DAVID WORRELL and
KEVIN DUNFORD,

Grievants,

v. **Docket No. 05-DOH-241**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

This matter was brought directly to level four on July 14, 2005, by David Worrell and Kevin Dunford ("Grievants"), challenging the selection process for the position of Transportation Crew Chief, Buildings and Trades, for District 10. This action arose from a previous grievance in which the level three grievance evaluator ordered the Division of Highways ("DOH") to "select an impartial and neutral committee to conduct interviews from the pool of individuals who previously applied and select an individual for the position Transportation Crew Chief, Building & Trades" ("TCC"). Once the interviews were repeated and the successful applicant had been determined, pursuant to the previous agreement of the parties, Grievants filed this matter directly at level four, again challenging the selection process for this particular position.

A level four hearing was conducted in Beckley, West Virginia, and in Charleston, West Virginia, on November 17, 2005, and December 19, 2005, respectively. Due to the resignation of the previously-assigned administrative law judge, this matter was reassigned to the undersigned on January 23, 2006. This grievance became mature for consideration upon receipt of the parties' fact/law proposals on February 2, 2006.[1]

Pursuant to my review of the entire record, including the recordings of the level four hearing in this matter, I find the following material facts have been proven by a preponderance of the evidence:

Findings of Fact

1. In late September of 2003, DOH posted a vacancy for the position of TCC (Buildings and Grounds Supervisor) in District 10. Grievants, William Johnson, and Samuel Gardner applied for the position and were interviewed. The interview committee selected Mr. Gardner to fill the position.

2. Grievants and Mr. Johnson filed a grievance challenging the selection of Mr. Gardner. At level three, in a decision dated March 23, 2005, the grievance evaluator found that the selection process was flawed and ordered DOH to appoint an "impartial and neutral interview committee" to reassess the applicants for the TCC position.

3. Pursuant to the level three order, a new interview committee was selected by Jeff Black, Director of Human Resources. The new interviewers were Lee Thorne, Maintenance Engineer from District 3, and Kenneth Cross, Administrative Services

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[1]Grievant Worrell was represented by counsel, J.W. Feuchtenberger; Grievant Dunford was represented by counsel, Kenneth E. Chittum; and DOH was represented by counsel, Barbara Baxter.

Manager for District 8. They were advised prior to the interviews to conduct their deliberations based solely on the applications and interviews and not to seek any information regarding the previous selection.

4. Mr. Gardner continued to serve in the TCC position while the second selection process was conducted.

5. Prior to the interviews, Mr. Thorne and Mr. Cross were provided with the applications of all the applicants, the job description, and Grievant Worrell's performance evaluations. The other applicants' evaluations were provided at a later time, prior to the selection decision.

6. Grievant Worrell has been employed by DOH since October of 1992, most recently classified as a Transportation Worker 3 ("TW3") in the Buildings and Grounds ("B&G") section for District 10. Prior to his employment with DOH, he had worked as a carpenter for various employers since at least 1985 and has over 30 years of construction experience.

7. Grievant Dunford has been employed by DOH since 1993. He was initially employed as an equipment shop mechanic for three years, but since that time has been assigned to B&G for District 10 as a TW3. Prior to his DOH employment, Grievant Dunford worked for approximately 10 years for various employers as an auto mechanic, including more than eight years as a mechanic supervisor. He also was an equipment mechanic for the West Virginia National Guard for approximately six years.

8. Samuel Gardner has been employed by DOH since March of 2002, and had been a TW3 in the B&G section for District 10 since July 1, 2003. After joining B&G, Mr.

Gardner began handling all P-Card transactions,[2] including reconciling the account, and handled vendor bids and purchase orders. Prior to his DOH employment, Mr. Gardner worked in maintenance for the City of Richmond for 13 years, both in a wastewater treatment plant and in floodwall maintenance. For approximately six of those years, he was the supervisor of six to fifteen maintenance employees and "supervised" a mechanic's helper for seven years. He was also a maintenance supervisor for approximately one year for an entity which performed service and repair to mechanical and electrical equipment used by Federal Express. Mr. Gardner had also completed over three years, or 93 credit hours, in an Industrial Technology degree program.

