TONY BALL,

Grievant,

v. **Docket No. 04-DOH-423**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Tony Ball ("Grievant") initiated this proceeding on February 16, 2004, claiming he should have been temporarily upgraded as shop foreman, instead of another employee. He seeks back pay for the period of time that Charles Crouse has been serving in the upgraded position. The grievance was denied at level one on February 16, 2004, and at level two on March 26, 2004. A level three hearing was conducted on August 31, 2004, and a decision denying the grievance was issued on December 3, 2004. Grievant appealed to level four on December 10, 2004. In lieu of a level four hearing, the parties elected to submit this matter for a decision based upon the record developed below, supplemented by fact/law proposals, to be submitted by April 8, 2005. (See footnote 1) However, in conjunction with its proposals, Respondent submitted a "Motion to Supplement Evidence," accompanied by additional documents not previously introduced, including the successful applicant's application, interview records, and licenses. After determining that this additional evidence would not be prejudicial to Grievant, the undersigned allowed Grievantuntil April 29, 2005, to submit any pertinent response to the new evidence submitted by Respondent. Grievant did not do so, so this matter became mature for consideration on April 29, 2005.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") in District Four as a

Transportation Worker 3--Mechanic. He has been employed by DOH for approximately eight years. He has been described by his supervisor as a dependable employee and has received good performance evaluations.

2. Charles Crouse has been employed by DOH for approximately four years, also as a Transportation Worker 3--Mechanic. Prior to his employment with DOH, Mr. Crouse had owned his own auto repair shop for approximately 11 years and also had previous management experience. He had been a heavy equipment operator and mechanic for over 20 years.

3. Anthony Colombo, Shop Foreman for District Four, was temporarily moved out of his position in order to fill in for an employee who was on an extended leave of absence.

4. The District Four Shop is divided into two sections, the Heavy Equipment section and the Transportation Section. The Shop Foreman must have knowledge of all aspects of both sections, but the majority of the work deals with heavy equipment.

5. Although Grievant is considered a knowledgeable and dependable employee, he was not selected to temporarily fill the Shop Foreman position, because he has displayed problems with his temper in the past. Lewis Swann, District Four EquipmentSuperintendent, made the selection decision, and he believed that Grievant's temper could interfere with his ability to manage the other employees.

6. Mr. Crouse was selected for the temporary upgrade, because he was considered to be the best “all around” person for the job, based upon his knowledge, experience, and abilities.

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 (2004); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

The crux of this Grievant's claim is that seniority was not considered in the selection of temporary Shop Foreman, and that, if it had been, Grievant would have received the upgrade. However, Respondent argues that, even considering Grievant's greater seniority, he would not have been placed in this supervisory position, due to concerns regarding his temper problems.

Temporary upgrades are governed by Division of Personnel's Temporary Upgrade Policy, which

states, in pertinent part:

> C. This policy applies to both classified and classified-exempt employees who are temporarily assigned to a higher classification under the following conditions:
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> 1. To a position in an acting capacity as a result of the separation or extended leave of absence of a higher-classified employee; for a short-term project; or for an emergency situation.
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> . . .
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> F. Employees proposed for temporary upgrade shall meet, or be within 3 months of satisfying, the minimum requirements of training and experience for the position to which they will be temporarily upgraded. Any licensure requirements, however, must be satisfied at the time of the upgrade.

In arguing that his seniority and experience should have been determinative, Grievant relies on the general laws of selection for permanent, posted positions in state government, citing W. Va. Code § 29-6-10(4), which states, in pertinent part:

> 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, . . . 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[.]

Even then, seniority is merely a factor to be considered, and is not determinative, as an employer retains the discretion to select a less-senior applicant with greater qualifications. Lewis v. W. Va. Dept. of Administration, Docket No. 96-DOA-027 (June 7, 1996). As was recently held in Ferrell v. Dep't of Transp., Docket No. 04-DOH-240 (Dec. 20, 2004), an employer may determine that a less senior applicant is more qualified for the position in question on the basis of particular qualities or qualifications that it determines are specifically relevant. "The employer retains the discretion to

discern whether one candidate has superior qualifications than another, without regard to seniority as a factor." Lewis, supra. See Board v. Dep't of Health & Human Res., Docket No. 99-HHR-329 (Feb. 2, 1999). In the instant situation, Respondent determined that Mr. Crouse's previous managerial experience and numerous years of experience with heavy equipment operation and repair gave him superior skills relevant to this supervisory position. Additionally, as with selection decisions for permanent positions, Respondent's decision here must be analyzed according to the arbitrary and capricious standard. “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)).

Under the circumstances presented, the undersigned finds that it was not arbitrary and capricious for Respondent to determine that Mr. Crouse was more qualified than Grievant for the upgrade, particularly in view of Mr. Crouse's extensive experience and Grievant's history of temper problems. Accordingly, Respondent's decision must be upheld.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In a non-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 (2004); Howell v. W. Va. Dept. of Health& Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A- 6.

2. Seniority is to be considered when two employees with substantially similar or equal qualifications are being considered for the award of a benefit such as a promotion, wage increase, or transfer. W. Va. Code § 29-6-10(4).

3. Seniority is merely a factor to be considered, and is not determinative, as an employer

retains the discretion to select a less-senior applicant with greater qualifications. Lewis v. W. Va. Dept. of Administration, Docket No. 96-DOA-027 (June 7, 1996).

4. “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).

5. Grievant has failed to prove by a preponderance of the evidence that he was the most qualified employee for a temporary upgrade to Shop Foreman, or that Respondent's decision in that regard was arbitrary and capricious or contrary to any rule or statute.

Accordingly, this grievance is **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." Any such appeal must be filed within thirty (30) days of receipt of thisdecision. 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: May 9, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented at level three by James C. Paugh, and Respondent was represented by counsel, Carrie Dysart. At level four, Grievant represented himself, and Respondent was represented by Barbara Baxter, Esquire.