THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TIMOTHY D. JUSTICE,
Grievant,

v. **Docket No. 2008-1518-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

DECISION

Grievant Timothy D. Justice filed his grievance on January 3, 2009. The statement of grievance reads:

> Grievant was denied a promotional transfer to an Environmental Resources Specialist 3 (DEP 0800025) at the WV DEP Logan DMR office based on demonstrated capacity, educational background, quality and length of service in accordance with 29-6-1 et. seq. and Title 143, Series 1-11.1(a).

Grievant's stated relief is, "To seek a promotional transfer to an Environmental Inspector Specialist position at the WV DEP Logan DMR office or higher position with a mandatory raise."

A level three hearing was held on November 18, 2009, at the Grievance Board's Charleston office. Grievant was represented by Jeffery S. Simpkins, Esq., and Respondent was represented by Raymond Franks, Esq., General Counsel. This case became mature after the hearing, as the parties declined to submit Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserts he should have been selected for the Environmental Resource Specialist 3 position, as he was most qualified. Grievant avers that he was not selected based on his score on the Profile XT Assessment ("Assessment") test which is designed

to determine if the test taker meets established benchmarks for the position. Grievant argues this is arbitrary and capricious.

Respondent asserts it considered the Assessment, as required by its policy[1], and when Grievant's score on the Assessment was factored in, he was not the successful applicant.

Grievant has met his burden of proof. This grievance is GRANTED.

Findings of Fact

1. Grievant is employed by Respondent as an Environmental Resource Specialist 2 ("ERS"). He works with the Division of Mining and Reclamation ("DMR") in Logan County.

2. Grievant has been employed by Respondent for eighteen years and holds a Bachelor of Science in Biology with a minor in Chemistry from Marshall University. Grievant has also taken post-graduate classes as well as attended a number of courses provided by Respondent.

3. Respondent posted the position of ERS 3 in Logan County.[2] Grievant applied, as did Christopher Dingess.

4. Mr. Dingess has an Associates Degree in Environmental Technology from Southern West Virginia Community College and is working toward a Bachelor's Degree at Columbia Southern University.

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[1]The policy referenced by Respondent was never provided to the undersigned.

[2]The date of this posting was not provided during the hearing.

5. Both Grievant and Mr. Dingess were minimally qualified for the position, and as such, both were interviewed.

6. Larry Alt, Permitting Supervisor in the Logan Office, conducted the interviews. He asked both Grievant and Mr. Dingess the same questions.[3]

7. Mr. Alt graded the interviewees on their job knowledge and knowledge of the regulations and law. Mr. Alt gave both categories a numerical value from 0 to 5, with 0 being the lowest and 5 being the highest.

8. Grievant received a 4 in the job knowledge category and a 5 in knowledge of regulations and law, bringing his total to 9.

9. Mr. Dingess received a 4 in the job knowledge category and a 5 in knowledge of regulations and law, bringing his total to 9.

10. The Assessment was the third category to be considered.

11. This Assessment is a computerized test that contains certain benchmarks DEP finds to be preferential for the particular position. The areas where benchmarks are provided are as follows:

> (1) Thinking Style, which encompasses the following subcategories: Learning Index, Verbal Skill, Verbal Reasoning, Numerical Ability, and Numeric Reasoning.
>
> (2) Behavioral Traits, which encompasses the following subcategories: Energy Level, Assertiveness, Sociability, Manageability, Attitude, Decisiveness, Accommodating, Independence, and Objective Judgement.
>
> (3) Occupational Interests which provides and interest ranking in the top three interests for the position and the three lowest interests.

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[3]There was no testimony concerning whether other individuals applied and/or interviewed for the position.

12. The benchmarks are determined by having supervisors at DEP choose employees who have longevity and display characteristics Respondent finds preferential for that position.

13. Respondent ensures the individuals chosen to provide the benchmarks have no disciplinary actions in their personnel files.

