THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

WILLIAM J. RIGGS,

Grievant,

v. Docket No. 2008-0797-DOT

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant William J. Riggs grieves the failure of Respondent Division of Highways ("Respondent" or "DOH") to offer him a position for which he applied, that of Transportation Engineering Technician Senior ("TRETSR"). His May 23, 2007, statement of grievance was: "District I WVDOH promoted another person with less experience, years of service, and education over me. (I helped train him) Violation: WV Code 29-6-10(4); (See footnote 1) 6C-2-2(iii); (See footnote 2) ADA Title I: Employment." (See footnote 3) The relief he sought was "promotion to level 4 with pay raise."

In a decision dated May 31, 2007, the grievance was denied at Level One, on the basis that no one had yet been offered the TRETSR position, that the recommendation made for the position was based on "work history, reliability and dependibility [sic]," and that the recommended candidate had "similar education and previous service experience . . . ." The Grievant appealed to Level Two on May 31, 2007. On June 15, 2007, District One

Engineer/Manager Anthony J. Carovillano issued a Level Two decision denying the grievance, "partly based on a premature filing of a grievance." The Level Two decision also states that "two of the candidates that were recommended appeared to be at least equal to your qualifications and experience and better in seniority and leave time. The third recommended candidate was removed from consideration . . . ."

The Grievant appealed to Level Three on June 29, 2007. At that time, the grievance was being processed under the statutes in effect before July 1, 2007, (See footnote 4) and "Level 3" referred to a hearing within the employing agency. Sometime after July 1, 2007, however, the parties agreed, pursuant to W. Va. Code § 6C-2-1(e) (2007), to complete the grievance process under the statutes which took effect on July 1, 2007, W. Va. Code §§ 6C-2-1 to 6C- 2-7 (2007) (commonly referred to as "transferring" the case to the "new system"). A Level Three hearing was convened before then Acting Chief Administrative Law Judge Reynolds on January 8, 2007. The Grievant appeared pro se. Respondent was represented by its counsel, Jennifer Francis Alkire of the DOH Legal Division. At the outset of the hearing, the Respondent moved for dismissal on the basis that the grievance was filed before the position in question was actually offered to the successful candidate, and that it was for that reason not ripe at the time of filing (in other words, that it was filed prematurely). At the conclusion of the Grievant's case, Respondent again moved to dismiss, arguing that in the Grievant's case in chief he had failed to produce sufficient evidence to prove his case by a preponderance of the evidence. Administrative Law Judge Reynolds deferred ruling on dismissal on either basis until the conclusion of the hearing, and review of the parties' post-hearing submissions.

The case became mature for decision on the deadline for the parties to file proposed findings of fact and conclusions of law, February 11, 2008. On March 13, 2008, the case was reassigned to the undersigned for decision, due to the retirement of Acting Chief Administrative Law Judge Reynolds.

Summary

The Grievant grieved his non-selection for a Transportation Engineering Technician Senior position, alleging that he was better qualified than the successful candidate. He also claimed violations of the Civil Service statute which requires selection of candidates on a meritorious

basis, and according to seniority; of the grievance statute which prohibits harassment and favoritism; and of the Americans with Disabilities Act. Grievant failed to present more than conclusions and accusations during his case in chief at the Level Three hearing. He offered no evidence supportive of his legal theories. The party with the burdenof proof in a grievance may not meet that burden with mere allegations. GRIEVANCE DENIED.

After thorough review of the record, the undersigned finds the following facts:

Findings of Fact

1 1. Respondent posted its Transportation Engineering Technician Senior position from February 9 through 26, 2007.

2 2. Grievant applied and interviewed for the position, along with three other candidates.

3 3. All candidates were interviewed by the same committee and were asked the same questions.

4 4. Grievant received a score of "meets minimum qualifications" while the other candidates were rated "exceeds minimum qualifications."

5 5. Grievant filed his grievance after learning that he had not been recommended for the position, while others were, but before anyone had been offered the position. (See footnote 5)

6 6. Grievant was not offered the position.

