THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

DELMER MATHENY and

JAMES NICHOLS,

Grievants,

v. DOCKET NO. 06-DOH-212

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievants filed separate but essentially identical grievances on March 29, 2005, each claiming discrimination related to the filling of a posted Transportation Crew Supervisor 2 position. Both grievances seek the position and an increase in pay. At the level four hearing, Grievants requested that the position be re-bid.

These grievances were consolidated for hearing at level four after being denied at all lower levels. A level four hearing was held in the Grievance Board's office on October 4, 2006. Grievants were represented by David Reed, and Respondent was represented by Barbara Baxter, Esq. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Synopsis

Grievants alleged the selection for a Transportation Crew Supervisor position was discriminatory and arbitrary. Respondent contended it chose the most qualified candidate, and that Mr. Nichols could not be chosen because it would result in nepotism. Grievants met their burden of proving the selection was arbitrary and capricious. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Mr. Matheny is employed by Respondent in District Three, Roane County, as a Transportation Crew Chief - Maintenance (TCC-Main). Mr. Matheny has 23 years of experience with DOH, and has been a crew leader for 18 years.

2. Mr. Nichols is also employed by Respondent in District Three, Roane County, as a TCC-Main. He has worked for DOH as a crew leader for about 18 years.

3. Respondent posted a position for a Transportation Crew Supervisor in District Three, Roane County. Grievants and Frank McQuain applied for the position. Mr. McQuain was selected to fill the position.

4. Mr. McQuain was also employed by Respondent in District Three, Roane County, as a TCC-Main. He has 9½ of experience working with DOH, and no prior highway construction or maintenance experience before that.

5. Interviews were conducted by Roane County Highway Administrator Clarence Boggs, and District Three Administrative Services Manager Debbie Farnsworth.

6. In addition to the application materials, Mr. Boggs & Ms. Farnsworth relied on their personal knowledge of the applicants' abilities, insofar as they knew of or had observed them. They did not check references.

7. Ms. Farnsworth had little personal experience working with any of the candidates, and relied on Mr. Bogg's opinion as to who he wanted to hire. 8. Mr. Nichols' brother also works in District 3 Maintenance running a grader, and would be under his supervision if he were placed in the position.

Discussion

As a preliminary matter, Mr. Nichols asserted at the level four hearing that a default had occurred in his grievance at level three. After the level three hearing, he was informed that the recording was defective and could not be transcribed, so a decision could not be issued unless the parties conducted a second hearing. Grievant was provided the transcript of the second, which was then made a part of the record in this case. However, at the level four hearing, Respondent cited to the transcript of the first hearing, and had a copy at the hearing. Upon discovery of the existence of the “missing” transcript that was made from the purportedly unintelligible recording, Grievants'

representative asserted that a default had occurred when no decision followed in the allowable time after the first level three hearing. However, as this grievance is granted, the issue of default is moot at this time.

In a selection case, a grievant must prove, by a preponderance of the evidence, that he was the most qualified applicant for the position in question. *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). Grievants believe Mr. Boggs, who made the selection for the position, showed bias and exhibited favoritism in choosing Mr. McQuain. 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 Rehabilitation 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 v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994). 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 [his] 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).

Certainly during the level three hearings, Mr. Boggs was evasive and non-specific in answering questions about how, in particular, Mr. McQuain's qualifications exceeded the other applicants'. When directly questioned as to why he believed Mr. McQuain exceeded expectations in the areas of his knowledge, skills, and abilities, and his interpersonal skills all he could or would answer was that he could use the computer. When Mr. McQuain was asked at the hearing whether he could use a computer, he himself answered “No, not very well, I can get by.” He also stated Mr. McQuain was

versatile, flexible and adaptable, because he did everything he was asked. He neveraddressed whether he asked Grievants to do similar things, but it was apparent he tends to rely more on Mr. McQuain to help out with some administrative tasks.

Mr. Boggs' testimony carries little credibility. He would not give a straight answer to a simple question, but usually just made a non-responsive statement that supported his decision. He testified that he and Ms. Farnsworth had equal input into the decision, but she had no personal knowledge of the candidates' qualifications. She testified that she discussed the candidates with Mr. Boggs, but relied on what he said and told her about them, because she did not observe their work. She did know that Mr. McQuain used the computer during SRIC season and sometime answered emails to Mr. Boggs, but she had no knowledge of Mr. Matheny's or Mr. Nichols' computer skills. While Mr. Boggs testified that he and Ms. Farnsworth had about equal input into the selection decision, Ms. Farnsworth testified that Mr. Boggs had about 90% input and she had about 10%. Ms. Farnsworth testified that all she knew about Mr. Matheny was what Mr. Boggs said, and that she knew Mr. Boggs “got along better” with Mr. McQuain.

The preponderance of the evidence suggest Mr. Boggs put little effort into the selection for this position, and instead of relying on a comparison of the data before him, he simply chose the man he was most familiar with and worked most with, then attempted to justify his decision *post facto.* There was no meaningful interview, and no meaningful analysis of the candidate's qualifications. Although he stated he made his decision on the basis of computer use, that is the one subject he did not ask any of the candidates about in the interviews.

Grievants have met their burden of proving the selection in this matter was arbitrary and capricious. However, Grievants have not proven who was the most qualified candidate. It is therefore ordered that Respondent re-post the position, making it open to any qualified applicant, andthen select the most qualified applicant based on a fair comparison of demonstrated experience, qualifications and abilities.

The issue of nepotism was raised as a bar to Mr. Nichols' placement in the position in question. The Division of Personnel ("DOP") adopted a Nepotism Policy in its Administrative Rule, (See footnote 1) which states:

> No appointing authority shall influence or attempt to influence the employment or working conditions of his or her immediate family. It is the responsibility of the appointing authority to administer the employment of relatives of any agency employee in a consistent and impartial manner.

> No employee shall directly supervise a member of his or her immediate family. More specifically, no employee shall review or audit the work of a member of his or her immediate family, or take part in discussions concerning employment, assignment, compensation, discipline or related matters involving a member of his or her immediate family. In the event that an individual, through marriage, adoption, etc. is placed in a prohibited business relationship with a member of his or her immediate family, the situation shall be resolved within thirty calendar days. *Resolution may be made by transfer, reassignment, resignation, etc. of one of the involved employees or by other accommodation which protects the interests of the public.*

[Emphasis supplied.] While placing Mr. Nichols in the management position would result in a situation where he would supervise his family member, that in itself is not an absolute bar to his selection. Respondent may place him in the position if he is found to be the most qualified, and then within thirty days take steps to ensure Mr. Nichols is not involved in the prohibited activities related to his brother.

The following conclusions of law support this discussion:

Conclusions of Law

1. 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 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.*

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. 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.*

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. "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 [his] 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).

6. Respondent's selection for the Transportation Crew Supervisor position at issue in this matter was made in an arbitrary and capricious manner.

7. The Division of Personnel Administrative Rule, 143 C.S.R. 1, prohibits nepotism, but is not an absolute bar to selecting the most qualified applicant for a position when that selection would violate the rule against nepotism. The appointing authority may resolve the prohibited organizational structure by means that protect the public interest.

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is ORDERED to re-post the position, making it open to any qualified applicant, and then select the most qualified applicant based on a fair comparison of demonstrated experience, qualifications and abilities.

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, and such appeal must be filed within thirty 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.

January 31, 2007

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

143 W. Va. C.S.R. 1.