THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

David Morgan,

Grievant,

v. **DOCKET NO. 07-DOH-352**

West Virginia Division of Highways,

Respondent.

DECISION

Grievant David A. Morgan filed a grievance on January 1, 2007, in which he claimed that he should have been selected for a position of Transportation Crew Supervisor 1 (TRCRSV1). He stated "I have more seniority and more previous supervisory experience than the person selected to fill this position." As relief, he is seeking "To be made whole in all ways. Which would include being put in the Position of TRCRSV1, increase in pay, and any other relief that may be deemed proper and fit." (See footnote 1)

A level three hearing was held May 18, 2007, at the DOH District 9 office in Lewisburg. The parties elected to submit the appeal to level four (See footnote 2) on the record developedbelow. Grievant was represented by Charles Holliday, and Respondent was represented by counsel, Robert Miller. The matter became mature for decision on August 22, 2008. (See footnote 3)

Synopsis

Grievant was not selected for a Transportation Crew Supervisor 1 position, although he had more seniority than the applicant who was hired. Grievant did have more seniority and more supervisory experience, but the selection criteria was weighted heavily with the subjective judgment of the two evaluators who knew both the applicants and the job well, and in their overall judgment, another applicant was better qualified. Grievant did not meet his burden of proving the selection process was improper, so this grievance is denied.

Findings of Fact

Based on a preponderance of the evidence contained in the record and adduced at the level three hearing, I find the following material facts have been proven:

1. Grievant David Morgan is employed by Respondent in District 9 as a Transportation Worker 3.

2. Respondent posted, in two separate postings, two Transportation Crew Supervisor I positions in the Bridge Department at about the same time, and the same four people (Grievant, Brian Carter, Rick Legg and Dexter McCoy), applied for both, and all applicants were interviewed for both positions on the same day. (See footnote 4) 3. John Fleshman is the District 9 Bridge Construction Superintendent. Along with Don Beals, Administrative Services Manager, and Adrian Lusk, the Bridge Engineer, he interviewed the candidates for the position at issue.

4. Mr. Fleshman and Mr. Lusk were the principal evaluators of the candidates. Of the hiring criteria, they placed the greatest importance on bridge construction experience. Mr. Carter had the most experience, Mr. Legg was next most experienced, then Grievant, then Mr. McCoy.

5. Both Grievant and Mr. Legg, at the time of the selection, were Transportation Workers 3 (TW3). Grievant began employment with the Respondent in August 1992, while Mr. Legg began in December 1996.

6. The interviewers considered the extent of the applicants' experience, and gave them a test of their bridge construction knowledge. All applicants were asked the same questions. Mr. Legg performed better on the test than Grievant.

7. Although Mr. Beals was part of the interview and evaluation process, he relied on the experience and opinions of Mr. Fleshman and Mr. Lusk, and basically just signed off on their recommendations, because he was less familiar with the requirements of the position and with the candidates.

8. Mr. Legg is certified to operate the truck crane and track hoe, two pieces of equipment used by the bridge department, that Mr. Morgan does not operate. The crane is used almost daily. There is no equipment that Mr. Morgan can operate that Mr. Legg cannot.

9. The crane can only be operated by a certified operator, and there are only two of those in the department, but the certification is not a requirement for the position at issue. 10. Mr. Fleshman has worked with Mr. Legg in the past, and formed the subjective opinion that Mr. Legg is

very particular about getting his jobs done just right and looking good. That opinion formed part of the basis for Mr. Fleshman's recommendation to hire Mr. Legg. Mr. Lusk shared the opinion that Mr. Legg had a better attitude toward completing a job, and takes a lot of pride in what he does. Mr. Lusk believed Grievant “tries to do as good a job as he can,” but lacks the experience to know all the tricks of the trade.

11. On the performance evaluations that were considered as part of the selection process, Mr. Legg had a rating of 2.09, while Grievant's rating was 1.83.

12. At the time of the interviews, Mr. Legg had almost 10 years of experience in the bridge department, while Grievant had about four years of bridge work experience.

13. Grievant had approximately thirteen months of bridge supervisory experience, while Mr. Legg had spent about 135 days supervising various other bridge workers.

14. Clarence Gunnoe is a Bridge Inspector who has both been supervised by Grievant and has been his supervisor. Grievant had been selected for a Transportation Crew Supervisor 1 position, and Mr. Gunnoe filed a grievance over that selection. (See footnote 5) It was determined that Mr. Gunnoe was more qualified, and he was instated in the position.

