THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS ALLEN WOOLRIDGE,

Grievant,

v. **DOCKET NO. 2008-0416-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Thomas Allen Woolridge ("Grievant") challenges his non-selection for the position of Transportation Crew Chief Maintenance ("TCCMAIN"), by Respondent Department of Transportation/Division of Highways. The September 11, 2007, statement of grievance provides that:

> I [Grievant] applied for a TCCMAIN, crew leader position. The job was awarded to another applicant with less yrs [years] in 1067 Disforce and a younger man than myself. I feel I was passed over because of my age. (etc)[.] This was the 3rd position of TCCMAIN I have applied for.

As relief, the Grievant seeks to be placed in the position of TCCMAIN in District 10.

On October 5, 2007, this grievance was denied at Level One. A Level Two mediation, held on October 23, 2008, was unsuccessful. A Level Three hearing was held before the undersigned in Beckley, West Virginia, on January 9, 2009. Grievant appeared pro se. Respondent appeared by and through its counsel, Barbara L. Baxter, Esquire. Both parties waived their right to submit proposed findings of fact and conclusions of law. This matter became mature for decision at the end of the Level Three hearing on January 9, 2009.

Synopsis

Grievant is employed as a Highway Equipment Operator 3 with the Department of Transportation/Division of Highways. He applied for a TCCMAIN position and was not the successful applicant. He alleges that he should have been selected for the position because he has more seniority than the successful applicant. Further, Grievant alleges he was not selected because of his age.

Grievant has not established by a preponderance of the evidence that the Respondent's selection of another applicant was arbitrary and capricious. Moreover, the Grievant has presented no evidence concerning his discrimination claim.

This grievance is denied.

Based upon a detailed review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant is employed as a Highway Equipment Operator 3 with the Department of Transportation/Division of Highways. He works in District 10, which encompasses the Mercer County area. Grievant works primarily as an excavator operator.

2. Grievant is certified on the following pieces of excavation equipment: motor grader, rubber-tired excavator, tracked excavator and backhoe.

3. Grievant has been employed with the Respondent since 1988.

4. Prior to working for the Respondent, Grievant was the head operator of a long-wall mining machine with U.S. Steel Mining Company. He served in this position for approximately five years. Grievant served in some supervisory capacity over several

workers while in this position.

5. Grievant has served as the mayor of Anawalt, West Virginia, for approximately one year.[1]

6. Grievant is fifty-eight years old.

7. On or about July 9, 2007, Grievant applied for the position of TCCMAIN, in District 10. The general duties of the posted TCCMAIN position are "under general supervision, lead and participate in a crew performing maintenance and construction on highways and highway facilities. Review work schedules and determine equipment and materials needed for specific projects. Oversee and assign crew members and equipment as needed to complete projects. Oversee progress and quality of work performed by the crew while adhering to policies, laws, regulations and safety practices. Complete daily reports and keep supervisor informed of the progress of the projects. Employee must have knowledge to position and set-up a drill and other equipment for piling projects." Level Three, Respondent's Exhibit 1 (June 22, 2007, Weekly Vacancy Report).

8. Four in-house employees applied for the TCCMAIN position. All four applicants met the minimum qualifications for the position.

9. Interviews were conducted by Alan Reed, District 10 Maintenance Engineer, and Wilson Butt, District Manager.[2] All four applicants were interviewed for the position. They were asked the exact same interview questions. Interviewers took notes of the applicants' answers. When determining the successful applicant, the interviewers considered the

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[1] The year Grievant served as mayor is not clear from the record.

[2] Mr. Butt has since retired from this position.

applications submitted by the applicants and the interview answers.

10. Upon completion of the interview process, Ronald Edward Smith ("Applicant Smith") was recommended and appointed to fill the vacancy.

11. Applicant Smith has been employed by the Respondent since February, 1990. At the time of application, he held the position of Transportation Worker 3/Equipment Operator and served in some supervisory capacity. In this position, he performed "work in construction and maintenance on highways and highway facilities." He operated heavy equipment. Additionally, he acted as Crew Chief on district "slip repair" projects from June 2005 to the time of application. *Id*.

12. Applicant Smith "assisted in operating and maintaining a rental drilling rig from June 2005 to June 2006." He also maintained records of materials and drilling for "piling projects." He determined quantities of materials needed for projects and scheduled deliveries as required. Level Three, Respondent's Exhibit 1 (Ronald Edward Smith's *Application for Examination*).

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 § 4.21 (2008). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).

It is well-established that the grievance procedure is not intended to be a "super interview," meaning the Grievance Board is not to engage in the selection process, but

rather to conduct a "review of the legal sufficiency of the selection process." *Thibault v. Div. of Rehab. Serv*., Docket No. 93-RS-489 (July 29, 1994). *See also Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). "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." *Jordan, supra*. Therefore, in a selection case, such as this, the Grievant "must prove by a preponderance of the evidence that the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CARR-384 (Feb. 28, 2005).

"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 and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citation 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)).

The Grievant has not established that the Respondent's selection of Applicant Smith was arbitrary and capricious. When comparing candidates, the Respondent must look to

WEST VIRGINIA CODE § 29-6-10(4), which provides:

> For 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).[3] Hence, pursuant to the statute, when considering the applicants for the TCCMAIN position, the Respondent must look to qualifications and records of performance. If the qualifications and records of performance are substantially equal, the Respondent must then look to seniority and use it as *a* factor.

