MARK JEFFREY MILLER,

Grievant,

v. **DOCKET NO. 05-DOH-021**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant filed this grievance on August 13, 2004, stating, "Supervised District 2 Equipment Storeroom from Nov. 2001-April 2003. Applied for position when posted in Jan. 2003. Position awarded to another applicant who in the 15+ months since has shown little ability to perform his duties in accordance with policy and procedure." His stated relief sought is "To be awarded the Supervisor 2 position for the District 2 Equipment Storeroom with back pay."

A level four hearing was held in the Grievance Board's Charleston office on April 19 and August 17, 2005. Grievant was represented by counsel, Andrew Katz, and Respondent was represented by counsel, Barbara Baxter. The matter became mature for decision on November 4, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant's position tests the theory that a job applicant who has performed a particular job for an amount of time renders one more qualified to perform the job than an applicant who is a stranger to the position. Grievant also contends the managers interviewing for the position favored a friend over himself. His argument also appears tourge the undersigned to determine who would have been the better supervisor, based on hindsight. (See footnote 2) Respondent asserted at the level four hearing, for the first time, that the grievance was untimely, and alternatively contends it selected the most qualified applicant.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent in District 2 as a Storekeeper 3.

2. Grievant was temporarily upgraded to the position of Supervisor 2 from July 1, 2002 to April 1, 2003, prior to the filling of the position on a permanent basis. The Supervisor position was for the Storeroom in which Grievant already worked.

3. The Supervisor 2 position was posted on January 17, 2003, and there were three applicants, including Grievant and Jimmy Dickerson, the successful applicant. The third applicant, Claude Gore, withdrew his application after the interviews. 4. James Roberts, Administrative Services Manager for District 2, and George Colegrove, Highway Equipment Supervisor for District 2, interviewed all three applicants using the same set of questions and interview format.

5. Based on the applications, interviews, and their prior knowledge of the applicants, Messrs. Roberts and Colegrove recommended Mr. Dickerson for the position.

6. Grievant's application indicated he has been employed by Respondent in various capacities since August 1992. He listed about 16 months of supervisory experience, although he had never performed supervisory duties such as evaluations and employee discipline.

7. Mr. Dickerson was employed by Respondent in District 2 from August 1979 to February 1992 as a Highway Equipment Supervisor. Since 1992, Mr. Dickerson had been employed as a Materials Technician for a construction company in Huntington, (See footnote 3) where he had no supervisory duties. His duties in his job at the time were listed as:

> Code and enter into computer system all information contained on ST-1 documents and make distribution as required. Process all ST-1 documents for distribution as required. Research and enter contents on T-702's into computer system and prepare for MCS&T to assign T-7 number and forward to assigned projects for their records. Check for accuracy and enter into computer system for pre-certification all Stats [sic] projects and all line item used to complete required work.

8. Mssrs. Roberts and Colegrove, as part of their evaluative process, completed a matrix of qualifications for the applicants. Subjectively comparing Grievant and Mr. Dickerson, they rated each as follows on their matrices:

Qualification	Grievant	Mr. Dickerson
Education	Meets	Exceeds
Relevant Experience	Meets	Exceeds
Possess Knowledge, Skills and Abilities	Meets	Exceeds
Interpersonal Skills	Meets	Meets
Flexibility/Adaptability	Meets	Meets

Presentability	Meets	Meets
Optional Measures (Specify)	No Rating	No Rating
Overall Evaluation	Meets	Exceeds

9. The Division of Personnel Classification Specification for Supervisor 2 reads, in part, as follows:

Nature of Work

Under general supervision, performs full performance supervisory work overseeing a section of employees engaged in technical work requiring advanced training. Work is reviewed by superiors through results produced or obtained in meetings. May represent the agency before committees and the general public. Performs related work as required.

. . .

Knowledge, Skills and Abilities

Knowledge of office methods and procedures; investigative procedures and techniques or technical specialty practice and methods.

Knowledge of departmental plans or procedures.

Ability to apply and instruct others in the application of governing laws, rules, and regulations.

Ability to make composite detailed reports based on individual reports of subordinates.

Ability to communicate effectively in oral and written form.

Ability to plan, assign, and coordinate the work of employees engaged in duties of a technical nature or field inspection work.

Minimum Qualifications

Training:

Graduation from an accredited four-year college or university.

Substitution:

Additional experience as described below may be substituted for the required training on a year-for-year basis.

Experience:

Two years of full-time or equivalent part-time paid experience in the area of assignment, one year of which must have been in an administrative or supervisory capacity.

Substitution:

Successfully completed graduate study in the area of assignment from an accredited four-year college or university may be substituted on a year-for-year basis, not to include the year of supervisory or administrative experience.

10. Neither Grievant nor Mr. Dickerson met the minimum qualification for “Training” without counting additional experience as a substitution. Counting such experience, both exceeded this qualification.

11. Both Grievant and Mr. Dickerson exceeded the minimum experience requirement for the position.

12. Mr. Colegrove has known Mr. Dickerson for a long time and is friends with him. He did not learn anything new about Mr. Dickerson at the interview, except maybe specifics about his prior college credit. He worked with Mr. Dickerson when he was employed with Respondent, and was Grievant's supervisor. Mr. Roberts has been friends with Mr. Dickerson for about twenty years, and admits he likes him more than he likes Grievant.

