THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JACK FISHEL,

Grievant,

v. **Docket No. 06-DOH-233** (See footnote 1)

Sue Keller

Senior Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Jack Fishel ("Grievant"), employed by the Division of Highways ("DOH") as a Transportation Crew Chief, filed a level one grievance on October 19, 2005, challenging his non-selection for the position of Highway Administrator 2 in Grant County. Grievant filed a second grievance on April 27, 2006, after he was not selected as Highway Administrator 2 in Hardy County. The relief requested in both grievances was "to be made whole in every way." The grievances were both denied at all lower levels. Upon appeal to level four, the grievances were consolidated for decision. Grievant's representatives, Don Gordon and Shabnaum Q. Amjad, AFSCME, and DOH counsel Barbara L. Baxter, agreed to submit the grievance for decision at level four based upon the lower-level records. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before December 8, 2006.

The following facts have been derived from a preponderance of the credible evidence admitted into the lower-level records.

Findings of Fact

1. Grievant has been employed by DOH since December 1975, and has held the classification

of Transportation Crew Chief - Maintenance, at the Mt. Storm sub-station for approximately twenty-three years. As Crew Chief, Grievant supervises ten regular employees as well as summer workers. He is responsible for various administrative duties involving personnel, budget, and equipment at his substation. Grievant had also functioned as a co-county administrator, under the supervision of the Maintenance Assistant, during a period of time the position was vacant.

2. On May 2, 2005, DOH posted a vacancy report for the position of Highway Administrator 2 for Grant County. This position functions as the county-wide administrator and is responsible for directing and implementing the schedule maintenance program within an annual budget, ensuring maximum utilization of equipment, personnel and materials, and responding to citizen complaints.

3. Seven applicants who met the minimum qualifications for the position were interviewed on August 30, 2005, by then-Acting District Engineer Robert A. Amtower, DOH Personnel Specialist Associate Leslie Staggers, and William R. Bennett, Regional Maintenance Engineer.

4. Each candidate was posed a standard series of questions during the interview. Afterward, the committee evaluated the individual as “does not meet,” “meets,” or “exceeds,” in the categories of: education; experience; knowledge, skills & abilities; flexibility/adaptability; and presentability. The candidate was then given an overall evaluation. 5. Grievant was rated as “meets” in all the categories and as his overall evaluation.

6. Based on the unanimous recommendation of the interview committee, the successful applicant was Asa Kisamore, Jr., an individual not previously employed by DOH. Mr. Kisamore had extensive experience supervising employees in his capacity as job superintendent for a plumbing, heating and air conditioning company, and in his capacity as crew leader for an excavating and trucking company. Mr. Kisamore had also had previous experience as a boilermaker and welder. In his various capacities, he had been responsible for coordinating building functions, reading blueprints, ordering supplies, and working within a budget. His experience also included building and grading roads, maintaining and operating construction equipment, and maintaining quality control, meeting federal safety standards, and serving as customer service representative.

7. The DOH interview committee rated Mr. Kisamore as “meets” in all areas, with the exception of experience in which he was ranked as “exceeds.” Overall, Mr. Kisamore was ranked as “meets.”

8. Mr. Kisamore was recommended by the interview committee based on their determination that he was the best qualified candidate for the position. This decision was based on his past

experience, excellent recommendations, and his performance during the interview in which he better articulated his knowledge, skill, and ability to accomplish the responsibilities of the position. By comparison, while Grievant had a significant amount of experience with DOH, he did not impress the committee with his responses, and while Mr. Amtower rated his performance as crew chief acceptable, he also noted that Grievanthad experienced problems in various areas, and opined that he could not satisfactorily complete the duties of a county administrator.

9. On August 17, 2005, DOH posted a vacancy for the position of Highway Administrator 2 for Hardy County. The duties of this position are identical to those of the Grant County posting, as set forth above.

10. Three applicants, including Grievant were interviewed on October 5, 2006, by Mr. Amtower and Ms. Staggers. Again, they were posed standard questions, and were rated as “does not meet,” “meets,” or “exceeds” in the areas of education, experience, knowledge, interpersonal skills, flexibility, and presentability. All three candidates were rated as “meets” in all categories.

11. The committee recommended Jonah Nazelrod for the position. Mr. Nazelrod had been Acting Highway Administrator 2 since June 2005, and had performed the duties exceptionally well. He had over twenty-three years of management experience in highways and related work, and experience working with customers and local officials.

12. Mr. Nazelrod declined the position, citing the increase in salary as inadequate for the increased responsibilities.

13. The position was then offered to, and accepted by, William Robinette in March 2006. Mr. Robinette has been employed by DOH since July 1987, and has worked as a bridge inspector, a Transportation Worker 3 crew member, a supervisor of a bridge maintenance crew, and manager of the Maintenance Section of the District Bridge Organization. Mr. Robinette additionally had gained experience in the repair and maintenance of airfield runways while on active duty with the Air National Guard. 14. Mr. Robinette was recommended for the position based upon his interview performance during which he impressed the committee with his vision of what needed to be done in Hardy County. By contrast, Grievant's attitude was that he should have the job based on his years of service.

Issues and Arguments

Grievant argues that the decision to hire Mr. Kisamore was arbitrary and capricious because he

was the more qualified applicant, and the required regulations in applying for the position were not followed. Grievant argues that the decision to hire Mr. Robinette was also arbitrary and capricious because he was more qualified, and because improper factors such as enthusiasm were applied. DOH asserts that the best qualified applicant was selected for both positions.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim 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."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).

In matters of non-selection for state employees, the grievance process is not intended to be a "super interview," but rather, serves as 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).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985). 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 [the employer]." *Blake v.*

Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

Grievant asserts that he is more qualified than either of the two successful applicants based upon his years of service and experience. Although Grievant has been employed by DOH for more years, that fact alone does not make him more qualified to successfully fulfill the duties of another position. While it is also true that Grievant'sexperience as a substation supervisor, with some limited responsibility as a co-county administrator, is an excellent background, the testimony of Mr. Amtower was that there have been problems. In short, while Grievant meets the expectations of his current position, his performance has not been such that his supervisors believed he could manage the entire county system. Had Grievant been found equally qualified with either of the successful applicants, his seniority would have given him the edge for the positions; however, the committee members all testified that he was not equally qualified.

Grievant also argues that the committee applied improper standards, *i.e.*, enthusiasm, when recommending the candidates. Grievant offers no authority for his argument. Generally, a factor such as enthusiasm may be considered as it offers some indication of the applicant's true interest in the position. Further, the candidates were not simply enthusiastic, they also discussed how and what they might do in the counties to advance the goals of DOH.

Grievant's claim that DOH erred when checking Mr. Kisamore's references, but not his own, is without merit. Mr. Kisamore's references were checked because he was not, and had never been, an employee of DOH. Grievant, however, had been an employee for approximately thirty years, and checking any prior references would not have been worthwhile since his work record was well known to DOH's administrators.

Finally, Grievant suggests that Mr. Kisamore's application may not have been timely filed. This assertion is based on the fact that Mr. Kisamore did not date his application, and there is no date stamp indicating when it was received by DOH. Grievant offered no evidence to support this claim.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law in support of this decision.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim 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 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).

3. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985). 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).

4. Grievant has failed to prove that he was more qualified than either of the successful applicants, or that the selection decision was arbitrary and capricious. 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 the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: DECEMBER 15, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

This grievance was consolidated with another level four grievance which had been assigned the Docket No. 06-DOH-316.