WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JAMES W. MCKINNEY, et al.,

Grievants,

v.

Docket No. 2008-0316-CONS

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION, DIVISION OF HIGHWAYS,

Respondent,

and

PAUL FACEMIRE,

Intervenor.

DECISION

This grievance was filed on July 10, 2007, by James W. McKinney, Ronald Arnett, Oran Morris, and James Haugh against their employer, Respondent, West Virginia Department of Transportation, Division of Highways ("DOH"). Grievants protest their non- selection for the position of Transportation Crew Supervisor 1, and request a re-posting of the position with a fair and objective selection process.

A Level I hearing was convened, however, due to the hearing evaluator's failure to record testimony, it was of no use. Grievants' Motion for Appeal to Level III was filed on July 23, 2007. This Board issued an Order providing the Grievants with the option of participating in a rescheduled Level I hearing convened by DOH in order to record the hearing or proceeding to Level II for mediation. Grievants opted to proceed to mediation. Following unsuccessful mediation, this grievance was

noticed for a Level III hearing to be conducted in the Board's Charleston office on November 15, 2007. By Order entered on November 13, 2007, Paul Facemire was granted intervenor status following his request made on November 8, 2007. Grievants were represented by Gordon Simmons, WestVirginia Public Workers Union, and Omanda Mitchell. Respondent was represented by Carrie A. Dysart, Esq. This case became mature for decision on December 11, 2007, following receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievants were applicants for the position of Transportation Crew Supervisor 1 posted on March 26, 2007. (See footnote 1) Paul Facemire, the successful applicant, had been a DOH employee since February 7, 2005. Grievants have more service time with DOH than Mr. Facemire, and raised the issue of seniority as a determining factor in the selection process. In addition, Grievants assert that the selection process was arbitrary and capricious or clearly wrong.

Mr. Facemire demonstrated to DOH interviewers through his prior work experience, his DOH experience, and his interview that he possessed the requisite qualifications for the position. In fact, Mr. Facemire exceeded Grievants in the criteria considered by DOH in the selection of a Transportation Crew Supervisor 1. Nothing suggests Grievants were equally qualified to the successful applicant so that seniority should have been used to make the hiring decision. Respondent provided a verifiable, objective basis for identifying Intervenor, Paul Facemire, as the best fit for Transportation Crew Supervisor 1. In relying on the qualifications intended to be considered, and in explaining the hiring decision in a manner consistent with applicants' experience, it cannot be said that Respondent's actions were arbitrary and capricious or clearly wrong.

After a detailed review of the record in its entirety, the undersigned AdministrativeLaw Judge makes the following Findings of Facts.

Findings of Fact

1. Grievant James W. McKinney, at the time the grievance was filed, had been employed by the DOH since January 1986. He is currently classified as a Transportation Worker II, Equipment Operator.

2. Grievant Ronald Arnett, at the time the grievance was filed, had been employed by the DOH since September 1992. He is currently classified as a Transportation Worker II, Equipment Operator.

3. Grievant Oran Morris, at the time the grievance was filed, had been employed by the DOH

since January 2001. He is currently classified as a Transportation Worker II, Equipment Operator.

4. Grievant James Hughes, at the time the grievance was filed, had been employed by the DOH since October 1999. He is currently classified as a Transportation Worker II, Equipment Operator.

5. Intervenor Paul Facemire, the successful applicant, at the time the grievance was filed, had been employed by the DOH since February 2005. Mr. Facemire has held the position of Transportation Crew Supervisor 1 since June 16, 2007. Prior to being hired for that position, Mr. Facemire held the position of Transportation Worker II, Equipment Operator.

6. The Transportation Crew Supervisor 1 position was posted in the West Virginia Department of Transportation Weekly Vacancy Bulletin on March 26, 2007, and the posting period closed on April 9, 2007. 7. Paul Facemire, Oran Morris, Ronald Arnett, and James McKinney were interviewed for the position. James Hugh was not interviewed because his application was not received by April 9, 2007.

8. Harry Griffith, Highway Administrator II, and Debbie Fransworth, Administrative Services Manager, conducted the interviews of all candidates.

9. All candidates submitted the standard DOH Application for Examination, which was subsequently reviewed by the interviewers. All candidates were asked the same questions during their interviews, each candidate was given an opportunity to ask questions during the interview, and each candidate spent the same amount of time in their respective interviews.

10. All of the candidates were rated by the interviewers in categories relating to their qualifications. The categories included education, relevant experience, knowledge, skills and abilities, interpersonal skills, flexibility, and presentation.

11. The specifications for Transportation Crew Supervisor 1 states:

Nature of Work

Under limited supervision, an employee in this class supervises one or more crews and participates in the maintenance and repair or highways, or the maintenance, repair, renovation or construction of bridges. May be exposed to hazardous working conditions and inclement weather. This position functions as a working supervisor. Performs related work as required.

Distinguishing Characteristics

Supervisory responsibility includes supervision of one or more crews. It is distinguished from the

Transportation Crew Supervisor 2 in that the higher level is responsible for supervision of an expressway maintenance organization or multiple bridge repair crews.

Examples of Work Assists in the scheduling of maintenance or repair projects for a specific time period; assigns duties to crew members; coordinates equipment; and determines materials needed on the projects.
Participates in the maintenance work performed while overseeing and checking the progress and quality of work performed by the crews through direct observation.
Completes records of time, equipment, and materials and incorporates into reports of individual projects.
Identifies equipment for repairs through review of employee records.
Checks complaints on roads and inspects highways to determine repair work needed.
Assigns bridge crew members to various tasks and leads crew in the completion of the project.
Participates in a crew performing maintenance, renovation, repair or the construction of bridges such as: concrete form construction, structural steel placement and repair, pouring concrete, installing and repairing guardrails.
Climbs high steel structures to inspect the repair of damaged metal bridge components.
Oversees the progress and checks the quality of work performed by crew.
Completes a daily report on the assigned project and submits to supervisor.
Trains crew members on individual tasks of maintenance and repair projects.