13. Mr. Colegrove identified some problems with Grievant when he was working the Supervisor 2 position in a temporary capacity, and communicated these problems to Mr. Roberts as they were discussing the candidates. 14. Due to the passage of time, Mr. Colegrove did not have a clear recollection of the problems Grievant had during his tenure as a temporary Supervisor 2, but he maintained some handwritten notes that memorialized:

1 * inventory not completed in time for audit

2 * complaint from a county garage that had trouble getting needed tires

3 * needed tires and motor oil not in stock

4 * bill from June 2002 unpaid in August, needed air filters not in stock

5 * Grievant needed extra overtime due to failure to delegate tasks to supervisees during regular hours

6 *

parts orders not sent in on time, paint not ordered after being told to do so, unpaid bills after multiple reminders

7 * garage door left open overnight (oral warning given)

8 * complaint from county that parts orders weren't being filled by district storeroom

9 * failure to cooperate with other shops in use of a lift, and defiance in face of order to do so

15. Neither Mr. Roberts nor Mr. Colegrove gave any consideration to the fact that Mr. Dickerson had not worked for Respondent in any capacity for thirteen years.

16. Mr. Roberts never observed either applicant on the job and had no first-hand knowledge of their performance.

17. Grievant is married to Mr. Colegrove's ex-wife.

Discussion

Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97-42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997). West Virginia Code § 29-6A-3(a)(2) provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing [sic]." Respondent contends this greivancewas untimely filed, a fact that appears to be self-evident based on the statement of grievance itself. However, Respondent asserted this defense for the first time at the level four hearing. Its failure to timely raise this issue is grounds for rejection of the defense.

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *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.* 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 Rehabilitation 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.* 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. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "While asearching 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 [the employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997)*; Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Both Mr. Colegrove and Mr. Roberts justified their decision to hire Mr. Dickerson by reference to his prior service with Respondent, his supervisory experience, and his interpersonal skills. However, their inaccurate completion of their own evaluation matrices bespeaks, as Grievant suggests, at least some measure of unreliability in their judgment, if not outright deception, as to their actual reasons for their selection. There is no basis in fact for the interviewers to rate, on their non-gradient scale, Mr. Dickerson higher than Grievant in the area of education and relevant experience relative to the job requirements. There is no evidence that Mr. Colegrove exceeds the knowledge, skill and ability requirements. However, it is also questionable that Grievant even met the minimum experience requirement, yet he was rated as meeting it. As Mr. Colegrove pointed out, the rating must have been based on Grievant's application, which listed about 16 months of supervisory experience, when in fact he had none.

While Respondent argues, quite properly, that valuable relevant experience can be gained working for other employers, neither interviewer cited Mr. Dickerson's outside employment as a significant influence on their choice. Mr. Dickerson's application described his then-current job in nearly indecipherable terms, and although it is possible he explained the relevance of his duties to the desired job, none of the interviewer's notes make mention of the fact. Both of the interviewers

cite Mr. Dickerson's prior service to the state as a major factor, but quite unreasonably gave no weight to the fact it had been over ten years since he last worked for Respondent. In comparing interview performance, neither seemed to credit the fact that, with Mr. Dickerson, they were interviewing a good friend, while with Grievant, there was some actual personal hostility between him and Mr. Colegrove. On the other hand, Grievant had demonstrated whether he had the ability to perform the job satisfactorily, and Respondent reasonably considered the problems he had in doing so as indicators that he might not be able to satisfactorily fill the role in the future.

Concerning those problems, Grievant introduced evidence at level four that Mr. Dickerson had similar difficulties since he began working in the position, but had not been similarly counseled by Mr. Colegrove. As stated above, this after-the-fact evidence was given no weight in this decision. However, Grievant argued in part that Mr. Colegrove's failure to counsel or discipline Mr. Dickerson for the same acts he faulted Grievant for, impeaches his assertion that these were, in fact, problems worthy of consideration. Specifically, Mr. Dickerson testified that a garage door was left open overnight on his watch, and nothing was said to him about it, unlike the warning given to Grievant. Nevertheless, I cannot conclude that this event did not warrant the warning _ if anything, it reinforces the point that Mr. Colegrove and Mr. Dickerson are friends and that Mr. Dickerson gets favored treatment, but that point is already well established.

Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Grievant did not meet his burden of proof. Even though a number of irregularities in the hiring process are evident, there is not enough evidence toconclude Grievant was the better candidate for the job. The successful candidate had extensive relevant experience in the type of work, experience supervising, and a positive prior experience with the employer. Grievant had not demonstrated a notable capacity to perform the functions of the job, and no actual supervisory experience, although he was eminently familiar with the job and the work systems of the employer. Without a clear indicator that Respondent had overlooked outstanding elements of Grievant's qualifications, the undersigned cannot second guess the management decision made.

The following conclusions of law support this discussion:

Conclusions of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97- 42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997). West Virginia Code § 29-6A-3(a)(2) provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing [sic]."

2. Respondent waived the timeliness defense by failing to assert this grievance was untimely at or before the level two conference.

3. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan.22, 1996); *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.*

4. 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).

5. 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.* 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. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (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 was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997)*; Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. 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*

Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). 5. Grievant failed to meet his burden of proving Respondent's employment decision was arbitrary and capricious. Although he did prove significant flaws in the selection process, he did not prove he was the better candidate for the job.

For the foregoing reasons, this grievance is hereby **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, and such appeal must be filed within thirty 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.

November 28, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

After having requested additional time to do so, neither party filed proposals.

Footnote: 2

For purposes of this decision, evidence of the successful applicant's performance in the job since he was hired is deemed irrelevant, and was not considered. Contrariwise, Grievant's performance in the position as a temporary appointee prior to the hiring decision is relevant, and was considered.

Footnote: 3

His application incorrectly lists "WVDOT" as the name of his employer.