CHARLENE PULLEN,

Grievant,

v. **Docket No. 06-DOH-121**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Charlene Pullen ("Grievant") initiated this proceeding on February 7, 2006, challenging her non-selection for two Highway Administrator 4 positions. She alleges "pre- job bid selection, sexual discrimination and favoritism." After denials at the lower levels, Grievant appealed to level four on April 3, 2006. Subsequently, the parties agreed to submit this grievance for a decision based upon the lower level record. Grievant represented herself in this matter, and Respondent was represented by Robert Miller, Esquire, at level three, and by Barbara Baxter, Esquire, at level four. This grievance became mature for consideration on June 30, 2006, the deadline for submission of the parties' fact/law proposals.

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

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") since 1978. Her positions with DOH have been:

1978-1988: Stenographer, office assistant, complaints investigator, and equipment analyst

1988-1995: Analyst and I-64 office assistant

1995-1997: Analyst and area maintenance assistant

1997-2000: Transportation Engineering Technician Trainee

2000-2002: Transportation Engineering Technician Trainee,
in construction inspection

2002-present: Supervisor, I-64 headquarters

2. In November and December of 2005, Respondent posted vacancies for two positions to serve as Area Maintenance Assistant in District 2. In order to attract a wide variety of applicants, these positions were posted as Highway Administrator 4, Transportation Engineering Technologist and Highway Engineer 3. (See footnote 1) The Maintenance Assistants are responsible for all maintenance operations for at least two counties, involving overseeing all work performed, including materials, human resources, and equipment required.

3. Grievant applied for both vacancies and was interviewed.

4. Eleven individuals applied for one of the positions, and eight people applied for the other.

5. Interviews were conducted for these positions on January 18, 19, and 20, 2006. The interview committee consisted of Robert Pennington, Construction Engineer for District 2, and Dave Bevins, Maintenance Engineer for the district.

6. All interviewees were asked a set of written questions from a prepared checklist, and the interviewers rated them as “does not meet,” “meets,” or “exceeds” ineach of the designated categories of qualifications. The determinations of how to rate the applicants in each category were made after the interviews, during a discussion between Mr. Pennington and Mr. Bevins, who discussed their impressions and agreed upon which ratings to give.

7. James Roberts and Phillip Manley were chosen to fill the two positions.

8. Mr. Roberts began employment with DOH in 1964 as an “instrument man” on a survey crew. He left West Virginia from 1971 to 1977 and worked as a supervisor and field engineer for a construction company in South Carolina. Mr. Roberts returned to DOH in 1977 as a Maintenance Assistant for three counties, where he worked for the next 21 years. From 1998 to 2001, he was responsible for reviewing and monitoring the work of contractors and also worked with FEMA on flood recovery projects. Since 2001, Mr. Roberts had been Administrative Service Manager for District 2, and he was responsible for all personnel matters in the district.

9. In October of 2005, while still performing his duties as Administrative Service Manager, Mr.

Roberts was appointed to be the temporary Maintenance Assistant for Corridor G, Logan and Mingo Counties. Two Maintenance Assistants positions in District 2 had become vacant due to the death of one individual, and the temporary absence of another due to an injury.

10. Mr. Roberts was selected for one of the vacant Maintenance Assistant positions because of his extensive experience with highway maintenance, numerous years supervising employees and dealing with personnel matters, and his previous experience as a Maintenance Assistant. 11. Mr. Manley has been employed by DOH since 1983. He was a member of the U.S. Naval Reserve from 1968 to 1999, supervising various construction projects throughout the world. When he first came to work for DOH, he was a laborer for ten years. In 1993, he became the assistant supervisor of the Medley Fork Bridge project on I-64. In 1994 and 1995, he worked as an inspector on the Corridor G project and on the Holden Bridge. He became a project supervisor in 1994, working for five years supervising the “Five Block Bridge” project in Logan County, along with a drainage project. Since 1999, Mr. Manley had been the Resurfacing Coordinator for all of District 2.

12. In early November of 2005, Mr. Manley was appointed as temporary Maintenance Assistant for Lincoln and Mingo Counties. He was also appointed as temporary Wayne County Supervisor in January of 2006.

13. Mr. Manley was selected for one of the Area Maintenance Assistant positions because of his demonstrated leadership and vision, and also because of his effectiveness in dealing with people, addressing public expectations and accountability.