12. Intervenor Paul Facemire distinguished himself as the best fit for the position on numerous fronts. His experience had been in the area of repair and maintenance of vehicles and equipment. He had supervised numerous employees during the course of his past work experience, and supervised the use of parts and inventory from suppliers. He owned his own business, and coordinated the purchase of equipment, purchase orders, and shop work orders. He was a well-represented person, and exceeded expectations in education, knowledge and skills, and flexibility.

13. Grievant Ronald Arnett had difficulty complying with new policies and directives. By his own admission, he reported he needed a change to his attitude from the past when handling conflict. Accordingly, DOH was concerned about his ability to act in a supervisory role.

14. Grievant James McKinney represented that he possessed more than twenty years of

supervisory experience. Questioning of the employer listed in the applicationrevealed that a substantial amount of this time of supervisory experience could not be verified.

15. Grievant Oran Morris represented in his interview that he was “bossy” and had only applied for the position to receive a pay increase. In addition, because of the clear lack of leadership skills, he was not qualified for a supervisory position.

Discussion

Unsuccessful applicants, such as Grievants, who grieve their non-selection for a posted position bear the burden of proving, by a preponderance of the evidence, that the employer “violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision.” *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005). “The generally accepted meaning of preponderance of the evidence is 'more likely than not.'” *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).

As previously noted, it is well-established that the Grievance Board's job is not to engage in the selection process but rather to conduct a “review of the legal sufficiency of the selection process.” *Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). In conducting such review, the Grievance Board has consistently held that “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.” *Jordan*, *supra*.

All Grievants appear to be minimally qualified for the position, and it is undisputed that Grievants possess more years of service with DOH than the successful applicant. However, these facts alone do not necessarily make Grievants' qualifications greater than or substantially equal to the successful applicant's. The Grievance Board has previously determined that “[a]n 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.” *Allen v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-230 (Sept. 23, 2005); *Ferrell v. Dep't of Transp.*, Docket No. 04-DOH-240 (Dec. 20, 2004).

Here, Grievants' qualifications and the successful applicant's were not substantially equal for the position at issue. The successful applicant possessed more supervisory experience and leadership qualifications. The successful applicant possessed experience in the area of repair and maintenance

of vehicles and equipment. The successful applicant supervised numerous employees during the course of his past work experience, and supervised the use of parts and inventory from suppliers. The successful applicant owned his own business, and coordinated the purchase of equipment, purchase orders, and shop work orders. The successful applicant is a well-represented person, and exceeded expectations in education, knowledge and skills, and flexibility. Because of his DOH experience, the successful applicant participated in the maintenance and repair of highways. Once again, the successful applicant did have experience in supervision and none of the Grievants shared that experience. It is clear that the successful applicant was more qualified for the position.

In addition, Respondent provided a verifiable, objective basis for identifying Intervenor, Paul Facemire, as the best fit for the Transportation Crew Supervisor 1. Inrelying on the qualifications intended to be considered, and in explaining the hiring decision in a manner consistent with applicants' experience, it cannot be said that Respondent's actions were arbitrary and capricious or clearly wrong. The evidence in this grievance reflects a selection process, while not perfect, properly based on objective criteria such as demonstrated ability, work history, education, and performance. While the successful applicant's supervision experience was not exclusive to DOH, Respondent felt it was relevant experience which was superior to Grievants'. Therefore, Grievants' seniority was not a determining factor in the selection of the successful applicant.

The following Conclusions of Law are appropriate in this matter.

Conclusions of Law

1. Unsuccessful applicants, such as Grievants, who grieve their non-selection for a posted position bear the burden of proving, by a preponderance of the evidence, that the employer “violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision.” *Workman v. Div. of Corr.*, Docket No. 04-CARR-384 (Feb. 28, 2005). “The generally accepted meaning of preponderance of the evidence is 'more likely than not.'” *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).

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. It is well-recognized that “selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary andcapricious behavior, such selection

decisions will generally not be overturned." *Jordan v. Dep't of Transp.*, Docket No. 04-DOH-202 (Jan. 26, 2005). Therefore, in a selection case, such as this, a grievant "must prove by a preponderance of the evidence that the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CARR-384 (Feb. 28, 2005).

4. An action is recognized as "arbitrary and capricious when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996). "Arbitrary is further defined as being 'synonymous with bad faith or failure to exercise honest judgment.'" *Jenkins-Martin v. Bureau of Employment Programs/Charleston Job Serv.*, Docket No. 98-BEP-285 (Sept. 24, 1998).

5. Grievants failed to establish by a preponderance of the evidence that they were the best qualified applicants for the position at issue.

6. Grievants failed to establish by a preponderance of the evidence that DOH acted in an unlawful, unreasonable or arbitrary and capricious manner in selecting Mr. Facemire for the position of Transportation Crew Supervisor I.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. The appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealingparty is required by the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board, effective December 27, 2007, at . 6.19 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County.

December 27, 2007

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

The posted position was Transportation Crew Chief Maintenance, however, that classification was subsequently renamed Transportation Crew Supervisor 1. The two titles were used interchangeably throughout this grievance.