THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHAEL J. NEELY,
Grievant,

v. **DOCKET NO. 2008-0632-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Michael J. Neely, filed this grievance against his employer, the Department of Transportation/Division of Highways, on February 24, 2006, challenging the selection of another employee for the Harrison County Highway Administrator II position. The statement of grievance reads:

> Appointee to Harrison County Highway Administrator II position is not the most qualified applicant for that position. Decision was based on discrimination, violation of code of ethics, disregard of seniority/work experience and political favoritism.[1]

As relief, Grievant sought:

> Appointee removed from position. If appointee is not removed from position, then I expect to be compensated by equal yearly income, including all

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[1] Grievant produced no evidence that the successful applicant had any political connections, or that any person made any attempt to assert their political influence in this process. Grievant did not pursue this argument in his written argument. The allegation of political favoritism will not be further addressed. Likewise, Grievant did not pursue the claim of "violation of code of ethics," either at hearing or in written argument, and it is considered abandoned.

overtime and salary increases. All legal fees incurred by grievant to be paid by WVDOT/DOH at Level IV.[2]

This grievance proceeded through levels one and two, where Grievant was apparently unsuccessful. Grievant appealed to level three on February 27, 2006. A level three hearing was held on March 12, 2007, but the hearing was not completed on that date. Prior to the second day of hearing being convened, the grievance procedure was overhauled by the West Virginia Legislature, effective July 1, 2007. This grievance was then transferred to level two of the new procedure.[3] The hearing was never completed at the old level three, and a level three decision was never issued.

A mediation was held at level two on May 5, 2008, but was not successful. Grievant appealed to level three on May 13, 2008. A level three hearing was held before the undersigned Administrative Law Judge on November 18, 2008, in the Grievance Board's Westover office. Grievant was represented by Kelly R. Reed, Esq., and Respondent was represented by Robert Miller, Attorney, Legal Division. This matter became mature for

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[2] "It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). New WEST VIRGINIA CODE § 6C-2-6 is entitled, 'Allocation of expenses and attorney's fees.' It specifically states: '(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.'" *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008).

[3] 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). Because this grievance has been transferred to the new procedure, it is being decided pursuant to the provisions of W. VA. CODE §§ 6C-2-1 to 6C-2-7 (2008).

decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on March 2, 2009.

Synopsis

This grievance was filed when David Cava was selected as the Harrison County Highway Administrator II. Two of the three members of the interview committee made their choice for the position based primarily upon how they believed the applicants would deal with the public. One of the committee members concluded that Mr. Cava would be better able to deal with the public than Grievant based upon his perception that Mr. Cava was friendly during the interview, and somehow projected a better attitude, while Grievant was arrogant during the interview, and sat with his arms crossed. The second member could not recall the basis for his conclusion that Mr. Cava was the best choice, other than that he thought Grievant was arrogant during the interview. The selection decision was not based upon demonstrated ability. Grievant demonstrated that the selection was flawed, and arbitrary and capricious. However, Grievant did not demonstrate that he should have been selected for the Highway Administrator II position over all the other applicants; therefore, it would not be appropriate to place Grievant in this position. The position should be posted again, and a new selection process should be undertaken by DOH.

The following Findings of Fact are made based upon the evidence developed at both level three hearings.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") as a Highway Equipment Supervisor I. He has been employed by DOH for 20 years.

2. On October 31, 2005, DOH posted a vacancy for the Highway Administrator II in Harrison County, which is in District 4.

3. Grievant applied for the Highway Administrator II position, as did Anthony Lopez, David Cava, Michael Roncone, Warren Spellman, Kevin Baker, Stephen Wilson, Gary Weaver, and Kevin Cullen, all of whom were DOH employees.[4] All of these employees were qualified for the position.

4. All qualified internal applicants, including Grievant, were interviewed by the three members of the interview committee, Greg Phillips, District 4 Manager, Anthony Paletta, Administrative Services Manager I in District 4, and Butch O'Hagan, Maintenance Assistant, District 4. The interviews were conducted on November 30 and December 1, 2005. Each applicant was asked the same questions.

5. After the interviews the members of the interview committee discussed the applicants, and they chose Mr. Cava for the position. Grievant was not among the top three choices for the position.

6. The only records maintained by DOH of the work of the interview committee were the question lists for each person interviewed, and a one page "Applicant Evaluation Record" for each interviewee. Mr. Paletta had made notes on the questions reflecting the answers given by the interviewees. Page two of the notes of Grievant's interview were lost by DOH. The questions on page two inquired about the interviewee's approach to dealing with people in general, supervisors, and subordinates. The Applicant Evaluation Record for Grievant and for Mr. Cava are identical, reflecting that both met the qualifications of the

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[4] Anthony Rome also applied for the position, but then withdrew his application.

position in the areas of education, relevant experience, possesses knowledge, skills and abilities, interpersonal skills, flexibility/adaptability, presentability, and overall evaluation. The applicants may be evaluated as exceeding qualifications in any category on this form. Neither Mr. Cava nor Grievant was rated as exceeding qualifications in any category.

7. Mr. Cava had worked for DOH for three years as a Transportation Engineering Technologist ("TRET"), or Inspector. In this position he had been responsible for obtaining proposals from contractors on paving projects, and assuring that the work was completed as required. He was also involved with the installation and cleaning of culverts, guardrail replacement, and aggregate testing. Mr. Cava had no supervisory responsibilities while employed by DOH.

