THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LEROY JAMES COMPTON,
Grievant,

v. **DOCKET NO. 2009-0357-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Leroy James Compton, filed this grievance against his employer, the Division of Highways, on September 18, 2008, challenging the selection of another employee for a posted Transportation Crew Supervisor 1, inmate supervisor, position. The statement of grievance reads: "Favoritism and prefer[e]ntial treatment for job TRCRSV 1 on Bulletin # 621." As relief, Grievant sought: "With seniority and dependability I want the job."

A hearing was held at level one on October 17, 2008, and a decision denying the grievance at that level was issued on November 6, 2008. Grievant appealed to level two on November 19, 2008. A mediation was held at level two on April 13, 2009, but was not successful. Grievant appealed to level three on April 23, 2009. A level three hearing was held before the undersigned Administrative Law Judge on July 15, 2009, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Barbara Baxter, Attorney, Legal Division. The parties presented oral argument at the conclusion of the hearing, declining to submit written argument, and this matter became mature for decision at the conclusion of the level three hearing on July 15, 2009.

Synopsis

This grievance was filed when Grievant was not selected for an inmate supervisor position. Grievant was the most senior applicant. The employee who was selected for this position had more experience supervising inmates than Grievant, and was deemed better qualified for this reason. This 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 by the Division of Highways ("DOH") as a Highway Equipment Operator III, Monongalia County, District 4. He has been employed by DOH for 16 years.

2. On October 31, 2005, DOH posted a vacancy for a Transportation Crew Supervisor I, inmate crew supervisor, in Monongalia County. The successful applicant would be supervising inmate crews from the Pruntytown Correctional Center, which were performing work for DOH.

3. Grievant applied for the posted position, as did Joey Maxon, John Lucas, and Dave McCourt, all of whom were DOH employees. All of these employees were qualified for the position.

4. Grievant, Mr. Maxon, Mr. Lucas, and Mr. McCourt were interviewed by the two members of the interview committee, Anthony Paletta, Administrative Services Manager I in District 4, and Kathy Westbrook, Highway Administrator for Monongalia

County. The interviews were conducted July 22 and August 5, 2008. Each applicant was asked the same questions.

5. After the interviews the members of the interview committee rated the applicants in the areas of education, relevant experience, knowledge, skills and abilities, interpersonal skills, flexibility/adaptability, presentability, and overall evaluation. Mr. Maxon was rated above the other applicants in the areas of relevant experience, knowledge, skills and abilities, and overall evaluation. Grievant and Mr. Maxon received a rating of "meets" in each of the other categories. Mr. Paletta and Ms. Westbrook discussed the applicants, and they recommended Mr. Maxon for the position. Their recommendation was approved, and Mr. Maxon was placed in the position.

6. Mr. Maxon had been filling in as the inmate supervisor for periods of time for about four years, and had never had any problems with the inmates.[1]

7. Grievant completed the inmate supervisor training offered by the Pruntytown Correctional Center in May 2007. Grievant has experience supervising student workers in the summer, and he has supervised the inmate crews a few times. The record does not clearly reflect the extent of Grievant's experience supervising inmate crews, but he has less experience in this area than Mr. Maxon.

8. Mr. Maxon was selected because he had the most experience supervising the inmates, and because he has never had any problems with the inmates.

---

[1] On several occasions employees supervising the inmates have had inappropriate interactions with the inmates, resulting in the Pruntytown Correctional Center removing the inmate crews for periods of time. In fact, Grievant had been involved in one such incident, providing watches to a co-worker who then gave or sold them to inmates. Grievant was not supervising the inmates at the time. Grievant told Ms. Westbrook before his interview that he did not know that the watches were for the inmates.

9. Ms. Westbrook also preferred Mr. Maxon over Grievant for this position because she has found Grievant to be somewhat passive, and she believed a strong personality, with strong leadership skills was preferable for supervising the inmates.

10. Grievant has more seniority than Mr. Maxon.

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).

Respondent selected Mr. Maxon for this position because he had the most experience supervising the inmates, and he had never had any problems with them. Also, Ms. Westbrook was concerned that Grievant was passive and did not have the leadership skills or personality preferred in handling inmates. These distinctions in the applicants made Mr. Maxon better qualified for the position. Respondent's selection of Mr. Maxon for the position was not arbitrary and capricious.

Grievant asserted that he had supervisory experience which was not considered; however, the record reflects only that he had some experience supervising student workers in the summer several years ago, as a lead worker. The only evidence presented by Grievant regarding his experience supervising the inmates was that he had supervised them "a few times," and that he makes them work the entire time when he is the supervisor. Grievant did not demonstrate his supervisory experience was equivalent to Mr. Maxon's.

Grievant also felt that he should have been selected over Mr. Maxon because he does not take a lot of annual or sick leave, demonstrating his dependability, whereas, he asserted that Mr. Maxon takes a lot of leave. No evidence was presented that Mr. Maxon

has abused his leave. Grievant also testified that many of his co-workers felt he should have been selected. Respondent does not dispute that Grievant is a dependable, valued employee; however, Mr. Paletta and Ms. Westbrook found Mr. Maxon's experience placed him above the other applicants, and this was an important consideration because of the nature of the job.

Finally, Grievant argued that he should have been selected because he had the most seniority of all the applicants. 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). In this case, the interview committee concluded that Mr. Maxon's qualifications exceeded those of the other applicants. They were not required to consider the seniority of the applicants in making a selection.

In his statement of grievance, Grievant claimed favoritism in the selection process. For purposes of the grievance procedure, favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish a 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). Grievant did not explain his claim of favoritism, and the undersigned has been unable to glean from the evidence presented any favoritism in the selection. All the applicants were asked the same questions by the same two interviewers, and each applicant was rated using the same

factors. Grievant did not demonstrate that there was any favoritism in the selection process.[2]

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

---

[2] Grievant seemed to suggest that he was not given the same opportunity to acquire experience supervising the inmates as Mr. Maxon was given. Whether this is true is not an issue in this grievance. Mr. Maxon has been filling in as the inmate supervisor for about four years, yet this is the first time Grievant has raised this as an issue. This grievance is about whether Grievant should have been selected, not about how Mr. Maxon acquired his supervisory experience.

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. Respondent's determination that Mr. Maxon was the best qualified applicant for the position 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).

8. "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). In this case, the interview committee concluded that Mr. