laborers for two months in 1988, four general construction laborers from June, 1983 through February, 1985 and five laborers for seven months in 1976.

10. Grievant's application listed employment dating back to November, 1989. In all four jobs listed, Grievant listed that he supervised from one to nine employees.

DISCUSSION

In a selection case such as this, 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). His claim must be proven by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claims are more likely valid than not. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant's position is that he was better qualified and more experienced than the selected applicant. Respondent avers it made its selection based on the candidate withthe most supervisory experience, as that was the most important aspect of the job. 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 Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994). 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 Rehab. 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 & Human Res.*, 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 her judgment for that of a board of education." *Trimboli*, *supra*; *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). Respondent claims it made its decision to hire Mr. Morgan on the basis of the applicant with the most supervisory experience, because it had just lost several experienced supervisors and needed to add experience in that area. Grievant points

out that, even if that were the most important criterion, his application was still superior to Mr. Morgan's. Grievant's position is better supported by the evidence than Respondent's, whose decision does not even superficially appear to be reasonable. The interview team gave very little, if any, credence to the candidate's actual job responsibilities or qualifications vis-á-vis the other job requirements, and Grievant had more and more recent supervisory experience. Although Grievant's contention that Mr. Morgan was hired because he was the son-in-law of the supervisor who vacated the position was not proven to be anything more than rumor, Respondent's stated justification fails on its face.

Grievant had greater experience with Respondent, was already in a higher classification than Mr. Morgan, and had ten months of experience in the job that was being posted. Grievant was qualified on all the equipment and duties required for the jobs he was supervising, while Mr. Morgan was not. Grievant had no deficient performance evaluations in evidence, and he worked in a supervisory capacity over at least one employee continually for fourteen years, according to his application, which is what Respondent contends it relied on as the sole basis of its information on background experience. By contrast, Mr. Morgan had last supervised one bookkeeper for four months fourteen years *ago*. His application showed a total of two and one-half years of supervisory experience spread out over a period of twenty-seven years.

Grievant has amply met his burden of proving Respondent's decision to hire Mr. Morgan was unreasonable, arbitrary and capricious.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. 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). His claim must be proven by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his 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 Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his 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 Rehab. 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 Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998); *Ashley v. W. Va. Dep't of Health & Human Res.*, 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. 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 & Human Res.*, 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 her judgment for that of a board of education. *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*; *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

8. Respondent's decision to hire Mr. Morgan instead of Grievant was unreasonable, did not

rely on criteria intended to be considered, was explained or reached in a manner contrary to the evidence before it, and was so implausible that it cannot be ascribed to a difference of opinion.

For the foregoing reasons, this grievance is **GRANTED**. Respondent is ordered to instate Grievant in the position. Respondent is further ordered to compensate Grievant for any additional pay and benefits he would have earned from the date the position was filled.

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: September 14, 2004

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Respondent's proposals were not received until September 10, 2004 and were not reviewed prior to this decision being written.