When considering qualifications and records of performance,[4] Applicant Smith had

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[3] *See also* 143 C.S.R. 1 § 2 (recognizing that the "appointment and promotions to positions in the classified service shall be made solely on the basis of merit and fitness."); 143 C.S.R. 1 § 11.1(a) (stating that the method of making promotions should be based on "demonstrated capacity and quality and length of service").

[4] Virtually no evidence was presented to indicate record of performance. The evidence in this matter consist of (1) applications, (2) interview question sheets and (3) Grievant's testimony. Records of performance cannot be ascertained to separately

recent and relevant supervisory experience with the Department of Transportation/Division of Highways. At the time of application, he served as a crew chief for "slip projects" and kept records for materials needed for the projects. Unlike Applicant Smith, Grievant's position generally related to earth moving and did not include an acting crew chief component. Upon consideration of the job description of the TCCMAIN position, it cannot be said that the Respondent's determination that Applicant Smith was more qualified was unreasonable. Applicant Smith had more direct experience, which equates to greater qualification.

Moreover, as Interviewer Alan Reed, District 10 Maintenance Engineer, testified, Applicant Smith gave better answers to interview questions. "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). Applicant Smith's answers exuded his great desire to aggressively take on the tasks of the TCCMAIN position. *See generally* Level Three Testimony, Alan Reed. In contrast, when the Grievant was asked why he was interested in the job, he provided four reasons: money, he wanted to keep his state vehicle, he was the oldest worker and he wanted to "work up" another paygrade to help with his retirement. Level Three, Respondent's Exhibit 1 (interview answer sheet of Thomas Woolridge).

Upon consideration of Grievant's qualification and interview answers, it cannot be said that the Respondent's selection of Applicant Smith was "without consideration, and

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analyze this element.

in disregard of facts and circumstances of the case." *Eads, supra.*[5]

Coupled and commingled with his argument that the Respondent's selection for the position of TCCMAIN was arbitrary and capricious, Grievant maintains that he was discriminated against because of his age. "Discrimination" is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

In order to establish either a discrimination or favoritism claim under the grievance statute, Grievant must prove, by a preponderance of the evidence:

> (a) that he has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and
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> (c) that the difference in treatment was not agreed to in writing by the employee.

See Frymier v. Higher Education Policy Comm., 221 W.Va. 306, 655 S.E.2d 52 (2007); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005). The Grievance Board does not have jurisdiction over West Virginia Human Rights Act or Age Discrimination in Employment Act claims. *See Norton v. W.Va. Northern Comm. College et al.*, 98-BOR-539 (April 28, 1993). However, WEST VIRGINIA CODE § 6C-2-2(d) encompass acts that may fall

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[5] Grievant and Applicant Smith's qualifications are not substantially similar or equal; therefore, seniority is not a necessary consideration. Assuming *arguendo* that seniority should be considered as a factor in this analysis, it still must be found that the Respondent's selection was reasonable. In regards to their seniority, mere months separate Applicant Smith and the Grievant.

within the West Virginia Human Rights Act or the Age Discrimination in employment Act. *See Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Honaker v. Bureau of Emply. Programs/ Fiscal and Admin. Management Division*, Docket No. 01-BEP-623 (Mar. 18, 2003).

Consideration of this issue is limited to analysis under WEST VIRGINIA CODE § 6C-2-2(d) and the Grievant has not established that he was treated differently from any other applicant. During his Level Three testimony, Grievant admitted that he did not have any proof that he was treated differently because of his age.[6] He simply recognized that age could have been a reason for his non-selection.

The Grievant has not established a prima facie case of discrimination. *See Ward v. Dep't of Trans./Div. of Highways*, Docket No. 96-DOH-184 (July 24, 1997)(holding that where there was no evidence the DOH considered a grievant's permanent partial disability in the selection process, a prima facie case of discrimination is not established). As indicated above, there is ample evidence demonstrating the Respondent's selection of Applicant Smith was reasonable. This same rationale also explains why Grievant was not selected for the position. There is no evidence that suggests the Grievant's non-selection was unrelated to the requirements of the position.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden

[6] The Grievant did not know Applicant Smith's age. However, he "guessed" him to be in his forties. Grievant is fifty-eight years old.

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 § 4.21 (2008).

2. In a selection grievance, in order to prevail, a grievant "must prove by a preponderance of the evidence that the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005), *citing Surbaugh v. Dep't of Health & Human Serv.*, Docket No. 97-HHR-235 (Sept. 29, 1997). 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 v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994).

3. Grievant has failed to establish by a preponderance of the evidence that the Respondent's selection of Applicant Smith for the position of TCCMAIN was arbitrary and capricious, unreasonable or clearly wrong.

4. In order to establish either a discrimination or favoritism claim under the grievance statute, Grievant must prove, by a preponderance of the evidence:

> (a) that he has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

See Frymier v. Higher Education Policy Comm., 221 W.Va. 306, 655 S.E.2d 52 (2007); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

5. Grievant has not established, by a preponderance of the evidence, that he was discriminated against.

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 Order. *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 WEST VIRGINIA 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: January 23, 2009

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Mark Barney
Administrative Law Judge