THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ROBERT M. GARRETT,
Grievant,

v. **Docket No. 2009-0484-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant Robert M. Garrett challenges his non-selection for the position of Transportation Engineering Technician Trainee by Respondent Division of Highways. The October 14, 2008, statement of grievance asserts that he was more qualified than other candidates and he was the victim of discrimination. As relief, Grievant seeks to be compensated and indicates on his grievance form that he "will discuss it."

On November 18, 2008, this grievance was denied at level one. A level two mediation session was conducted on April 29, 2009. A level three hearing was held before the undersigned Administrative Law Judge on September 22, 2009, at the Board's Westover office. 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 September 22, 2009.

Synopsis

Grievant is employed as a Transportation Worker 3 - Mechanic with the Department of Transportation/Division of Highways. He applied for a Transportation Engineering Technician position and was not the successful applicant. He alleges that he should have been selected for the position because he has more experience than the successful

applicants. Further, Grievant alleges he was not selected because of his age. The position was posted again some time later and Grievant once again applied for the position. Grievant was interviewed and shared with his employer additional information concerning his qualifications. Grievant was offered the position. Grievant did not accept the offer.

Grievant has not established by a preponderance of the evidence that the Respondent's initial selection of other applicants for the position was arbitrary and capricious. Moreover, Grievant did not establish that he was the victim of discrimination.

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 Transportation Worker 3 - Mechanic with the Department of Transportation/Division of Highways. Grievant has been permanently employed by Respondent at the District Four Equipment Division since January 15, 2003.

2. On August 12, 2008, the Division of Highways ("DOH") posted four technician positions for the District Four Construction Department. The four positions were posted as three different levels, Transportation Engineering Technician, Pay Grade 14, Transportation Engineering Technician Associate, Pay Grade 11, and Transportation Engineering Technician Trainee, Pay Grade 8.

3. The brief sketch of job duties for the posted Transportation Engineering Technician Trainee is "[E]mployee to be utilized as a project inspector. Will be assigned to any of the Construction Sections. Participates in a training program requiring 180 Technical Development hours. Responsibilities: record keeping, competing [sic] inspection

reports, surveying, materials testing, performance of basic calculations for labor, materials and equipment. Work could be outdoors in adverse weather conditions, on rough terrain around moving machinery and at heights. Performs related duties as required." Level three, Respondent's Exhibit 2.

4. On August 21, 2008, Grievant applied for the position of Transportation Engineering Technician Trainee in District Four.

5. One of the vacant positions was filled with a Transportation Engineering Technician. Grievant and other internal applicants were interviewed for the three remaining Transportation Engineering Technician Trainee positions.

6. All internal applicants met the minimum qualification of high school graduate or equivalent for the Transportation Engineering Technician Trainee classification.

7. Prior to working for the Respondent, Grievant's application for the position reflected he owned and operated Garrett's Gas and Grocery from 1973 to 2001. He served in some supervisory capacity over eight employees while operating the business. His application notes a Bachelor of Science degree in physical education. His application did not reflect any experience in construction work.

8. Grievant is sixty-two years old.

9. Interviews were conducted by Danny Donlin, Construction Engineer, and Anthony Paletta, Administrative Services Manager. All applicants were interviewed for the Transportation Engineering Technician Trainee position. They were asked the exact same interview questions. Interviewers took notes of the applicants' answers. When determining the successful applicants, the interviewers considered the applications submitted by applicants and the interview answers.

10. Upon completion of the interview process, Frank Mano, Christina Marple, and Richard Sigley were recommended and appointed to fill the vacancies.

11. The interviewers based their recommendations on the applicants' experience in the area of construction work.

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 Board 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). 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 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 has not established that the Respondent's selection of the successful applicants was arbitrary and capricious. The interviewers stated that the qualifications and experience of all the applicants were reviewed. Grievant contends that he disclosed construction experience during the interview, and contends that because he has a college degree he is more qualified than the other applicants. The record of this grievance demonstrates that Grievant's response to questions concerning his qualifications in regard to construction work reflect responses such as "not much experience, knowledgeable and teachable, zero years of [construction] type of experience."[1] Level three, Respondent's Exhibit 4. The interviewers acknowledged that Grievant exceeded the minimum

[1]While curious, but information not controlling in this grievance, the level three hearing did disclose that Grievant made a subsequent application for the same position at a later posting. When Respondent was provided with some indication that Grievant possessed construction experience he was offered the position. Grievant did not accept the offer likely because it amounted to no more than a lateral move with the same salary.

qualifications in the area of education; however, he lacked experience in construction work and computer knowledge.

When considering qualifications and record of performance, Mr. Sigler had worked in construction for approximately twenty years, with eleven years experience working for the DOH Bridge Department. Mr. Mano had worked in a county maintenance headquarters for five years as an equipment operator, had worked with blacktopping crews, and had worked with concrete for two years prior to his employment with DOH. Mr. Mano also had computer knowledge. Ms. Marple had worked in a county maintenance headquarters for two years, performing record keeping for paving projects. Ms. Marple also had computer experience and knowledge. In contrast, Grievant stated he did not have any experience in construction and very little computer experience. He wanted the job because he had worked six years as a mechanic and wanted to try something different.

Upon consideration of Grievant's disclosed qualifications and interview answers, it cannot be said that Respondent's selection of the successful applicants was "without consideration, and in disregard of facts and circumstances of the case." *Eads*, *supra*.

Grievant maintains he was discriminated against because of his age. For purposes of the grievance procedure, 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 a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she 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.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). The Grievance Board does not have jurisdiction over the 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) does encompass acts that may fall within the West Virginia Human Rights Act or Age Discrimination in Employment Act. *See Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997).

Consideration of the issue is limited to analysis under WEST VIRGINIA CODE § 6C-2-2(d) and, in this instance, Grievant has not established that he was treated differently from any other applicant. The record at levels one and three reveals that Grievant stated he did not have any hard evidence that he was treated differently because of his age. He simply pointed out that age could have been a reason for his non-selection because two other applicants were in their forties and one was in her twenties.

Grievant has not established a prima facie case of discrimination. As indicated above, there is ample evidence demonstrating the Respondent's selection of the successful applicants was reasonable. In addition, 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 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 Board 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). 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, supra.*

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

5. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she 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.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. Grievant did not establish that he was the victim of discrimination.

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: December 18, 2009

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Ronald L. Reece
Administrative Law Judge