# WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**RANDY J. FERRELL**
**Grievant,**

**v.** **Docket No. 2009-0173-DOT**

**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,**
**Respondent.**

## D E C I S I O N

Grievant, Randy J. Ferrell, filed this grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("DOH"), on August 5, 2008, challenging his non selection for one of the posted positions of Transportation Crew Supervisor I.[1] The statement of grievance reads: "Not selected for Bulletin [#619 or] #620 posting." As relief, Grievant sought: "To be made whole, selection for position."

A hearing was held at level one on August 28, 2008, and a decision denying the grievance at that level was issued on September 11, 2008. Grievant appealed to level two on September 19, 2008. A level two mediation held on December 17, 2008, was unsuccessful. An Order of Unsuccessful Mediation was entered on December 18, 2008, and Grievant appealed to level three. A level three hearing was held before the undersigned Administrative Law Judge on April 6, 2009, in the Grievance Board's Charleston office. Grievant was represented by Gordon Simmons, UE Local 170, WV Public Workers Union and Respondent was present by its counsel Robert Miller, Esq.,

---

[1] Grievant was not selected for Bulletin #619 or #620 posting. It is acknowledged by all parties and not disputed that Grievant applied for simultaneous posted Transportation Crew Supervisor 1 positions. Grievant's original grievance statement was incomplete.

DOH, Legal Division. This case became mature for decision on May 15, 2009, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

## Synopsis

This grievance was filed after Grievant was not selected for a Transportation Crew Supervisor I position with the Department of Transportation/Division of Highways. Grievant alleges that he should have been selected for a position because he has more seniority than the successful applicants. After the interview process, two other employees were deemed more qualified than Grievant. Grievant has not established by a preponderance of the evidence that the Respondent's selection of other applicants was arbitrary and capricious. Respondent's selection decision was not arbitrary and capricious or clearly wrong.

The following Findings of Fact are made based upon the evidence developed at levels one and three.

## Findings of Fact

1. Grievant is employed as a Transportation Worker 3 (TW3EQOP) with Respondent, the Department of Transportation/Division of Highways. Grievant has been employed with Respondent since 1988. Grievant currently works in District 1, which encompasses the Boone County area.

2. Prior to working for Respondent, Grievant worked for eight years as a roof bolter operator and performed various tasks for a local long wall mining company. Grievant is certified on the following pieces of excavation equipment: motor grader, excavator and

tilt trailer. Grievant also worked for one summer in 1988 supervising laborers who were cleaning up the city of Danville, West Virginia as a part of the Summer Youth Program.

3. Respondent posted employment opening(s) for Transportation Crew Supervisor 1 (TRCRSV1) positions in the spring of 2008. *Resp's Ex. 1 (April 24, 2008, Weekly Vacancy Report, Bulletin #619 and May 21, 2008, Weekly Vacancy Report, Bulletin #620 ).*

4. Eight internal employees applied for the posted positions. Grievant applied for a Transportation Crew Supervisor 1 position in District 1 as posted in Bulletins #619 and #620. All applicants met the minimum qualifications for the position.

5. The job posting contained a brief sketch of the job duties of a Transportation Crew Supervisor 1 position. The general duties of the posted TRCRSV1 positions are:

> [U]nder limited supervision … will supervise two or more crews and participate in the maintenance and repair of highways. Will coordinate equipment and determine material needed, complete record of time, equipment and material used, complete daily reports and train crew members. May be exposed to inclement weather and hazardous working conditions. Performs related work as required.

*Resp. Ex. 1.*

6. The interview and selection panel for the posted positions consisted of Larry Harper, Supervisor Boone County, and Margie Stover, Administrative Service Manager, District 1.

7. Interviews were held on June 24, 2008, for both of the posted positions. Supervisor Harper, Service Manager Stover, and Ms. Amy Adkins were present during all interviews. Ms. Adkins is an Office Assistant 3 who was present during the interview process for clerical purposes.

8. All eight applicants were interviewed for the positions. All applicants were asked the same set of questions during the interviews and were rated on the same qualifications including: education; relevant experience; possess knowledge, skills & abilities; interpersonal skills; flexibility/adaptability; and presentability.

9. All three candidates relevant to this grievance met the minimum qualifications for the positions. They were all asked the exact same interview questions. Interviewers took notes of the applicants' answers. When determining the successful applicant, the interviewers considered the applications submitted by the applicants and the interview answers.

10. On the application evaluation records, candidate Stowers "exceeded" in three of the qualifications, candidate White "exceeded" in four of the qualifications.

11. Pursuant to the application evaluation records, Grievant did not "exceed" in any of the qualifications. However, during the level one grievance hearing, it was determined that Grievant and candidate Stowers should have received an "exceeds" in Education.

12. Results of the interviews and Supervisor Harper's knowledge of the employees' work were taken into consideration when selecting which applicant to recommend for the position.

