THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RONALD A. LEMLEY,
Grievant,

v. **Docket No. 2009-0174-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

This grievance was filed on August 6, 2008 by Ronald Lemley, a Trade Specialist Lead II at West Virginia University ("WVU"). His Statement of Grievance reads:

> I applied for three Trade Specialist Lead 2 positions in which two of the three have been filled by other employees with less years of WVU service. I feel that I have not been given the fairness that I deserve with the experience that I have in the lead field and the total maintenance experience at WVU that I have. I have been a Trade Specialist lead 2 for approximately five years and I have been a WVU employee for over 19 years which all those years it has been in the maintenance field. I feel the hiring practices at WVU have been violated in this case and in past years as well in order to keep quality nightshift personnel on the nightshifts. I also feel that the nightshift employees are being treated unfairly by not being given the opportunity to receive a dayshift position. I feel that over time that the nightshifts does [sic] have a major effect and is a hardship on life in general and family life as well. I have worked nightshift for the past ten years and I feel that I have given my time and experience long enough on the nightshift and should be given the oppurtunity [sic] to receive a dayshift position in the same paygrade (15). There has [sic] been many dayshift positions that myself and some of the other nightshift employees would have been interested in having, but for years these positions were posted as a paygrade 11 as entry level and within a year those positions were then raised to a paygrade 13 (which the nightshift employees were at the time). I feel that these positions were posted this way to keep the nightshift personnel on nightshift and not be given the chance to go to dayshift because of the hiring practices that were followed.

The relief Grievant is seeking is "equal dayshift position, better opportunity for day shift."

This grievance was denied at level one by Decision dated September 17, 2008, and entered by Sue Keller, Chief Grievance Administrator. Appeal was made to level two on September 26, 2008 for the purpose of conducting a mediation session. Grievant appealed to level three on February 2, 2009. A level three hearing was conducted before the undersigned Administrative Law Judge on August 17, 2009, at the Grievance Board's office in Westover, West Virginia. Grievant appeared in person and by his representative, Steve Angel, AFT-West Virginia/AFL-CIO. WVU was represented by Kristi A. McWhirter, Assistant Attorney General. This matter became mature for consideration following receipt of the last of the parties' fact/law proposals on September 18, 2009.

Synopsis

Grievant asserts that his years of experience as a Trade Specialist Lead II establish his credentials to hold the same position on a different shift. Grievant believes that night shift employees are intentionally being denied transfers to ensure competent workers are available on the least desirable shift. WVU denies any wrongdoing, and counters that while Grievant met the standards for the day shift positions, there were simply two candidates whose qualifications exceeded those of other applicants, including Grievant. The record of the grievance failed to establish that Grievant's non-selection was arbitrary and capricious, or that he was more qualified than the successful applicants for the positions in question. This grievance is denied.

The following findings of fact are based on the evidence presented at level one and level three:

Findings of Fact

1. Grievant has been employed by WVU since January 1989, and has held the classification of Trade Specialist Lead II since December 1997. Grievant has been assigned the 11:00 p.m. to 7:00 a.m. shift throughout the time he has worked as a Trade Specialist Lead II.

2. In March 2008, two vacancies were posted for Trade Specialist Lead II on the day shift. Position 91 was in the Facilities Management for Zone 2, while position 92 was assigned to Zone 3.

3. Operations Manager David Areford interviewed those applicants who met the minimum qualifications for position 91, including Grievant and Steven Carter, the successful applicant. Each applicant was given the opportunity to respond to a series of twenty-eight questions during the interview.

4. Mr. Areford then completed a "Candidate Evaluation Form" for each of the applicants. Grievant and Mr. Carter were rated as: 1 (unacceptable); 2 (meets requirements); or 3 (exceeds) in the following categories:

	Grievant	Carter
Education	2	3
Experience	2	3
Knowledge, Skills and Abilities	2	3
Certification/Licensure	2	2

5. Mr. Areford recommended Mr. Carter for the position, stating:

> This candidate's job knowledge and experience was far superior to any of the other candidates interviewed for this position. The candidate was quick to respond to interview questions asking for specific details of experience.

> The candidate exhibited strong communication skills during the interview. The candidate has better prepared himself for this position by taking leadership and supervisory courses, as well as technical classes offered by WVU, vendors, trades schools, etc. the candidate has experience training employees and other staff members. The candidate exhibited a genuine concern for insuring above average customer service. This candidate is clearly the 1st choice candidate for this position. His knowledge, experience, skills, and demonstrated abilities was [sic] superior to that of any other candidate.

6. Addressing Grievant, Mr. Areford stated:

> Although this candidate indicated the knowledge and experience required to fulfill the requirements of this position, there was one candidate that indicated a higher level of qualifications. This candidate would be a good second choice if the first choice candidate choices [sic] to decline the position.

7. Grievant has been employed by WVU as a Trade Specialist Lead II since December 1997. Previously, he held the position of General Trade Helper at the Personal Rapid Transportation department from March 1992 through December 1997, and was a Custodian at the Health Science Center from January 1989 until March 1992. Prior to WVU employment, Grievant was employed as a tire buffer/operator at a tire service garage from 1983 until 1989. He holds a high school diploma which included completion of a two-year machine shop course at the Monongalia County Vocational Technical Center. Grievant additionally holds an Asbestos Certification License. As a Trade Specialist Lead II, Grievant supervises ten employees who are responsible for providing troubleshooting services in all craft areas, in all WVU buildings, after midnight.

