THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

BILLY PRATER,

Grievant,

v. **Docket No. 06-DOH-424**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent,

and

RICHARD BURKE,

Intervenor.

D E C I S I O N

Billy Prater ("Grievant"), employed by the Division of Highways ("DOH") as a Transportation Worker 3, filed a level one grievance on May 5, 2006, in which he alleged discrimination and favoritism resulting in his nonselection for the position of Transportation Crew Chief. For relief, he requests instatement, and to be made whole. The grievance was denied at levels one and two. Following an evidentiary hearing at level three, the grievance was granted, and DOH ordered to select neutral parties to interview Grievant and Intervenor, and to recommend a selection for the position. The committee was further directed not to consider the 2005 performance evaluations or any records of significant occurrence for either applicant. Grievant filed a level four appeal on November 14, 2006. Grievant's counsel, Timothy Conaway, and DOH counsel Barbara Baxter agreed to waive a level four hearing and submit the case for decision based on the lower-level record. Proposed findings of fact and conclusions of law were filed by the parties on March 1, 2007. On March 19, 2007, Richard Burke advised the Grievance Board that he wishedto Intervene in this matter. Representing himself, Intervenor filed a written position statement, with attachments, on May

24, 2007. A conference call was conducted on June 29, 2007, to address a referenced settlement allegedly entered into between Intervenor and DOH regarding the position. DOH counsel confirmed by e-mail dated July 3, 2007, that to her knowledge “no settlement was entered into between Mr. Burke and the DOH regarding the position of TCC Main.” Intervenor did not respond to this information, and the grievance became mature for decision.

The following facts have been derived from a preponderance of the credible evidence made a part of the level three record.

Findings of Fact

1. Grievant has been employed by DOH since March 28, 1990, and has been classified as a Transportation Worker 3 - Equipment Operator in District Two, Mingo County, at all times pertinent to this grievance.

2. Intervenor has been employed by DOH since October 8, 1993, and was classified as a Transportation Worker 3 - Equipment Operator until he was temporarily upgraded to Transportation Crew Chief 2, from July 16, 2005, until March 1, 2006.

3. On September 7, 2005, the Mingo County Democratic Executive Committee wrote to then-DOH Assistant Commissioner Chuck Felton, stating that the Committee, along with Chairman H. Truman Chafin, and Mingo County Administrator Norman Stepp, were recommending Intervenor for the position of Highway Administrator 1, and another individual for the position of Equipment Operator 3. These recommendations were not implemented by DOH. 4. Beginning on September 28, 2005, Mr. Stepp began completing Record of Significant Occurrence forms, describing incidents which indicated a decline in Grievant's performance. Those reports stated: 9/28/05 On 09-28-05 Bill was instructed to patch holes (activity 201) at Stafford Branch (80/9). He was instructed to patch the deep holes with base asphalt because wearing course was not available to us. He was told that we would have to go back to these holes with wearing course when it was available. He first refused then stated that he would but 'He did not like it.'

11-30-05 For the months of October and November '05 we had contacted Bill several times over a reoccuring [sic] complaint about a tree that had the creek blocked and was hanging in the road on rt. 80 with no satisfaction.

5. Beginning in October 2005, Mr. Stepp began completing Record of Significant Occurrence

forms supporting performance above expectations for Intervenor. The “incidents” addressed in those documents are as follows:

10/14/05 The Mingo County Maintenance Headquarters received an audit report (No. 5022. Review No. 17) on 10-14-05. This review was performed by Tim Yearout, member of the Procedures Compliance Evaluation Section of Transportation Auditing. In this audit report he stated “[a]t the time of this review Richard Burke, an equipment operator, had been upgraded as a temporary Assistant Supervisor, and appeared to be very competent for this position.

11/13/05 Since being upgraded to Assistant Supervisor (TRCRSV) Richard has been completing our weekly maintenance schedule worksheet. He has done this in a consistent and proffessional [sic] manner. He has proven to be very competent in this upgrade.

12/30/05 Over the past several months, Richard has documented and maintained our Class 11 file as rececommended [sic] by our last audit report. This shows great initiative.

