EDWARD MATTHEW TUTTLE,

Grievant,

v. **Docket No. 05-DOH-298**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Edward "Matt" Tuttle ("Grievant") initiated this proceeding on February 15, 2005, alleging he should have been selected for a truck driver position. After denials at the lower levels, Grievant appealed to level four on August 18, 2005. A hearing was held in Elkins, West Virginia, on November 30, 2005. Grievant was represented by counsel, Kelly Reed, and Respondent was represented by Carry Dysart, Esquire, at level three, and by Krista Duncan, Esquire, at level four. This matter became mature for consideration upon receipt of the parties' fact/law proposals on January 20, 2006.

The following material facts have been proven by a preponderance of the evidence adduced at the level three and level four hearings.

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH"), Equipment Division, since February of 2002, as a truck driver. He is assigned to the warehouse, and his job duties consist of delivering parts for equipment to various DOH facilities. Grievant usually drives a truck with a "box" trailer attached. 2. Prior to beginning employment with DOH, Grievant worked in several different truck driver positions, starting in 1995. This included two years driving a box trailer for a lumber company, one year driving a coal (dump) truck, 10 months driving a chemical tanker truck, and three years in a position which entailed driving a tanker truck and also hauling heavy equipment (which included backhoes and bulldozers).

3. In December of 2004, DOH posted a vacancy for a Transportation Worker 3, Equipment Operator, specifically to operate a “low boy” tractor trailer. The purpose of the position would be to travel around the country, picking up and delivering large equipment, such as bulldozers and cranes. The low boy trailer is a specific trailer that is made to be raised and lowered for loading and unloading large equipment, and to carry oversize loads. The individual placed in this position would be required to operate the tractor trailer, along with any equipment hauled, and he would sometimes travel overnight.

4. Grievant and several other individuals applied for the position, and ten people were interviewed by Robert Andrew, Director of the Equipment Division, and Bill Hefner, Equipment Shop Supervisor. All of the applicants were asked identical questions.

5. Mike Felton was selected for the position. He is the son of Charles Felton, who was the Acting Assistant Commissioner of DOH at the time this decision was made.

6. Mike Felton had worked as a truck driver and equipment operator for various entities since 1992. Since 1993, all of Mr. Felton's truck driving experience had consisted of driving low boy, tanker and other types of tractor trailers to the 48 states and Canada, hauling oversized equipment. Since 1996, while sometimes working for other companies, Mr. Felton also was self-employed, driving his own tractor trailer and hauling large equipment, such as bulldozers and backhoes, all over the country. 7. There is no evidence of record that either Mr. Andrew or Mr. Hefner discussed Mr. Felton's application with the Assistant Commissioner.

8. Mr. Hefner had a series of negative experiences with Grievant, while Grievant was helping haul cars that had been part of the state's vehicle fleet. During a trip to Beckley, Grievant's truck got stuck in a snowy, crowded equipment yard and suffered very minor damage. The parties present on that occasion disagreed as to whether or not Grievant mishandled the truck or handled the situation correctly.

9. On another occasion, Grievant and Mr. Hefner had a misunderstanding regarding delivery of cars to Berkeley Springs, when Grievant left early without advising Mr. Hefner, because he also had to make a parts delivery that day. Mr. Hefner had decided not to have the other truck drivers make the trip, and he believed Grievant was insubordinate when he went ahead on his own. As it turned out, there was no ramp to unload the cars at Berkeley Springs, so Grievant and other DOH employees fashioned one out of rocks, which potentially could have damaged the vehicles. The

record indicates that there was some confusion between Grievant and Mr. Hefner as to whether Grievant knew there was a ramp for this purpose at Belington, where Mr. Hefner directed Grievant to deliver the cars when he decided not to send the other drivers. Grievant went on to Berkeley Springs, thinking there was no loading ramp at Belington, leading Mr. Hefner to believe Grievant disobeyed his orders.

10. Because Mr. Hefner believed that Grievant had a tendency to “do what he wanted” and not follow orders, he did not believe Grievant was suited to the low boy truck driver position, which would entail a great deal of unsupervised work and extensive independent travel. 11. Aside from the incidents involving the car deliveries, Mr. Hefner had not interacted directly with Grievant while he has been employed at DOH and was not his supervisor.

12. Grievant was not the interviewers' second choice for this position.

13. While employed at DOH, Grievant has received favorable evaluations; his direct supervisor believes he is a good employee who performs his job as directed.

14. Grievant received correspondence from Mr. Andrew on January 28, 2005, informing him that “another applicant” had been selected to fill the position.

15. On February 1 or 2, 2005, Grievant confirmed that Mr. Felton had been placed in the truck driver position.

16. Grievant initiated this grievance on February 15, 2005, alleging he should have been placed in the position instead of Mr. Felton.

Discussion

As a preliminary issue, Respondent contends that this grievance was untimely filed. 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). A grievance must be filed with the immediate supervisor of the grievant “[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .” W. Va. Code § 29-6A-4(a). There is no question that Grievant's filing on February 15, 2005, was more than 10

working days after his receipt of Mr. Andrew's letter on January 28, 2005. However, Grievant contends that he did not “discover” the grievable event, i.e., that Mr. Felton was the successful applicant, until February 2, 2005, making his filing timely. As held by this Grievance Board in Shay v. Monongalia County Board of Education, Docket No. 01-30-024 (July 23, 2001), in a non-selection grievance, an employee is obligated to file his or her claim within the applicable statutory time period after being informed that he/she has not been selected for the position. In that case, it was determined that Grievant's investigation, spanning several months, of the reasons as to why she was not selected, did not toll the statutory timelines.

In the instant case, Grievant's evidence and arguments have focused chiefly upon the reasons why he should have been selected for the position at issue, his own qualifications, and his allegations that Mr. Hefner's alleged “bias” against him was unfounded. Accordingly, the undersigned finds that Grievant was obligated to file this grievance regarding his non-selection within 10 days of being informed of that event, so this grievance was untimely filed. Nevertheless, the undersigned believes that a brief discussion of the merits of this case would be beneficial to all parties.

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 aselection 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).

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).

Applying these principles, it is simply impossible to conclude that DOH's selection of Mr. Felton was unreasonable under the circumstances, and it cannot be second guessed by the undersigned. The unrefuted evidence in this case established that Mr. Felton had been performing the duties required of this position, i.e. driving a “low boy”tractor trailer across the country hauling heavy equipment, consistently for the past 13 years. Grievant, on the other hand, while an experienced truck driver, had far less experience of this type. Moreover, although Grievant has alleged that Mr. Felton's hiring was the result of improper influence from his father, there is simply no evidence in the record to support this allegation, aside from the fact that they are father and son. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg*, Docket No.97-BOT-359 (Apr. 30, 1998); *See Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995). Mr. Felton's extensive qualifications for the position speak for themselves and cannot be disputed. Accordingly, Grievant has failed to prove by a preponderance of the evidence that DOH's decision was arbitrary and capricious or clearly wrong.

The following conclusions of law support this decision.

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).

2. A grievance must be filed with the immediate supervisor of the grievant “[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or withinten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .” W. Va. Code § 29-6A-4(a).

3. Grievant did not file this grievance within ten working days of the grievable event.

Accordingly, this grievance is **DISMISSED** as untimely filed.

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 1, 2006

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DENISE M. SPATAFORE

Administrative Law Judge