8. Mr. Carter has worked at WVU since March 2004. Initially he held the position of Maintenance Worker, but has been classified as a Trade Specialist since July 2005. He worked at a plumbing and heating company from November 1995 through March 2004, serving as a foreman for five years. He had also worked in private industry for an

additional eight years. Mr. Carter attended Fairmont State College for two years in Business and Computer Programming, and later completed a two-year program in Facilities Maintenance at the Marion County Technical Center. He has completed training sessions in management and trade skills since 2004.

9. Operations Manager Mark Spiroff interviewed the applicants who met the minimum qualifications for position 92, including Grievant and Dean Thompson, the successful applicant. Each applicant was given the opportunity to respond to the same series of twenty-eight questions posed during the interview for position 91.

10. Mr. Spiroff then completed a "Candidate Evaluation Form" for each of the applicants. Grievant and Mr. Thompson were rated as: 1 (unacceptable); 2 (meets requirements); or 3 (exceeds) in the following areas:

	Grievant	Thompson
Education	2	2
Experience	2	2
Knowledge, Skills and Abilities	2	2
Certification/Licensure	2	2

11. Mr. Spiroff recommended Mr. Thompson for the position, finding that he had more training and knowledge for the position. Grievant was Mr. Spiroff's second choice.

12. Mr. Thompson was first employed by WVU as a Building Service Worker in June 2002. He transferred to a position of Electrician Helper in September 2003, and became a Trade Specialist in November 2005. Mr. Thompson is a licensed journeyman electrician.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

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. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter*, *supra*.[1] The grievance

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[1]W. VA. CODE § 18B-7-1(d)(3) provides that, "If more than one qualified, nonexempt classified employee applies, the best qualified nonexempt classified employee is awarded the position. In instances where the classified employees are equally qualified, the nonexempt classified employee with the greatest amount of continuous seniority at that institution is awarded the position."

West Virginia University Human Resources Policy 3, "Application to and Referral for Classified Positions Policy," mirrors this statutory language, stating in pertinent part: "If there is more than one qualified internal non-exempt candidate for a non-exempt vacancy, the best-qualified non-exempt employee will be offered the position. If there is more than one qualified internal non-exempt candidate for a non-exempt vacancy and the candidates are equally qualified, the more senior employee will be offered the position."

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).

The Grievance Board recognizes that selection decisions are largely the prerogatives of management. While the individuals who are chosen should be qualified and able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. *Skeens-Mihaliak v. Div. of Rehabilitation Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998); *Ashley v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-070 (June 2, 1995); *McClure v. W. Va. Workers' Compensation Fund,* Docket Nos. 89-WCF-208/209 (Aug. 7, 1989). 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)).

"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. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the*

Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). 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." *Id.* (*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 her judgment for that of a board of education. *See generally, Harrison v. Ginsberg,* [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli*, *supra*.

Grievant asserts that his years of experience as a Trade Specialist Lead II establish his credentials to hold the same position on a different shift. He further notes that he trained Mr. Carter, and that Mr. Thompson was promoted into the Lead position by his supervisor. He asserts that night shift employees are intentionally being denied transfers to ensure competent workers are available on the least desirable shift. Respondent denies any wrongdoing, and counters that while Grievant met the standards for the positions, there were two candidates whose qualifications exceeded those of the other applicants, including Grievant.

While Grievant's frustration is understandable, he has failed to demonstrate that he is more qualified for the positions 91 and 92 than the successful applicants. For position 91, Mr. Carter was chosen because the supervisor needed an employee with expertise in

electrical and air-conditioning skills. In addition, Mr. Carter took the opportunity to further his education by taking leadership and supervisory courses, as well as technical classes offered by WVU, vendors, and trade schools. Respondent determined that this coupled with Mr. Carter's experience training employees and other staff members, made him more qualified than Grievant and the best qualified applicant for position 91.

The fact that Mr. Thompson holds a journeyman electrician license increased his qualifications for position 92. Grievant's experience with appliances was limited to installation, while Mr. Thompson actually had appliance repair experience. The record reflects that actual repair experience and the electrician's license were relevant to the duties of position 92. Certainly, Grievant is a qualified Trade Specialist Lead II; however, when filling a vacancy "[a]n 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*, Docket No. 05-DOH-230 (Sept. 23, 2005).

Grievant has failed to prove by a preponderance of the evidence that his non-selection was arbitrary and capricious, or that he was more qualified than the successful applicants for positions 91 and 92.

The following conclusions of law support this Decision:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

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. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter*, *supra*. 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. The Grievance Board recognizes that selection decisions are largely the prerogatives of management. While the individuals who are chosen should be qualified and able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. *Skeens-Mihaliak v. Div. of Rehabilitation Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998); *Ashley v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-070 (June 2, 1995); *McClure v. W. Va. Workers' Compensation Fund,* Docket Nos. 89-WCF-208/209 (Aug. 7, 1989). 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*.

4. Respondent's determination that Mr. Carter and Mr. Thompson were the best qualified applicants for the positions at issue was based upon relevant factors, and was not arbitrary or capricious, or clearly wrong.

Accordingly, this 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 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 (eff. July 7, 2008).

Date: November 10, 2009

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Ronald L. Reece
Administrative Law Judge