2/2/06 On 02-01-06 Richard successfully completed supervisor training (Welcome To A Drug-Free Workplace). He participated well in this training.

2/2/06 On 02-01-06 Richard successfully completed supervisor training (Preventing Harassment: A Shared Responsibility). He participated well in this training. (See footnote 1)

7. In December 2005, DOH posted a vacancy for the position of Transportation Crew Chief - Maintenance (TCC MAIN) in Mingo County. The only qualification for this position is two years of full-time or equivalent part-time experience in highway construction or highway maintenance.

8. Grievant, Intervenor, and one other individual applied for the TCC-MAIN position.

9. Mr. Stepp and James Roberts, Administrative Services Manager, conducted interviews for the three applicants on January 25, 2006.

10. Mr. Stepp presented the Record of Significant Occurrence forms and the employees' performance evaluations for the years 2003 and 2004, for Mr. Roberts to review during the interview process. The Application Evaluation Records completed by Mr. Stepp and Mr. Roberts included their 2005 evaluation scores in the “Comments” section.

11. Mr. Stepp had completed the performance ratings for both Grievant and Intervenor, rating them as follows: Grievant Intervenor

Year 2003	2.00	2.53
Year 2004	2.56	2.64
Year 2005	2.00	2.86

(See footnote 2)

12. Grievant was rated by the interviewers as "Exceeds" in the areas of Experience and Knowledge, Skills & Abilities; "Meets" in the areas of Education and Presentability; and "Does Not Meet" in the areas of Interpersonal Skills and Flexibility/Adaptablilty, for an overall rating of "Meets" qualifications. Under the comments section it was noted, "does not except [sic] change very well. Does not interact with other employees well. He looks for reasons not to do as he is instructed. Does not follow orders well. Evaluation 2.00."

13. Intervenor was rated by the interviewers as "Exceeds" in the areas of Experience, Knowledge, Skills & Abilities; Interpersonal Skills, and Flexibility/Adaptability; and "Meets" in the areas of Education and Presentability for an overall rating of "Exceeds." Comments for Intervener state that "Mr. Burke has shown great iniative [sic] and results in accomplishing the desired work in Mingo County. Audit Report # 5022 stated Mr. Burke is working as a temp. Asst. Supervisor and appears to be very competent for this position. Evaluation 2.86 highest of all applicants.

14. When the position was not yet filled on March 15, 2006, Intervenor filed a level one grievance asserting that he was the most qualified applicant, and that the failure to appoint him to the position was politically motivated and discriminatory. Acting County Administrator Phillip Manley lacked authority to grant the grievance at level one. The complaint was denied by District Manager Keith Chapman at level two. By letter dated May 23, 2006, Intervenor's attorney, Bradley J. Pyles, Esq., advised level three Hearing Examiner Brenda Craig Ellis that the grievance had been resolved. He confirmed that Grievant "has been awarded the position of TCCMAIN which was at issue in this matter.. . [and] agreed not to seek any back pay which may have accrued during the delay in awarding the position." (See footnote 3)

15. Grievant filed the present grievance on May 5, 2006, alleging discrimination and favoritism. The grievance was denied at levels one and two. Following an evidentiary hearing at level three, the grievance was granted based on a determination that the process was so significantly flawed that Grievant may have been the successful applicant if the review had been properly conducted.

16. Although DOH was ordered by the level three hearing evaluator to select neutral parties to conduct interviews of and recommend a selection for the position without consideration of their 2005

evaluation scores, or any records of significant occurrence for either applicant, Grievant elected to appeal to level four.

Discussion

Initially, the question of whether a settlement was negotiated between DOH and Intervenor regarding the TCC MAIN position must be addressed. Notwithstanding the language in Mr. Pyles' letter of May 23, 2006, DOH denies that a settlement was effectuated, and Intervenor has not produced one. In the absence of a written settlement agreement, the undersigned must review the case based on the assumption that Intervenor was selected for the position based on merit.

