BARRY ALLEN,

Grievant,

v. **Docket No. 05-DOH-230**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Barry Allen ("Grievant") initiated this proceeding on January 10, 2005, challenging his non-selection for the position of Transportation Crew Supervisor 1. The grievance was denied at level one on January 18, 2005, and at level two on January 28, 2005. A level three hearing was conducted on May 6, 2005, and the grievance was denied in a decision dated June 22, 2005. Grievant appealed to level four on June 29, 2005. After appeal to level four, the parties agreed to submit this matter for a decision based upon the record developed below. (See footnote 1) This matter was assigned to the undersigned administrative law judge for a final decision on September 9, 2005.

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

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") since 1977. He is currently classified as a Transportation Crew Chief Maintenance ("TCCMain") in Mercer County.

2. In the fall of 2004, DOH posted a vacancy for the position of Transportation Crew Supervisor 1 ("TCS1").

3. Grievant and four other applicants were interviewed for the TCS1 position.

4. Interviews were conducted by Eugene Tuckwiller, Highway Engineer, and Art Hodges, Highway Administrator. All applicants were asked identical questions.

5. At the conclusion of the interviews, both Mr. Tuckwiller and Mr. Hodges agreed that Eddy

Kessler was the best person for the position.

6. Prior to the interviews, Grievant and Mr. Kessler were both given the opportunity to temporarily work in the TCS1 position, so that their supervisory skills could be observed.

7. Like Grievant, Mr. Kessler had been classified as a TCCMain for several years, a position which entails leading, training, and supervising other workers. Mr. Kessler also had over 30 years of experience in road construction and maintenance.

8. The decision to select Mr. Kessler was based upon his application, interview, his work as acting supervisor, and his past work with DOH. Specifically with regard to Mr. Kessler's work as acting supervisor, he was eager and willing to accept responsibility and act independently, maintained a positive attitude, and organized the work and the schedule well. Also, he provided clear direction to the employees he supervised, and they responded well to his supervision. 9. Grievant's performance evaluations for 2003 and 2004 noted that, as a supervisor, he needed “to take more initiative in making decisions on the job.”

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. 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)). Without any arguments to review in this case, the undersigned is somewhat uncertain as to Grievant's reasoning as to why he should have been selected for the position, other than his

alleged superior qualifications. However, it must be mentioned that,when employees are equally qualified, employers are urged to consider the relative seniority of the applicants. See W. Va. Code § 29-6-10(4). 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. Dep't 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).

When a supervisory position is at stake, it is appropriate for an employer to consider factors such as the appropriate personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. See Ball v. Dep't of Transp., Docket No. 04-DOH-423 (May 9, 2005). Under the circumstances presented, Mr. Kessler's demonstrated success in supervising employees while serving in this position, along with concerns regarding Grievant's inability to take initiative and make decisions, were valid considerations in selecting Mr. Kessler. Respondent's decision cannot be found to have been arbitrary and capricious or an abuse of discretion.

The following conclusions of law support this Decision.

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. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 2. Selection decisions 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)).

3. 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. Lewis v. W. Va. Dep't of Administration, Docket No. 96-DOA-027 (June 7, 1996); Ferrell v. Dep't of Transp., Docket No. 04-DOH-240 (Dec. 20, 2004). See Board v. Dep't of Health & Human Res., Docket No. 99-HHR-329 (Feb. 2, 1999). 4. Respondent's selection of Eddy Kessler for the position in question cannot be found to be arbitrary and capricious or an abuse of discretion.

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 West Virginia Code section 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 23, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented in this case by counsel, J.W. Feuchtenberger, and Respondent was represented at level three by counsel, Carrie Dysart. The parties did not file written fact/law proposals.