WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CLARENCE W. RAMSEY,

Grievant,

v. **Docket No. 07-DOH-226**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Clarence W. Ramsey ("Grievant") initiated this proceeding on August 22, 2006, challenging his non-selection for a Transportation Worker 3 _ Equipment Operator position. After denials at the lower levels, and a level three hearing conducted on February 15, 2007, this matter was appealed to the Grievance Board on May 24, 2007. Due to legislative changes affecting the grievance procedure and the Grievance Board, this grievance was not assigned to the undersigned administrative law judge until October of 2007, and a hearing was ultimately scheduled for February 20, 2008. However, the parties notified the undersigned that they wished to submit this grievance for a decision based upon the record developed below, and requested leave to file written briefs by May 6, 2008. Respondent's counsel, Robert Miller, elected not to file additional argument, and no brief was received from Grievant's Counsel, Bernard Mauser.

Synopsis

Grievant contests his non-selection for a Transportation Worker 3 position. The successful

applicant had not previously been employed by DOH, but was selected because of his 22 years of experience operating a variety of heavy equipment. By comparison,Grievant had only operated DOH equipment during his tenure with them for approximately seven years. The selection decision was based upon pertinent factors and was not arbitrary and capricious, and an administrative law judge cannot substitute her judgment for that of the agency in selection matters. Therefore, the grievance must be denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by the Division of Highways (“DOH”) since 1999 in Braxton County. He has been classified as a Transportation Worker 2 _ Equipment Operator (“TW 2") for approximately seven years.

2. Grievant's duties as a TW 2 have involved operation of trucks, endloaders and mowing equipment. Because he is certified to operate graders and gradalls, Grievant is temporarily upgraded from time to time in order to operate those pieces of equipment (which are traditionally operated by Transportation Worker 3s).

3. On January 19, 2006, DOH posted a vacancy for a Transportation Worker 3 _ Equipment Operator (“TW 3") in Weston, West Virginia. The position would be assigned to the construction and maintenance division, and the employee would be required to operate a variety of heavy equipment. The TW 3 position also requires a CDL (Commercial Driver's License). The TW 3 job class is expected to operate a variety of heavy motorized equipment, including graders, bulldozers, backhoes, and semi-trailers.

4. Grievant was the only DOH employee who applied for the TW 3 position. The state register compiled by the Division of Personnel, containing names of individualsinterested in employment in particular classifications and who have met the minimum qualifications, was consulted for additional applicants.

5. Seven individuals, including Grievant, were interviewed by Bruce Garrett, County Supervisor, and Mary Heath, Personnel Specialist.

6. Grievant's application listed only his work experience with DOH since 1999 and provided the

names of the equipment he has operated, without specific details.

7. During the interview, Grievant gave limited answers to questions and did not elaborate very much regarding his work experience and qualifications.

8. David Hinkle was the successful applicant for the position. He had not previously been employed by DOH. Mr. Hinkle had approximately 22 years of continuous experience driving trucks for private employers. His application provided detailed descriptions of the heavy equipment he had operated and the type of work he had done in the construction, paving, and fuel industries. During the interview, he was agreeable and discussed his experience operating backhoes, endloaders, trucks, tractor trailers and farm machinery.

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 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). In such cases, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legalsufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994).

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. *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 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 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).

Grievant contends that, because he was already employed by DOH performing duties which were similar to those of the position at issue, and because he had certifications that Mr. Hinkle did not possess, he should have been selected. As stated in the Division of Personnel's Administrative Rules at Section 1.1 (a), "Method of Making Promotions":

> In filling vacancies, appointing authorities shall make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. Whenever practical and in the best interest of the service, an appointing authority may fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the classified service based on demonstrated capacity and quality and length of service.

Although this provision encourages employers to “promote from within,” it does not mandate that a current employee be hired over a new employee. Indeed, as the Grievance Board has recognized on many occasions, when reasonable minds may differ as to which applicant is more qualified and both meet the minimum qualifications for the position, the selection of an external candidate cannot be deemed to be arbitrary and capricious. *See Gordon v. Dep't of Transp.*, Docket No. 05-DOH-445 (Feb. 28, 2006); *Tuttle v. Dep't of Transp.*, Docket No. 05-DOH-298 (Feb. 1, 2006); *Jordan v. Dep't of Transp.*, Docket No. 04-DOH-202 (Jan. 26, 2005).

While it is undisputed that Grievant was certified on two pieces of equipment that Mr. Hinkle was not, Mr. Garrett testified that there are three other TW 3s in the organization who are certified to operate that equipment, and those certifications, while desirable, are not minimum requirements for the position. In fact, the individual who had vacated the position had primarily worked as a truck driver. Mr. Garrett also explained that Mr. Hinkle's numerous years of running heavy equipment at a variety of construction sites was particularly pertinent to this position, because of the bridge and construction work which is performed by his employees.

Clearly, Mr. Hinkle has many more years of heavy equipment experience than Grievant, albeit with private employers. In addition, as Mr. Garrett testified, Grievant provided little information on his application or during his interview, while Mr. Hinkle waspleasant and agreeable and elaborated extensively regarding his qualifications. Under these circumstances, the undersigned cannot substitute her judgment for DOH, and the selection of Mr. Hinkle, based upon his experience, cannot be deemed to be arbitrary and capricious or an abuse of the agency's discretion in selection matters.

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. 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).

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

4. "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). 5. The selection decision at issue was based upon reasonable justifications, was not arbitrary and capricious, and was not an abuse of DOH's discretion in such matters.

Accordingly, 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 (repealed) (See footnote 1). Neither the West 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.

Date: June 25, 2008

_____

DENISE M. SPATAFORE

Acting Chief Administrative Law Judge

Footnote: 1

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). Grievances which were pending prior to July 1, 2007, are 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. References in this decision are to the former statutes, which continue to control the proceedings in this case.