14. Every employee is required to take this Assessment. When the employee applies for an in-house position, the employee's results are compared with the benchmarks. Then there is an Overall Job Match given in percentage form and that percentage is then given a numerical value. The percentage is ranked as follows: 0-69% and below = 0; 70-74 = 1; 75-79 = 2; 80-84 = 3; 85-89 = 4; 90 and above = 5.

15. The numerical value given is then factored into the final decision.

16. Mr. Dingess received 5 points for his score on the Assessment. Grievant received 0.

17. Because Mr. Dingess and Grievant were tied on the topics of job knowledge and knowledge of regulations and law, Mr. Alt used the Assessment to determine the successful candidate.

18. Mr. Dingess was awarded the position.[4]

19. This test has been used in every hiring decision since 2004.

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the

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[4]Mr. Dingess has since left this position, and it has been reposted. Both Grievant and Mr. Dingess applied again.

undersigned Administrative Law Judge to decide that his 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.*

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.ofHighways*, Docket No. 95-DOH-287 (Jan. 22, 1996). 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*s., 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. Servs.*, Docket No. 98-RS-126 (Aug. 3, 1998). An agency's decision as to who is the most 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)).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner

contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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)).

When determining whether DEP's selection was unreasonable, the statutory language governing internal hiring and promotion must be examined. WEST VIRGINIA CODE § 29-6-10(4) provides:

> [f]or promotions within the classified service which shall give appropriate consideration to the applicant's *qualifications, record of performance, seniority* and his or her score on a written examination, when such examination is practicable. An advancement in rank or grade or an increase in salary beyond the maximum fixed for the class shall constitute a promotion. When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, 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 or have the benefit withdrawn, as the case may be. When an employee classified in a secretarial or clerical position has, irrespective of job classification, actual job experience related to the qualifications for a managerial or supervisory position, the division shall consider the experience as qualifying experience for the position. 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.

(Emphasis added). Hence, pursuant to the statute, when considering the applicants for the ERS 3 position, DEP must first look to qualifications and records of performance. If the qualifications and records of performance are substantially equal, it must then look to seniority and use it as *a* factor.

In this case, Grievant and Mr. Dingess were equally matched for the position, yet instead of following the statute and breaking the tie using seniority, Respondent used the Assessment, as is the policy of the agency.

Filling positions using this Assessment is troubling. First, the agency establishes benchmarks for certain positions by having supervisors choose those employees with longevity who demonstrate characteristics Respondent values. This is a highly subjective, unreliable way of determining what characteristics are important to a position and may exclude individuals who have innovative ideas. Second, it completely disregards the employee's work history which is a more accurate measure of his ability. Lastly, there is no evidence that the Assessment has any scientific validity.

In this case, Grievant had been active in training several employees, including Mr. Dingess, the successful applicant. Grievant had strived to be a team leader. Mr. Alt testified that Grievant had more knowledge, skill and education than the successful applicant.

Yet, according to the Assessment, Grievant scored a 1 on independence, when the desired bench mark was 4,5,or 6, while Mr. Dingess scored a 7. No one provided testimony on whether a 1 or 10 indicated more independence. On attitude, Grievant scored a 7, while the desired bench mark was 3,4,or 5. Mr. Dingess scored a 3. The undersigned was given no evidence with regard to the numbers' meaning. Therefore, it

is difficult to review the scores in relation to the desired benchmarks and glean any information from the Assessment.

Respondent seems to assert that Grievant was not tied with Mr. Dingess for the position because when using the scores on the Assessment, Mr. Dingess prevails. However, given the nature of the Assessment, Respondent's reliance on it is arbitrary and capricious, as this seems merely a personality test masquerading as the holy grail of hiring.