8. Prior to his employment with DOH, Mr. Cava had been employed by the City of Clarksburg for four years as a Code Enforcement Officer. His application for the position lists that he "officially supervised" five employees for two years (Respondent's Exhibit Number 5). Mr. Cava only supervised these employees in his supervisor's absence, but his application does not note this fact. Mr. Cava inspected buildings, investigated complaints, and worked with the public in this job on a regular basis to resolve complaints. He had also worked as a Foreman for a construction company for ten years, supervising carpenters, electricians, laborers, and subcontractors.

9. In his current position, Grievant is responsible for acquiring surplus property, primarily equipment, from the federal government. He had previously been an Inspector for DOH for 13 years, and in that position he had overseen the work of contractors, primarily on bridge projects, assuring the work was completed in accordance with all applicable rules and regulations. In addition, he had coordinated the work of other

Inspectors for DOH, and reported the status of all projects to his supervisor, and he had received, reviewed, and followed-up on citizen and employee complaints. Prior to that, he was an Equipment Operator for DOH, and for a coal company.

10. Several of the applicants had more supervisory experience or more road maintenance experience than Grievant.

11. Mr. Phillips evaluated the applicants primarily based upon personality and the ability to deal with the public and politicians, as demonstrated by the applicants during the interview. He believed experience accounted for only about 20% of what was required to perform the job, with the remaining 80% being the ability to deal with the public in a professional manner, and resolve their problems.

12. Mr. Phillips believed Mr. Cava "had a better attitude toward the position" (level three transcript at p. 13), and he had experience working with the public. Mr. Phillips found Mr. Cava to have a "friendly and direct way of dealing with people" (level three transcript at p. 24).[5] He found Grievant to be arrogant during the interview, and recalled that Grievant had sat with his arms crossed during the interview, which he believed was not "a positive way to sit," and because of this, Mr. Phillips did not like Grievant's demeanor (level three transcript at pp. 75-76). Mr. Phillips did not believe Grievant had much experience working with the public. Mr. Phillips could not further elaborate on why he believed Mr. Cava had a better attitude than Grievant.

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[5] Mr. Phillips' viewpoint was not reflected during the level three hearing before the undersigned. Mr. Cava was condescending, and at one juncture made a point of correcting Grievant's attorney when she pronounced a name incorrectly.

13. Mr. Paletta believed maintenance experience, supervisory experience, and experience and ability to work with the public were all necessary to the job.

14. Mr. Paletta did not believe Grievant had as much experience as some of the other applicants in road maintenance, and he did not have as much supervisory experience as some of the other applicants. Mr. Paletta acknowledged that Mr. Cava was also lacking in road maintenance experience.

15. Grievant has as much road maintenance experience as Mr. Cava, and he has significantly more experience in DOH policy and procedure, and the operation of equipment than Mr. Cava.

16. Mr. Paletta found Grievant to be pleasant and cooperative during the interview. He did not find him to be arrogant, although he believed Grievant's self-confidence came across as somewhat arrogant.

17. Mr. O'Hagan believed experience and personality were equally important to the position. He had served as a Highway Administrator, and believed that some days personality trumped experience when dealing with the public.

18. Mr. O'Hagan had little recollection of the reason he did not believe Grievant was the best choice for the position. He believed Grievant was boastful and conceited during the interview, but he could not offer any explanation for his conclusion.

19. None of the members of the interview committee noted any action Grievant had ever taken which would indicate that he was not capable of dealing with the public or politicians in a professional manner, and resolving complaints.

Discussion

Grievant has the burden of proving his grievance by a preponderance of the evidence. *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). A preponderance of the evidence is defined as evidence which is 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. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *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. 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).

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)).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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." *Eads, supra (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 [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

"Also, as the Grievance Board has held many 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 and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008).

Certainly, DOH cannot be faulted for desiring an individual in the Highway Administrator position who was capable of dealing with the public in a professional manner and resolving problems. However, Mr. Phillips concluded that Mr. Cava would be better able to deal with the public than Grievant based upon his perception that Mr. Cava was friendly during the interview, and somehow projected a better attitude, while Grievant was arrogant. Mr. O'Hagan could only recall that he viewed Grievant as arrogant during the interview, but he could not remember what had given him this perception. This decision was not based upon demonstrated ability. Mr. Phillips and Mr. O'Hagan just liked Mr. Cava better than Grievant. This is not a sound basis for such an important decision. The undersigned cannot help but point out that when someone is interviewing for such an important supervisory position, that person would surely be expected to project self-confidence and knowledge of the job during the interview. Grievant demonstrated that the selection was flawed, and arbitrary and capricious.

However, Grievant did not demonstrate that he should have been selected for the Highway Administrator II position over all the other applicants; therefore, it would not be appropriate to place Grievant in this position.[6] The position should be posted again, and

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[6] Because the undersigned has concluded that there was a flaw in the selection process, and that Grievant did not demonstrate he was entitled to be placed in the position over all the other applicants, it is unnecessary to address Grievant's claim of discrimination and his claim that his seniority should have been a consideration.

a new selection process should be undertaken by DOH. The undersigned would suggest that Mr. Phillips and Mr. O'Hagan NOT be on the interview committee.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. *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).

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. 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). 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 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*.

4. 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 Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

5. "Also, as the Grievance Board has held many 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 and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008).

6. Grievant demonstrated that the selection process was flawed. However, he did not demonstrate that he was entitled to the position.

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART**. Respondent is **ORDERED** to repost the Harrison County Highway Administrator II position

within thirty days of receipt of this decision, and select a Highway Administrator II based upon the actual qualifications of the applicants.

Any party or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: April 23, 2009