13. Upon completion of the interview and evaluation process, Stefen R. White was recommended and appointed to fill the vacancy set forth in Bulletin #619. Applicant White was classified as a TW3EQOP when he applied for the postings and has approximately 3 years experience with the Division of Highways. He worked in the mine

construction business for three years and served in the Air Force as a fuel specialist, responsible for the transfer of jet fuel and the supervision of seven men.

14. Upon completion of the interview and evaluation process, Michael Stowers was selected for the Bulletin #620 posting. Applicant Stowers was classified as a TW3EQOP when he applied for the postings and has nearly 12 years of experience with the Division of Highways. Stowers had been performing the duties of the Crew Supervisor since March 2008, until the position was posted.

**Discussion**

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

Grievant contends he should have been selected for one of the Transportation Crew Supervisor 1 positions posted by Respondent for District 1. Grievant asserts he is qualified, has supervisory experience, and has more seniority than the successful applicants. Grievant accentuates that his equipment certification is higher than candidate White, and that he [Grievant] has been a crew leader.

Grievant argued that he should have been selected because he had the most seniority of all the applicants. Grievant, in support of this contention, highlights a February 20, 2004, Division of Highways' "Statement on Seniority," by then Commissioner Fred VanKirk. (Gr. Ex 2). It is Grievant's proposition that pursuant to this agency directive Respondent is required to select [him] the most senior applicant for the posted position, in that such change in employment (a promotion) constitutes an employment benefit.[2]

Grievant's interpretation of the principles discussed in the 2004 Memorandum; seniority rights, employment benefits, WEST VIRGINIA CODE § 29-6-10(4), and Agency decision(s), as applicable to the instant matter is faulty. Neither the Memorandum nor the WV Statute cited in the document require that the most senior applicant be selected for all

---

[2] In relevant part, the Division of Highways' 2004 Statement reminds supervisors and manager of the provisions of WEST VIRGINIA CODE § 29-6-10(4) and applicable requirements regarding seniority. In relevant part the document states:

> Please make special note that the law says "*any benefit.*" That phrase is to be construed broadly and should not be considered limited to the examples provided. The most instructive language noted in the law is *"a choice is required."* That indicates to supervisors and managers that when we must choose between employees in any decision affecting employees' conditions of work that can be construed as benefits, the level of seniority must be considered when two or more of the employees are substantially equally or similarly qualified. This is also true where qualifications are irrelevant to the benefit at issue.

February 20, 2004, Statement on Seniority (Gr. Ex 2) (Emphasis added in Original).

benefits. WEST VIRGINIA CODE § 29-6-10(4) requires an employer to consider seniority in selection decisions "if some or all of the eligible employees have substantially equal or similar qualifications[.]"

Grievant's position does not acknowledge or adequately recognize an agency's discretion in selection decisions. WEST VIRGINIA CODE § 29-6-10(4) provides, in pertinent part:

> 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.

The first question presented by this statutory language is not which applicant is the most senior, but rather were the applicants' qualifications "substantially equal" or "similar." *Ward v. Dep't of Transp.*, Docket No. 96-DOH-184 (July 24, 1997). "Where the grievant and the successful applicant meet the minimum qualifications for the job, but one applicant, or in this case, seven applicants, are more qualified than the grievant, their qualifications are not substantially equal or similar, and seniority need not be considered. *Mowery, supra*." *Sheppard and Gregory v. W. Va. Dep't of Health and Human Resources,* Docket No. 97-HHR-186/187 (Dec. 29, 1997). "The employer retains the discretion to discern whether one candidate has superior qualifications than another, without regard to seniority as a factor." *Lewis v. W. Va. Dep't of Admin.,* Docket No. 96-DOA-027 (June 7, 1996). "If the qualifications of the applicants are similar or substantially equal, 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).

Respondent is not required to consider the seniority of the applicants as the decisive factor in making every selection decision.

The selection panel had the opportunity to summarize the observations that they had made and signed in the Application Evaluation Record that was prepared for each applicant. Grievant scored "Meets" in all of the places on his Application Evaluation Record. And while Grievant may have had sufficient education to raise him up to an "Exceeds" for that category, this change alone would not raise his overall evaluation up to that of the two successful applicants, White and Stowers. (*See* Stover level three testimony). The interview/selection panel rated applicants White and Stowers higher than Grievant in nearly all categories.

Applicant White had recent and relevant supervisory experience with DOH. At the time of application, he held the position of Transportation Crew Supervisor and had served in a supervisory capacity since May of 2007.[3] Ms. Stover testified that applicant White had a great deal of experience including three years of supervisory experience and six years experience where he assisted the supervisor and did the Core Maintenance. Further, applicant White had more daily office experience which included computer usage and familiarity with Excel and Word.

Applicant Stowers, at the time he applied for this position, had been filling in as a Temporary Crew Leader since March of 2008. He assisted the Supervisor and other Crew

[3] In this position, applicant White operated a variety of equipment, helped with the six month work schedule and the weekly Maintenance Schedule.

