WILLIAM ROBINSON and LARRY SMITH,

Grievants,

v v.

Docket No. 04-DOH-328

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondents.

D E C I S I O N

Grievants, William Robinson and Larry Smith, filed this grievance on or about April 1, 2004, against their employer, the Division of Highways ("DOH"). Their Statement of Grievance states:

> Racial Discrimination. I believe I have been discriminated against in violation of WV Law 29-6-20 (a) [sic] and Title VII of the Civil Rights Act of 1964, with regard to not being promoted to TW3 Equipment Operator.
>
> Relief sought: To have the position re-interviewed by persons not working in District 10, and with no personal ties to management in District 10, and to be made whole. (See footnote 1)

This grievance was denied at all lower levels. At Level III, the grievances were consolidated by agreement, as both grievances stated exactly the same thing. Grievants appealed to Level IV on September 3, 2004, and a Level IV hearing was held on October 12, 2004. At the close of the hearing, the parties agreed this grievance would become mature for decision on that date, as they did not wish to submit proposed Findings of Fact or Conclusions of Law. (See footnote 2)

Issues and Arguments

Grievants assert they were not selected for a Transportation Worker - Equipment Operator III position because of racial discrimination. While not clearly asserted in the Statement of Grievance, Grievants indicated at hearing that they were equally or more qualified than the successful applicant.

Respondent avers there was no discrimination, and the best qualified person was selected for the position. (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. On September 24, 2003, DOH posted a vacancy for a Transportation Worker - Equipment Operator III in District 10, Raleigh County. A Transportation Worker - Equipment Operator III works with heavy equipment such as a grader or excavator, and is called upon to be a crew leader when there is a need. Jeff Lilly is the Highway Administrator for Raleigh County. Three employees applied: Grievant Robinson, Grievant Smith, and Greg Morris. (See footnote 4)

2. Grievant Robinson has been employed by DOH at District 10, Raleigh County since August 3, 1998. The last four years he has been a Transportation Worker - Craftworker 2. He is an African-American. The scores for his performance evaluations forfour of the last years are: 1) 1999 - 1.91; 2) 2000 - 1.91; 3) 2002 - 1.91; 4) 2003 - 1.73. (See footnote 5) Resp. No. 5 at Level IV.

3. The scores for Grievant Robinson's performance evaluation for 2003 based on the 23 factors were: 1 "Exceeds Expectations," 15 "Meets Expectations," and 7 "Needs Improvement" resulting in an overall score of 1.71, in low range of "Meets Expectations." (See footnote 6) Grievant Robinson received the exceeds expectations rating in openness to learning and applying new skills, as he requests to attend training on additional equipment. He received "Needs Improvement" in areas of flexibility and customer service. This performance evaluation noted Grievant complains about job assignments, did not like change, had a negative attitude, wanted to pick his job assignment and equipment, did not work well with his supervisor, and did not deal well with these supervisory conflicts. Grt. No. 1 at Level IV. This performance evaluation rating was reiterated in the testimony of Mr. Lilly, and Grievant Robinson's behavior at hearing reflected Grievant Robinson's argumentative behavior. Grievant Robinson has little annual leave or sick leave accumulated.

4. Grievant Robinson has approximately six full years of experience operating heavy equipment, and some additional experience he gained working part-time and on weekends. (See footnote 7) While Grievant Robinson has not received any disciplinary actions, he has been counseled about his behavior.

5. Grievant Smith has been employed by DOH at District 10, Raleigh County since August 12, 1998, as a Transportation Worker - Equipment Operator II. He is anAfrican-American. The scores for his performance evaluations for the last five years are: 1) 1999 - 1.91; 2) 2000 - 2.21; 3) 2001 - 1.78; 4) 2002 - 2.09; 5) 2003 - 1.91. Resp. No. 4 at Level IV.

6. Grievant Smith has had several disciplinary actions filed against him during the time he has worked at DOH. These actions relate to dependability, absenteeism, and "disappearing" while at work. (See footnote 8) Grievant Smith has very little annual leave or sick leave accumulated.

7. Grievant Smith has six years of experience operating heavy equipment with DOH, and he has additional experience he gained working part-time and on weekends. Grievant Smith also drove a truck for the City of Beckley for thirteen years.

8. On his application for this position, Grievant Smith incorrectly filled out the length of time he worked for City of Beckley, and listed only three years, instead of thirteen. During the interview, Grievant Smith stated he had twenty-five years of experience operating heavy equipment. Mr. Lilly did not realize there was a conflict between Grievant Smith's statement and his application until the interview was over. He did believe Grievant Smith had worked longer than three years for the City of Beckley and had worked some with his father, but he did not know the length of this experience. (See footnote 9)

9. The successful applicant, Greg Morris, had been employed by DOH at District 10, Raleigh County since December 26, 2000, as a Transportation Worker - Equipment Operator II. He is Caucasian. The scores for his performance evaluations for the last fouryears are: 1) 2000 - 2.26; 2) 2001 - 2.30; 3) 2002 - 2.52; 4) 2003 - 2.34. Resp. No. 6 at Level IV. Mr. Morris has never had any disciplinary actions taken against him. Although employed a shorter length of time, Mr. Morris has 200 more hours of annual leave and 400 more hours of sick leave than Grievants.

