THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

JOSEPH VANCE,

Grievant,

v. **Docket No. 06-DOH-418**

Denise M. Spatafore

Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Joseph Vance ("Grievant") initiated this grievance on March 30, 2006, alleging he should have been selected for a Transportation Worker 3 -- Equipment Operator position. The grievance was denied at level one on March 31, 2006, and at level two on April 5, 2006. A level three hearing was held on August 2, 2006, and the grievance was granted in a decision dated November 8, 2006. In that decision, Hearing Examiner Brenda Craig Ellis ordered Respondent to select a new interview committee to conduct interviews of Grievant and the successful applicant, and that certain factors used in the previous selection decision not be considered. Grievant appealed that decision to level four on November 13, 2006, seeking placement in the position. Once at level four, the parties elected to submit this matter for a decision based upon the record developed below, accompanied by fact/law proposals, which were received by the undersigned on December 22, 2006. The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") in District Two, Mingo County, as a Transportation Worker 2 -- Equipment Operator ("TW2"). He was first employed by DOH for approximately two and a half years between 1992 and 1994, then returned to his employment with DOH in January of 2000.

2. Grievant has performed a variety of duties for DOH, including truck driver, loader operator, grader operator, loader man, and backhoe operator. He has worked often as a crew leader, and he has certifications for grader and backhoe. Grievant also has training and experience in gasoline and diesel engine repair. 3. On September 7, 2006, the Mingo County Democratic Executive Committee wrote a letter to Chuck Felton, DOH Assistant Commissioner, stating, in part:

> The Mingo County Democratic Executive Committee members, along with Chairman H. Truman Chafin, and Norman Stepp, WV Dept. of Highways Administrator, would like to highly recommend two Williamson area [DOH] employees be considered for upgrading in their ranking within the agency. These two employees, Mr. Richard Burke and Mr. Billy Jack Parsley, display admirable work ethics and leadership in their daily performance. The committee feels upgrading these men respectively, Mr. Burke to Highway Administrator 1, and Mr. Parsley to Equipment Operator 3, would be a valuable asset to the WV Department of Highways and to the Mingo County area.

4. In December of 2005, Mr. Stepp, who is the administrator for Mingo County, reprimanded Grievant for not performing his mowing duties, even though Mr. Stepp knew there were mechanical problems with the mower. After it was confirmed by other employees that the mower was not working properly, Mr. Stepp was forced to rescind the reprimand.

5. Grievant's performance evaluation score for 2003 was 2.26, but he did not receive a rating for 2004. Mr. Stepp evaluated him in January of 2006, giving him an overall rating for 2005 of 1.86.

6. Billy Parsley was employed by DOH as a TW2--Equipment Operator since August of 2000. His only certification was on a track excavator, and no other DOH employees have ever seen him operate a grader.

7. Mr. Parsley's evaluation scores for 2003 and 2004 were 2.14 and 2.17, respectively. Mr. Stepp also evaluated Mr. Parsley in January of 2006, giving him an overall evaluation score of 2.60. 8. In February of 2006, a TW3 -- Equipment Operator position was posted in Mingo County.

9. The classification specification for TW3 states that the employee must operate a variety of equipment, including graders and backhoes, and perform repairs on equipment, including diesel engines.

10. Because Mr. Stepp was temporarily assigned to another county, interviews were conducted by Phillip Manley and David Bevins on March 13, 2006.

11. Both Grievant and Mr. Parsley were evaluated by the interviewers as “meets” requirements in each of eight categories contained on an application form used during the interviews. However, Grievant was not recommended for the position because of his low evaluation score, and because of the written reprimand he received “for not doing his duty in mowing operations.” Resp. Ex. 3, Level III.

12. Mr. Manley also testified that a factor in not hiring Grievant was his low leave balance, as compared to Mr. Parsley. However, the interviewers did not inquire of Grievant as to the reason for his high leave usage, which was caused by the illness and subsequent death of his mother due to Lou Gehrig's disease.

Discussion

In this case, Grievant alleges that the promotion should clearly have been his, rather than being awarded to an applicant whom he believes was less qualified, had less seniority, and was the beneficiary of improper political influence. 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). This claim must be proven by a preponderance of the evidence, which means Grievant must provide enough evidence for the undersigned Administrative Law Judge 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).