15. Mr. Gunnoe was of the opinion that Grievant was both a good worker and good to work for.

16. An “Applicant Evaluation Record” was filled out by the interviewers for each candidate. Grievant was rated “meets” on all eight qualification rating areas, while Mr. Legg was rated “meets” on seven and “exceeds” on one. 17. A TRCRSV1 in the Bridge Department holds a supervisory position that, under limited supervision, supervises a bridge maintenance crew and participates in the repair, maintenance or construction of bridges, and performs related work as required.

Discussion

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 footnote 6) In such cases, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. (See footnote 7)

The 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. (See footnote 8) 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. (See footnote 9) 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. (See footnote 10) "While a searching inquiry into the facts is required to determine ifan 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]." (See footnote 11)

It is true, as Grievant contends, that he had more seniority than Mr. Legg. West Virginia Code § 29-6-10(4) requires an employer to consider seniority in selection decisions "if some or all of the eligible employees have substantially equal or similar qualifications[.]" In other words, seniority is a "tie breaker," not a primary consideration. In this case, the qualifications of the candidates, as determined by the interviewers, were not so similar that seniority needed to be used as anything other than evidence of past experience.

Grievant's witness Franklin Cade, a retired TW3 Bridge Worker, testified that he had worked with Grievant, albeit no more recently than 2003, and found him to be an excellent, hard worker who got along well with everyone. All of the witnesses testified that they had no real problem with Grievant's work or work ethic. However, the interviewers considered Mr. Legg's work to be more thorough and conscientious. "[W]hen a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees." (See footnote 12)

It was on the basis of this subjective evaluation, which Grievant's evidence did not rebut, and the strength of Mr. Legg's interview, test, and overall experience, that he was selected. The interviewers had a rational basis for their decision, and Grievant did notmeet his burden of proving it was arbitrary and capricious just because he was a more senior highways employee with more bridge department supervisory experience. "An 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." (See footnote 13)

The following Conclusions of Law support this decision:

Conclusions of Law

1. 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).

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), *Jones v. Dept. of Transp./Div. of Highways*, Docket No. 07-DOH-340 (July 18, 2008).

3. 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 Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994).

4. “An 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*, DocketNo. 05-DOH-230 (Sept. 23, 2005); *Ferrell v. Dep't of Transp*., Docket No. 04-DOH-240 (Dec. 20, 2004), *McKinney, et al., v. Dep't of Transp./Div. of Highways*, Docket No. 2008- 0316-CONS (Dec. 27, 2007).

5. Grievant did not meet his burden of proving Respondent's selection decision was arbitrary and capricious or clearly wrong.

For the foregoing reasons, this grievance is **DENIED**.

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. *See* W. Va. Code § 29-6A-7 (*See Footnote 2)*. 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 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.

September 18, 2008

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M. Paul Marteney

Administrative Law Judge

Footnote: 1 *Grievant also requested certain information on the selection criteria and process, but it appears from the record that has already been provided to him.*

Footnote: 2 *In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.*

Footnote: 3 *There were no proposed findings of fact and conclusions of law in the record from either party.*

Footnote: 4 *This grievance was filed as a challenge only to the vacancy that Rick Legg was chosen to fill, pursuant to Bulletin #589.*

Footnote: 5 *See Gunnoe v. Dep't of Transp./Div. of Highways, Docket No. 04-DOH-157 (Sep. 14, 2004).*

Footnote: 6 *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).*

Footnote: 7 *Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).*

Footnote: 8 *Skeens-Mihaliak v. Div. of Rehab. Serv., Docket No. 98-RS-126 (Aug. 3, 1998), Jones v. Dept. of Transp./Div. of Highways, Docket No. 07-DOH-340 (July 18, 2008).*

Footnote: 9 *Thibault, supra.*

Footnote: 10 *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)).*

Footnote: 11 *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).*

Footnote: 12 *Pullen v. Dep't of Transp., Docket No. 06-DOH-121 (Aug. 2, 2006); Allen v. Dep't of Transp., Docket No. 05- DOH-230 (Sept. 23, 2005); See Ball v. Dep't of Transp., Docket No. 04-DOH-423 (May 9, 2005); Jones, supra.*

Footnote: 13 *McKinney, et al., v. Dep't of Transp./Div. of Highways, Docket No. 2008-0316- CONS (Dec. 27, 2007).*