9. Thomas Bailey, who was the B&G Supervisor for District 10 for over 22 years, wrote a letter of recommendation for Grievant Dunford, stating that he had the most expertise of all the B&G workers in all phases of buildings and grounds and had "earned his chance" to be supervisor for the division.

10. Evaluations submitted for Grievants and Mr. Gardner for 2004 indicated that all received a "meets expectations" rating. Evaluations for Grievant Worrell for 2000 and 2001 revealed that Mr. Bailey rated him as "exceeds expectations" in every single category, giving him an overall perfect evaluation score both years.

11. During the interviews conducted on May 26, 2005, all applicants were asked identical questions by the interviewers, who took brief notes showing each applicants' response to each question.

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[2]The P-Card is a state-issued credit card which is used by employees for the exclusive purpose of purchasing materials and supplies to be used by state agencies.

12. One of the interview questions was "[w]hat do you see as different about this job compared to the one you have now?" While responding to this question, Mr. Gardner inadvertently informed the interviewers that he was currently serving in the TCC position.

13. TCC is a supervisory position which is required to schedule projects, determine equipment and materials needed, assign work, and complete and maintain records and reports. The individual in this position must have the ability to plan work and lead crews, along with maintaining effective working relationships. No formal education is required. *See* Transportation Crew Chief Classification Specification, Division of Personnel website.

14. The interviewers recommended Mr. Gardner for the TCC position, based upon his interpersonal skills--as evidenced by his relaxed manner and thorough responses during the interview, his education, and his years of supervision of maintenance employees.

Discussion

Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their 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). If the evidence supports both sides equally, then Grievants have not met their 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).

Grievants contend that DOH ignored their greater seniority and experience in selecting Mr. Gardner for the position at issue. They also argue that, because this position requires no specific education, it was improper for the interviewers to select Mr. Gardner because of his college credit hours. Similarly, Grievants believe that it was inappropriate for Mr. Gardner's "interpersonal skills" to form a basis for his selection, alleging that there is no such requirement or qualification for a TCC.

_____As to seniority, W. Va. Code § 29-6-10(4) 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[.]

Grievants contend that their qualifications were at least equal to, if not greater than, those of Mr. Gardner, requiring DOH to hire one of the more senior employees. However, even when applicants are equally qualified, seniority is merely a factor to be considered, and is not determinative. An employer also 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 discussed 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).

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 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).

In the instant case, there can be no dispute that DOH was presented with at least three extremely qualified applicants, each having numerous years of experience in maintenance and/or construction. However, as explained by Mr. Thorne and Mr. Cross in their level four testimony, Mr. Gardner impressed them the most with his excellent interpersonal skills, his greater education, and his supervisory experience in the

maintenance field. Although Grievant Dunford has maintained that his own supervisory experience exceeds that of Mr. Gardner, the interviewers believed that Mr. Gardner's supervisory experience was more relevant, due to his supervision of maintenance workers, while Grievant Dunford's was in the auto mechanics area. As set forth above, as long as the qualifications are relevant to the position at issue, it is not an abuse of Respondent's discretion to determine that an applicant's qualifications in a particular area are more important than those of other applicants. *See Ferrell*, *supra*.

It is also within the employer's discretion to determine that, due to the greater qualifications of the less senior applicant, seniority will not govern the selection decision. 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). In this case, Mr. Gardner's interpersonal skills and demonstrated experience supervising maintenance employees was appropriate for consideration and provided proper reasons for his selection for this position. In addition, his education, although not a required qualification, and his computer skills were deemed by the interview committee to be relevant and helpful to one serving in this type of position, which cannot be found to be an abuse of DOH's ample discretion in selection cases.

The following conclusions of law support this decision.

Conclusions of Law

1. Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their 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. 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).

3. 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).

4. 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)).

5. "The employer retains the discretion to discern whether one candidate has superior qualifications than another, without regard to seniority as a factor." *Lewis v. W. Va. Dept. of Administration*, Docket No. 96-DOA-027 (June 7, 1996); *See Board v. Dep't of Health & Human Res.*, Docket No. 99-HHR-329 (Feb. 2, 1999).

6. Grievants have failed to prove that the selection at issue was arbitrary and capricious or an abuse of Respondent's discretion in such cases.

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: February 22, 2006

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DENISE M. SPATAFORE
Administrative Law Judge