In matters of non-selection for state employees, the grievance process is not intended to be a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv*., Docket No. 93-RS-489 (July 29, 1994). Unless proven arbitrary or capricious or clearly wrong, an agency's decision regarding promotion/selection will be upheld. *Ashley v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-070 (June 2, 1995).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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, 474 S.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)). "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 herjudgment for that of [the employer]." *Trimboli, supra; Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

W. Va. Code § 29-6A-2 (h) defines "favoritism" as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." To prevail in a claim for favoritism under *W. Va. Code* § 29-6A-2(h), a grievant must show by a preponderance of the evidence that:

(a) one or more appositely similarly-situated employee(s) have been granted preferential, exceptional or advantageous treatment that the grievant has not; and,

(b) that the different treatment is not related to the actual job responsibilities of the employees;

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

In cases of proven political favoritism, this Grievance Board has determined that this is an improper and illegal basis for selection decisions. *Akers v. W. Va. Dep't of Health,* 188 W. Va. 698, 425 S.E.2d 840 (1992) and *W. Va. Code* § 29-6-4(e). *See also Lowther v. W. Va. Dep't of Transp.*, Docket No. 01-DOH-589 (Mar. 27, 2002), *aff'd* Cir. Ct. of Kanawha Cty. Case No. 02-AA-55 (July 27, 2003)(Posted position of Braxton County Maintenance Supervisor was improperly filled on a temporary basis based upon political patronage, and not upon fitness and merit). In selection cases where political motivation is alleged, the grievant must offer sufficient evidence to permit a finding that the selection was substantially motivated by political considerations. *Coleman v. Dep't of Health*

and Human Res., Docket No. 03-HHR-318 (Jan. 27, 2004). The requisite political motivation, as with any state of mind, can be proven by circumstantial evidence, as it is commonly theonly kind available for this purpose. *Mercer v. W. Va. Dep.'t of Highways*, Docket No. 01- DOH-604 (Mar. 20, 2002); *Wiley v. W. Va. Dep't of Highways*, Docket No. 99-DOH-109 (Aug. 3, 1999).

In this case, the political influence regarding Mr. Parsley's selection was so brazen that circumstantial evidence is not necessary. Before the position was even posted, the county democratic committee, along with Mr. Stepp, stated clearly and in writing that they wanted Mr. Parsley to be placed in a TW3 position (See footnote 1) . As if this were not shameful enough, Mr. Stepp continued to take matters into his own hands by giving Grievant a reprimand for something that he did not do, which he was later forced to rescind. Then, the “final nail in the coffin” for Grievant was Mr. Stepp's granting of an uncharacteristically high evaluation score to Mr. Parsley, while significantly lowering Grievant's usual score. Grievant has successfully proven that the decision to hire Mr. Parsley was the result of political favoritism.

Although the level three hearing evaluator determined that this selection was tainted, she did not order that Grievant be placed in the position. Accordingly, Grievant has argued that the relief granted was insufficient, insofar as the selection process at issue has become so tainted that his hopes of getting a “fair shake” are slim. Therefore, the undersigned must now evaluate whether or not Grievant is entitled to placement in the position. If one compares the qualifications of Grievant versus Mr. Parsley, it would appear that Grievant has more experience and qualifications relevant to the position at issue. As Grievant testified, he is experienced in running the three pieces of equipment which are used in Mingo County, which include a backhoe, track excavator, and grader. The uncontroverted evidence in this case was that Mr. Parsley did not have any grader experience. In addition, Grievant has completed training for and has repaired and rebuilt diesel engines, which it appears Mr. Parsley also cannot do. Finally, Grievant's DOH seniority is greater than Mr. Parsley's. *W. Va. Code* § 29-6-10(4) states that, when applicants have substantially equal or similar qualifications, seniority may be used as a determinative factor.

Accordingly, in consideration of all of the evidence of record, the undersigned finds that Respondent's selection of Mr. Parsley was arbitrary and capricious, was clearly wrong, and was in violation of laws prohibiting political favoritism. Grievant's qualifications exceeded those of Mr. Parsley for the position at issue, and, if not for the improper considerations which were utilized in this

decision, he would have been placed in this position.

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. To prevail in a claim for favoritism under W. Va. Code § 29-6A-2(h), a grievant must show by a preponderance of the evidence that:

(a) one or more appositely similarly-situated employee(s) have been granted preferential, exceptional or advantageous treatment that the grievant has not; and,

(b) that the different treatment is not related to the actual job responsibilities of the employees;

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

3. In selection cases where political motivation is alleged, the grievant must offer sufficient evidence to permit a finding that the selection was substantially motivated by political considerations. *Coleman v. Dep't of Health and Human Res.*, Docket No. 03-HHR- 318 (Jan. 27, 2004); *Mercer v. W. Va. Dep't of Highways*, Docket No. 01-DOH-604 (Mar. 20, 2002); *Wiley v. W. Va. Dep't of Highways*, Docket No. 99-DOH-109 (Aug. 3, 1999).

4. Grievant has proven by a preponderance of the evidence that the selection decision at issue was arbitrary and capricious, was the result of unlawful favoritism, and was due to the consideration of improper factors and political motivation.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to place Grievant in the TW3--Equipment Operator position, with retroactive pay, benefits, and seniority to April of 2006 when Mr. Parsley 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 thegrievance 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: _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

It should also be noted that Mr. Chafin is not only a member of the county democratic committee, but he has also been an active and influential member of the state legislature for many years.