In a selection case it is Grievant's burden is to demonstrate the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Surbaugh v. Dep't of Health and Human Serv.*, DocketNo. 97-HHR-235 (Sept. 29, 1997). This claim must be proven by a preponderance of the evidence, which means Grievant must provide enough evidence for the undersigned to decide his claims are more likely valid than not. *Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96- DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93- HHR-322 (June 27, 1997). 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, 474S.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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Both Grievant and Intervenor assert themselves to be entitled to the TCC MAIN position. DOH's position is that Intervenor was properly awarded the position. The evidence admitted at level four does not support a conclusion that the selection was made in compliance with the *W. Va. Code* § 29-6-10(4), provision that seniority is to be thedeterminative factor in situations involving promotion

when two or more applicants are similarly qualified.

Notwithstanding the efforts of Mr. Stepp, Grievant and Intervenor are similarly qualified for the position of TCC MAIN. Mr. Stepp undeniably acted within the political arena in an effort to obtain a promotion for Intervenor in September 2005. Although there is no evidence of political maneuvering regarding the TCC MAIN position, Mr. Stepp was clearly making a continued effort to assure a promotion for Intervenor as evidenced by the Records of Significant Occurrence, which demonstrated neither poor nor superior performance by either applicant. Further, he inappropriately provided Mr. Roberts with 2005 performance evaluations which had not yet been finalized . (See footnote 4) Therefore, the order of the level three Hearing Evaluator to disregard the records of significant occurrence and the 2005 performance evaluations was reasonable. Further, the interview ratings which were determined upon reviewing this information, must also be disregarded. Mr. Stepp's participation in and of itself taints the selection process, due to his documented bias toward Intervenor.

The remaining information available for review are the 2003 and 2004 performance evaluations. Intervenor's rating was substantially higher than Grievant's in 2003, but their 2004 ratings were very similar. There is no evidence that either individual had been subject to any formal discipline in the past. Additionally, there is no evidence that either applicant excelled in knowledge or experience applicable to this particular position. Therefore, seniority would be the determinative factor as to which applicant should be awarded the position, pursuant to *W. Va. Code* § 29-6-10(4), which states in part:

[when] any benefit such as a promotion . . . is to be awarded, . . . and a choice is required between two or more employees in the classified service as to who will receive the benefit . . . , and if some or all of the eligible employees have 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[.]

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). Having established that the applicants are similarly qualified, seniority is the determinative factor for selection. Because Grievant has more seniority, awarding the position

to Intervenor was arbitrary and capricous, and contrary to *W. Va. Code* § 29-6-10(4).

In addition to the foregoing findings of fact and discussion, the following conclusions of law support this decision.

Conclusions of Law

1. In a selection case it is the Grievant's burden is to demonstrate the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. Surbaugh v. Dep't of Health and Human Serv., Docket No. 97-HHR-235 (Sept. 29, 1997).

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 action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96- DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93- HHR-322 (June 27, 1997).

4. When a choice is required between two or more similarly qualified employees in the classified service as to who will receive a benefit such as a promotion, 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[.] *W. Va. Code* § 29-6-10(4).

5. Grievant has proven by a preponderance of the evidence that the selection decision at issue was arbitrary and capricious and contrary to law.

Accordingly, this grievance is **GRANTED**, and Respondent is ORDERED to place Grievant in the TCC MAIN position, with retroactive pay, benefits, and seniority effective the date Intervenor was placed in the position.

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 ofthis decision. *W. Va. Code* § 29-6A-7

(1998)(*but see Executive Order No. 2-07*, May 8, 2007). 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 8, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *There was no indication of how Mr. Stepp was aware of this, or what Mr. Burke actually did during the session to support a conclusion that he "participated well."*

Footnote: 2

[2]The 2005 calendar year evaluations were dated January 31, 2006, nearly a week after the interviews were conducted on January 25, 2006.

Footnote: 3

[2]As previously noted, Intervenor was not represented by Mr. Pyles at level four.

Footnote: 4

[3]Although political favoritism is an improper and illegal basis for selection decisions, Mr. Stepp has an established record of engaging in such activity. See Vance v. Dep't of Transp./Div. of Highways, Docket No. 06-DOH-418 (Jan. 24, 2007).