Discussion

Burden of Proof

Because this grievance does not involve a disciplinary matter, the Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howellv. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). Recognized in *State v. Miller*; 194 W. Va. 3, 459

S.E.2d 114, 123 (1995). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

At the Level Three hearing before Administrative Law Judge Reynolds in this case, the documentary evidence which the Grievant introduced consisted of copies of documents establishing his qualifications for the position in question. He testified that the successful candidate got the job in question through "political connections"; that when the interview committee failed to inspect the documentation of his qualifications, he knew he was not being seriously considered for the position; that the secretary lied to him about the processing of his application; and that the employer "skirted the law" by permitting the successful candidate to transfer to another location, where he was given a higher salary than the Grievant.

The Grievant also offered testimony about the personal stress he had been under in the year preceding the grievance and stated that, after he filed the grievance, he had been treated with disrespect and "talked down to" by management, which he said created a hostile work environment. He alleged reprisal, but Administrative Law Judge Reynolds ruled that allegation out of order, on the basis that it went beyond his statement of grievance. The Grievant called no witness other than himself.

Claim that Non-selection was Arbitrary and Capricious

In a selection case, the grievance procedure is not intended to be a "super interview," but rather a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv*., Docket No. 93-RS-489 (July 29,1994). Selection decisions are largely the prerogative of management; in the absence of unlawful, unreasonable, or arbitrary and capricious behavior, they will not generally 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*.

The "clearly wrong" and"arbitrary and capricious" standards of review are deferential ones

which presume that an agency's action is valid as long as the decision is supported by substantial evidence or by a rational basis. *In re Queen*, 196 W. Va, 442, 473 S.E.2d 483 (1996); *see Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001). "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 her 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).

In his statement of grievance, the Grievant alleged that "[d]istrict I WVDOH promoted another person with less experience, years of service, and education over me. (I helped train him). . . ." The Grievant's conclusory statements during his testimony do not provide a sufficient factual basis to prove his claim that the selection decision was made on non-meritorious grounds. The evidence introduced by the Grievant is not an adequate basis for the undersigned to reach any conclusions regarding the selection decision he challenges. He presented no evidence regarding the successful candidate's qualifications and did not name the successful candidate during his case in chief. As a result, he failed to meet his burden to prove by a preponderance of the evidence that his non-selection was improper.

"Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Directors/W Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998); *See Harrison v. W Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995).

<u>Other Legal Theories Advanced by the Grievant</u>

The statement of grievance also referred to "WV Code 29-6-10(4) [the statute which authorizes the Division of Personnel to adopt rules for selection 'which shall give appropriate consideration to the applicant's qualifications, record of performance, [and] seniority']; 6C-2-2(iii) [W. Va. Code § 6C-2-2(g)(1) (2007), the grievance statute which defines harassment and favoritism] ; [and] ADA Title I: Employment [which prohibits discrimination on the basis of disability; *see* fn. 3 above]." The Grievant likewise failed to offer evidence sufficient to meet his burden of proof under any of these alternative legal theories.

Because the Grievant did not offer evidence regarding the other candidates for the position he sought, he provided no basis to conclude that the selection decision did not properly consider "the applicant's qualifications, record of performance, [and] seniority," W. Va. Code § 29-6-10(4), *supra*. Because he offered no specific facts, only conclusory statements about being treated badly, he provided no evidence which would support afinding of harassment; and because he offered no evidence regarding the other candidates for the position, he provided no basis to conclude that there was favoritism. W. Va. Code § 6C-2-2(g)(1), *supra*. The Grievant's brief reference to the personal stress he was under is insufficient to establish even that he was disabled within the meaning of the ADA, much less that he was discriminated against on the basis of a disability.

Conclusion

Even "[w]here the evidence equally supports both sides, the employee has not met his burden of persuasion. *Dixon v. W. Va. Div. of Corrections*, Docket No. 98-CORR-243 (Aug. 24, 1998). *See Leichliter v. W. Va. Dep't of Health & Human Resources* , Docket No. 92-HHR-486 (May 17, 1993)," *Jones v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 98-PEDTA-110 (June 29, 2001). If an employee fails to meet his burden when the evidence weighs equally, he also fails to meet it when he fails to produce evidence of facts which support his claims.