14. The interviewers based their decision on experience and their impressions of the applicants during the interviews, placing great importance on communication and interpersonal skills, which are extremely important for a Maintenance Assistant, who must deal with the public, superiors at the district level, and the many levels of workers in each county they supervise.

Discussion

Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claims are more likely valid thannot. *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 her 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 Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

Grievant contends that the two successful applicants were “pre-selected,” the application process was not followed, applicants were not asked the exact same questions, and the selections were based on favoritism toward the successful applicants.

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 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 HumanResources*, Docket No. 93-HHR-322 (June 27, 1997)*; Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Grievant has argued that the documents submitted indicate that the successful applicants may have only applied for one posting or the other, and that there was confusion regarding who applied for which position. However, Grievant's evidence on this point is quite confusing and, unfortunately, does not support her contentions. The required applications were submitted and reviewed by the interview committee, and the interview checklists clearly show that Grievant, Mr. Roberts, and Mr. Manley, along with several others, were interviewed and considered for both positions. The positions were properly posted, applications were submitted, and proper interviews were conducted. The undersigned cannot find that the application process was improper in this case.

As to the questions asked during the interview, Mr. Pennington testified that the prepared set of questions was asked of each and every applicant. However, as happens during a question-and-answer session, some applicants would answer four questions with one answer, and specific follow-

up questions may have been asked in other cases, depending on answers given. Interviewing is far from an exact science, and the most important consideration is whether all applicants were asked the same questions from a prepared checklist, which was done in this case. There is no indication from the evidence that any particular interview question gave a successful applicant any particular advantage.

As to pre-selection, Grievant believes that this is evidenced by some indicators that Mr. Roberts may have submitted his application before the postings were made. However, since Mr. Roberts' job at that time was dealing with all personnel matters for the district, it is only logical that he would have known about the postings before they actuallyappeared. Nevertheless, there is no evidence that Mr. Roberts influenced his own selection or received special treatment with regard to this selection process.

"'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." (See footnote 2) To prevail in a claim for favoritism under W. Va. Code § 29-6A-2(h), a grievant must show by a preponderance of the evidence that:

> (a) one or more appositely similarly-situated employee(s) have been granted preferential, exceptional or advantageous treatment that the grievant has not; and
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees;

If the employees have differing job responsibilities that justify the difference in treatment, then they are not similarly-situated. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the favoritism. *Sheets v. Dep't of Transp.*, Docket No. 05-DOH-366 (March 10, 2006); *See Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

In this case, it is virtually impossible to find that Grievant and the successful applicants are similarly situated, because they all have different qualifications and job experiences. In addition, the "preferential treatment" here is being selected to fill a position, which happens in every selection

case. As to unfairness, Respondent has selected two highly qualified individuals to fill the position at issue, so it cannot be found that Grievant's non-selection was unfair. Mr. Roberts' 42 years of experience with DOH,let alone his numerous years serving as a maintenance assistant and personnel manager, make his qualifications unquestionable. Although Grievant has more experience with DOH than Mr. Manley, he has numerous years of experience as a supervisor and impressed the interviewers with his interpersonal skills. As this Grievance Board has held many times, 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. *Allen v. Dep't of Transp.*, Docket No. 05- DOH-230 (Sept. 23, 2005); *See Ball v. Dep't of Transp.*, Docket No. 04-DOH-423 (May 9, 2005).

The evidence presented does not prove that Respondent's selection decisions were arbitrary and capricious, clearly wrong, or the result of favoritism. The following conclusions of law support this decision.

Conclusions of Law

1. Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claims are 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).

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. 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)).

4. To prevail in a claim for favoritism under W. Va. Code § 29-6A-2(h), a grievant must show by

a preponderance of the evidence that:

(a) one or more appositely similarly-situated employee(s) have been granted preferential, exceptional or advantageous treatment that the grievant has not; and

(b) that the different treatment is not related to the actual job responsibilities of the employees;

If the employees have differing job responsibilities that justify the difference in treatment, then they are not similarly-situated. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the favoritism. *Sheets v. Dep't of Transp.*, Docket No. 05-DOH-366 (March 10, 2006)*; See Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

5. Grievant has failed to prove that Respondent's selection decisions were arbitrary and capricious, clearly wrong, or the result of favoritism.

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 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: August 2, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

However, it appears that the successful applicants were actually classified as Highway Administrator 4, although this is not crystal clear in the record.

Footnote: 2

W. Va. Code § 29-6A-2(h).