10. Mr. Morris has four years of experience operating heavy equipment with DOH, and an additional eleven years of experience he gained when he was Vice President and General Manager of an excavation company. During this time he supervised employees, as well as running the equipment himself.

11. During much of the year, Mr. Morris is on loan to DISforce, the district organization that handles large projects and major flood relief. The individual in charge of DISforce is Mr. Morris' father, but Mr. Morris is not directly supervised by him. Mr. Morris works for Raleigh County during

the SRIC season. Mr. Morris' performance evaluation is done by the Raleigh County supervisors and foremen. When Mr. Morris is not there, other employees are upgraded as needed. These upgrades included Grievants.

12. During the time of his employment, Mr. Morris was allowed to obtain the four certifications for Equipment Operator III equipment. Grievants only have certifications on two pieces of Equipment Operator III equipment.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

I. Credibility

The first issue to address is credibility. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health & Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 10) See Holmes v. Bd. of Director./W. Va. State

College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra. Mr. Lilly testified at Level IV that he had a conversation with Grievant Smith shortly after the grievance was filed and the subject of racial discrimination was discussed. Mr. Lilly told Grievant Smith that he did not think there was racial discrimination, and Grievant Smith agreed, but stated this was the only way to file a grievance on the selection matter. Although Grievant Smith testified at Level IV, he did not rebut this testimony. Accordingly, it will be accepted as true.

II. Selection law

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 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 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). 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.

Grievants' 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 processhad been conducted in a proper fashion, this Board can require the employer to review the qualifications 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 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 (W. Va. 1982)." Trimboli, supra.

Additionally, although not cited by the parties, the undersigned Administrative Law Judge will take administrative notice of the guidelines which DOH is to apply when comparing candidates. See Ward v. Dep't of Transp./Div. of Highways, Docket No. 96- DOH-184 (July 24, 1997). W. Va. Code § 29-6-10(4) states:

> For promotions within the classified service 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, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, 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. . . .

(Emphasis added.)

Further, as cited in the Division of Personnel's Administrative Rules at Section 1.1 (a), "Method of Making Promotions":

> 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.

(Emphasis added).

III. Merits

Grievants argue they were not awarded the position because they are African- Americans, and DOH has discriminated against them. In this case, all three applicants were minimally qualified for the position, and it is undisputed Grievants had more seniority with DOH than the successful applicant. However, these facts alone do not necessarily make Grievants' qualifications greater than or substantially equal to the successfulapplicant's. When a grievant and a successful applicant meet the minimum qualifications for the job, but one applicant is more qualified than the grievant, the qualifications are not substantially equal, and seniority need not be considered. Mowery v. W. Va. Dep't of Natural Res., Docket No. 96-DNR-218 (May 30, 1997). "The employer retains the discretion to discern whether one candidate has superior qualifications than another, without regard to seniority as a factor." Lewis v. W. Va. Dep't of Admin., Docket No. 96- DOA-027 (June 7, 1996). See Board v. Dep't of Health & Human Res., Docket No. 99- HHR-329 (Feb. 2, 1999).

This Grievance Board has determined that it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act (W. Va. Code §§ 5-11-1, et seq.). See Bowman v. W. Va. Educational Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997); Rodak v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-536 (June 23, 1997). Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination", "favoritism", and "harassment", as those terms are defined in W. Va. Code § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over race-based discrimination claims. See Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995). The selection of a more qualified candidate based on appropriate factors would be a racially neutral determination, and would be upheld based upon the above cited selection law.

W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as, "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 theemployees." Administrative notice is taken that the West Virginia Supreme Court of Appeals recently revised the legal test for discrimination/favoritism claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme

Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 11)

> (a) that he or she has been treated differently from one or more similarly- situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievants have not met their burden of proof and demonstrated they were similarly- situated to the successful applicant. Additionally, Grievants have not demonstrated that the selection was related to racial issues instead of "actual job responsibilities."

The first issue to address is evaluation scores, and this issue applies to both Grievants. The performance evaluation scores of the successful applicant were consistently better than Grievants. Mr. Morris' scores over the four-year period ranged from a low of 2.26 to a high of 2.52. The last evaluation before the selection was 2.34. Grievant Smith's scores over the last five years ranged from a low of 1.91 to a high of 2.21. The last evaluation before the selection was 1.91. Grievant Robinson's scores over the last five years ranged from a low of 1.73 to a high of 1.91. The last evaluation before the selection was 1.73. Clearly, Mr. Morris has consistently been rated as a better performing employee as compared to Grievants.