After a thorough review of the entire record, the undersigned concludes that the Grievant failed to meet his burden to produce evidence sufficient to support his claims. In the words of *Baker, supra*, the case presented by the Grievant amounted to ""[m]ere allegations alone without substantiating facts. . . ."

Accordingly, his grievance must be DENIED.

Conclusions of Law

1 1. Because this grievance does not involve a disciplinary matter, the Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v.*

***Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). Recognized in *State v. Miller*; 194 W. Va. 3, 459 S.E.2d 114, 123 (1995). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).**

2 2. In a selection case, the grievance procedure is not intended to be a "super interview," but rather a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv*., Docket No. 93-RS-489 (July 29,1994). Selection decisions are largely the prerogative of management; in the absence of unlawful, unreasonable, or arbitrary and capricious behavior, they will not generally 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*.

3 3. The "clearly wrong" and"arbitrary and capricious" standards of review are deferential ones which presume that an agency's action is valid as long as the decision is supported by substantial evidence or by a rational basis. *In re Queen*, 196 W. Va, 442, 473 S.E.2d 483 (1996); *see Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001). "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 her judgment for that of [the employer]." *Trimboli v. Dep't of Healthand 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).

4 4. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Directors/W Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998); *See Harrison v. W Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995).

5 5. Even "[w]here the evidence equally supports both sides, the employee has not met his burden of persuasion. *Dixon v. W. Va. Div. of Corrections*, Docket No. 98-CORR-243 (Aug. 24, 1998). *See Leichliter v. W. Va. Dep't of Health & Human Resources* , Docket No. 92-HHR-

486 (May 17, 1993)," *Jones v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 98-PEDTA-110 (June 29, 2001). If an employee fails to meet his burden when the evidence weighs equally, he also fails to meet it when he fails to produce evidence of facts which support his claims.

6 6. The Grievant failed to offer evidence sufficient to meet his burden to prove by a preponderance of the evidence that his non-selection was improper.

7 7. The Grievant also failed to offer evidence sufficient to meet his burden of proof under any of the following legal theories set forth in his statement of grievance: "WV Code 29-6-10(4); 6C-2-2(iii); ADA Title I: Employment."

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. W. Va. Code § 6C-2-5 (2007). Neither the West Virginia Public Employees Grievance Board nor any of itsAdministrative 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) (2008) to serve a copy of the appeal petition on the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.19 (eff. Dec. 27, 2007) and Rule 2(e) of the West Virginia Rules of Procedure for Administrative Appeals.

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Thomas J. Gillooly

Administrative Law Judge

Date: June 18, 2008

Footnote: 1

" Rules of division. The board shall have the authority to promulgate, amend or repeal rules, according to chapter twenty-nine-a [§§ 29A-1-1 et seq.] of this code, to implement the provisions of this article: . . . (4) For promotions within the classified service which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority . . . . When any benefit such as a promotion, wage increase or transfer is to be awarded . . . , and a choice is required between two or more employees . . . , and if some or all of the eligible employees have substantially equal or 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 . . . . The division in its classification plan may, for designated classifications, permit substitution of qualifying experience for specific educational or training requirements at a rate determined by the division." W. Va. Code § 29-6-10(4) (2008) (in pertinent part).

Footnote: 2

The Grievant is presumably referring to W. Va. Code § 6C-2-2(g)(1) (2007): "'Grievance' means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including: . . . (iii) Any specifically identified incident of harassment, including repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the demeanor expected by law, policy and profession, or favoritism, including unfairtreatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another similarly situated employee . . . ."

Footnote: 3

42 U.S.C. §§ 12101 - 12213, the Americans with Disabilities Act.

Footnote: 4

In 2007, the Legislature, 2007 Acts ch. 207, 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).

Footnote: 5

By the time of the Level Three hearing, the selections for the position were complete. In light of the basis on which this Decision disposes of the grievance, and because the lower-level decisions also reached the merits, it is unnecessary to decide Respondent's contention that the grievance was filed prematurely.