It has been recognized by the Grievance Board numerous times, "when 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. *Pullen v. Dep't of Transp.*, Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen, supra*. *See Ball v. Dep't of Transp.*, Docket No. 04-DOH-423 (May 9, 2005)." *Freeland v. Dep't of Health & Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008). *See also Morgan v. W.Va. Div. of Highways*, Docket No. 07-DOH-352 (Sept. 18, 2008). Hence, where a supervisory position is at issue, relevant "personality traits and abilities" are bound up within the analysis of "qualifications" and "record of performance" under WEST VIRGINIA CODE § 29-6-10(4).

While it is understandable that Respondent would want to ensure the successful candidate possess the required personality traits and abilities to perform the duties of the position, that determination should be based on actual interaction, not a written personality test. This Grievance Board has found a significant flaw occurred in the selection process where an agency selected an applicant based upon the applicants' friendliness or superciliousness, as perceived by the selection committee during the interview process.

See *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009).

Grievant's case is even clearer because, by requiring Mr. Alt to consider the numerical score given on the Assessment, he had no discretion as to which applicant's personality traits and abilities would best fit so as to be effective in getting the job done. This is extremely troubling to the undersigned. Every witness testified that Grievant was a good worker, a team player, and a dedicated employee. Yet he did not get the job because of the results of a personality test. This line of thought tends to pigeon hole workers, and could have a chilling effect on encouraging employees to continue to attend training which would only benefit both the employee and agency.

Respondent asked the undersigned to review *Smith v. Dep't. of Environmental Protection*, Docket No. 2008-1014-DEP (Oct. 16, 2009). In that case the grievant was grieving non-selection for an Engineer IV position. That grievance was denied because the successful applicant received higher ratings in all but one of the categories being reviewed, therefore giving him the higher numerical score. In that case, mention is made of the Assessment. However, the Assessment was never a direct issue in the case, and no one presented testimony on the specifics of it.

Relying on the Assessment when making hiring or promotional decisions is arbitrary and capricious. When taking the Assessment score out of the factors for determining the successful applicant, Grievant and Mr. Dingess are tied. Based on the testimony presented at the hearing, Grievant is highly qualified and should have been awarded the position. Therefore, this grievance is GRANTED.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his 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, 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.ofHighways*, Docket No. 95-DOH-287 (Jan. 22, 1996). 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*s., Docket No. 93-RS-489 (July 29, 1994).

3. 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. Servs.*, Docket No. 98-RS-126 (Aug. 3, 1998). An agency's decision as to who is the most 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)).

4. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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)).

5. WEST VIRGINIA CODE §29-6-10(4) requires that seniority be considered as a factor in the selection only if the qualifications of the applicants are similar or substantially equal. Even then, "the statute still does not require that the most senior applicant be selected. It says that seniority must then be considered as a factor in the decision-making process." *Honaker v. Bur. of Emp. Programs*, Docket No. 01-BEP-623 (Mar. 18, 2003).

6. "When 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. *Pullen v. Dep't of Transp.*, Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen, supra*. *See Ball v. Dep't of Transp.*, Docket No. 04-DOH-423 (May 9, 2005)." *Freeland v. Dep't of Health & Human Res.*, Docket No.

2008-0225-DHHR (Dec. 23, 2008). *See also Morgan v. W.Va. Div. of Highways*, Docket No. 07-DOH-352 (Sept. 18, 2008). Hence, where a supervisory position is at issue, relevant "personality traits and abilities" are bound up within the analysis of "qualifications" and "record of performance" under WEST VIRGINIA CODE § 29-6-10(4).

7. Grievant has met his burden and proved that Respondent's complete reliance on the Assessment under the facts presented in this case was arbitrary and capricious.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to place Grievant in the ERS 3 position immediately with compensation pursuant to the Division of Personnel Rules and back pay and benefits from the date Mr. Dingess was hired.

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 Decision. *See* W. VA. CODE § 6C-2-5. 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 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 § 6.20 (2008).

DATE: December 17, 2009

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Wendy A. Elswick
Administrative Law Judge