Grievant Smith had greater seniority and several years more experience operating heavy equipment than the successful applicant, but these years of experience were not properly reflected in the application Grievant Smith filled out. Grievant Smith did not have any supervisory experience, and the successful applicant had approximately eleven years of supervisory experience. If seniority and years of heavy equipment experience were the only factors to consider, it would appear Grievant Smith should have received the position. However, this is not the case. An employer is to select the best qualified applicant for the position, and Mr. Lilly's consideration of Grievant Smith's reliability and dependability is appropriate. Mr. Lilly's consideration of Grievant Smith's past disciplinary record is also warranted, as these incidents demonstrated his lack of willingness to work and his difficulty in following rules and regulations. Even Grievant Smith agreed the section of Mr. Morris was not racially

motivated. Given this set of facts, the undersigned Administrative Law Judge can find no racial discrimination in the selection of the successful applicant over Grievant Smith.

Grievant Robinson had greater seniority with DOH, but had fewer years of operating heavy equipment than the successful applicant. Grievant Robinson, like Grievant Smith, did not have any supervisory experience, and, again, the successful applicant had approximately eleven years of supervisory experience. If seniority were the only factor to consider, it would appear Grievant Robinson could have received the position. However,that is not the case. When one applicant is more qualified than the other, the qualifications are not substantially equal, and seniority need not be considered. Mowery, supra. Here, Grievant Robinson and the successful applicant were "not substantially equal" for the position at issue. First, Grievant Robinson did not have anywhere near the experience the successful applicant had. Second, Grievant Robinson had previously demonstrated his difficulty in accepting legitimate management decisions. This difficulty had been pointed out to Grievant Robinson without any resulting change. Respondent is not required to promote an employee who does not want to accept management decisions or does not work well with others. Salmon v. Div. of Highways, Docket No. 99-DOH-384 (Apr. 25, 2000). See Sheppard and Gregory v. Dep't of Health and Human Res., Docket Nos. 97- HHR-186/187 (Dec. 29, 1997). Given this set of facts, Grievant Robinson's qualifications of were "not substantially equal" to those of the successful applicant.

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, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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 & Human Res., 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 Rehab. Serv., Docket No. 93-RS-489 (July 29, 1994).

3. Selection decisions are largely the prerogative of management. Accordingly, 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 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. If a 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 Grievance Board can require the employer to review the qualifications 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).

6. Grievants have failed to demonstrate Respondent's decision was unlawful, unreasonable, or arbitrary and capricious.

7. The Grievance Board has determined it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act (W. Va. Code §§5-11-1, et seq.), including a claim of racial discrimination, but does have authority to provide relief to employees for "discrimination", as that term is defined in W. Va. Code § 29-6A-2. See Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997); Rodak v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-536 (June 23, 1997). In other words, the Grievance Board does have subject matter jurisdiction over racially-based discrimination claims within the context of a grievance. Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

8. W. Va. Code § 29-6A-2(d) defines discrimination as, "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."

9. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals revised the legal test for discrimination claims raised under the grievance procedure statutes. A grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly- situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

10. Grievants have failed to establish a claim of racial discrimination as they did not show they were similarly situated to the successful applicant or that the decision was not based on the actual job responsibilities. Accordingly, this grievance is **DENIED**.

Any party 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 theBoard 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: February 4, 2005

Footnote: 1

Grievants sought to amend their relief sought at Level IV over Respondent's objection. Grievants now seek to be promoted to Transportation Worker - Equipment Operator III's. As there was only one job posted and two Grievants, this amendment cannot be granted.

Footnote: 2

At Level III, Grievants were represented by a co-worker, Andrew MacDonald. At Level IV, Grievants were represented by Grievant Robinson, and Respondent DOH was represented by Barbara Baxter, Esq.

Footnote: 3

The issue of training was resolved by EEO action. Because of some issues arising out of that settlement, the parties went off the record at the hearing to discuss this agreement. This issue will not be addressed further by the undersigned Administrative Law Judge.

Footnote: 4

There was an additional applicant, but he withdrew his name.

Footnote: 5

There was no explanation given for the lack of a performance evaluation for 2001.

Footnote: 6

The "Meets Expectations" range is 1.51 to 2.50.

Footnote: 7

Grievant Robinson's application contained information about his other work experience, but these did not relate to the use of heavy equipment.

Footnote: 8

Although mentioned in the testimony, the most recent disciplinary action, a suspension, occurred after the selection process was over and was not considered by the undersigned Administrative Law Judge in reaching this Decision. Resp. No. 1 at Level IV.

Footnote: 9

Grievant Smith's application did not contain any information about his work experience before his position with the City of Beckley.

Footnote: 10

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 11

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).