Leaders in planning jobs and ordering materials. He filled out daily time sheets and set up traffic control to keep the crews safe. Before this, applicant Stowers operated a grader, pulled ditch lines, operated a dump truck, operated boom and frail mowers in high traffic areas, operated a salt truck and end loader in the winter months, and set up traffic control for lane closures. Unlike applicants White and Stowers, Grievant's position generally related to earth moving and did not include sufficient acting crew chief components. The successful applicants had more direct experience, which many times equates to greater qualification. Upon consideration of the job description of the TRCRSV1 position, it cannot be said that the Respondent's determination that applicants White and Stowers were more qualified was unreasonable.

In this case, the qualifications of the candidates, as determined by the interviewers, were not so similar that seniority needed to be used as anything other than evidence of past experience. "An 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." *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-304 (July 18, 2008); *McKinney, et al., v. Dep't of Transp./Div. of Highways,* Docket No. 2008-0316-CONS (Dec. 27, 2007); *Allen v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-230 (Sept. 23, 2005); *Ferrell v. Dep't of Transp.*, Docket No. 04-DOH-240 (Dec. 20, 2004). Specifically, it was determined that the successful applicants were more qualified than Grievant.

Coupled and commingled with Grievant's argument that Respondent's selections for the posted positions were arbitrary and capricious, Grievant maintains that he was discriminated against. "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 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).

It is unfortunate that Supervisor Harper was unavailable to testify, especially given that his opinion had significant weight.[4] Administrator Stover acknowledges that she relied to some extent on Supervisor Harper's recommendations. Nevertheless, Grievant failed to establish the essential elements to demonstrate discrimination or favoritism.

Interviewers Stover and Harper reviewed all of the documents furnished by the applicants, were present for all of the interviews and discussed each applicant as the candidates were being evaluated. Applicant White scored "Exceeds" in Education; Relevant Experience; Possess Knowledge, Skills & Abilities. He scored "Meets" in Flexibility/Adaptability and Presentability. Applicant Stowers received "Meets" in Education and Relevant Experience; "Exceeds" in Possess Knowledge, Skills & Abilities and

---

[4] Supervisor Larry Harper, (member of the interview and selection panel), is retired and is no longer an employee of Respondent.

Flexibility/Adaptability; and "Meets" in Presentability. The successful applicants were rated higher than Grievant in nearly all categories. Additionally, Supervisor Harper had had the opportunity to observe each of the three applicants, relevant to this grievance, perform in the work place and observed their strong and weak points. He had the opportunity to observe how they got along with their fellow employees, their supervisors and how their actions were on a day to day basis.

Grievant has not established that he was treated differently from any other applicant. Grievant has not established a prima facie case of discrimination or favoritism. As indicated above, there is ample evidence demonstrating that Respondent's selection was reasonable. This same rationale also explains why Grievant was not selected for the position. Evidence of record does not establish that Grievant's non-selection was unrelated to the requirements of the position.

While Grievant met the minimal qualifications for the position, he did not adequately demonstrate to the interview panel that he was more qualified than the successful applicants. In review of Grievant's qualifications, interview scores and employment history with Respondent, it cannot be said that the Respondent's selection of applicants White and Stowers was without due consideration, or in disregard of pertinent facts and circumstances of the job responsibilities. Although it is understandable that Grievant would perceive his lengthy employment and knowledge of the department as making him abundantly qualified, the ultimate decision is based upon a determination as to which candidate would do the best job. Grievant's perception omits the concept that seniority is not the primary consideration. In this case, the interview/selection panel explained their reasoning in determining that applicants White and Stowers were more qualified than

Grievant, and the undersigned does not find abuse of the ample discretion afforded Respondent regarding such decisions. Grievant has not proven there was a flaw in the selection process which necessitates the reversal of Respondent's discretion. Selection decisions are largely the prerogative of management. Grievant has failed to meet his burden of proof and establish the selection process was arbitrary and capricious or DOH's choice of the successful applicant was an abuse of discretion.

## Conclusions of Law

1. 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).

2. 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*.

3. 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).

4. An 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. *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-304 (July 18, 2008); *McKinney, et al., v. Dep't of Transp./Div. of Highways,* Docket No. 2008-0316-CONS (Dec. 27, 2007); *Allen v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-230 (Sept. 23, 2005); *Ferrell v. Dep't of Transp.*, Docket No. 04-DOH-240 (Dec. 20, 2004)

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

7. 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). In this case, the interview panel concluded that the qualifications of applicants White and Stowers exceeded those of Grievant. Respondent was not required to consider the seniority of the applicants in making a selection.

8. Grievant has failed to establish that the selection of the successful applicants White and Stowers for the posted Transportation Crew Supervisor 1 positions was arbitrary and capricious, unreasonable or clearly wrong.

9. In order to establish either a discrimination or favoritism 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).

10. Grievant did not demonstrate that there was discrimination or favoritism in the selection process. 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 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:** September 29, 2009

**Landon R. Brown**
**Administrative Law Judge**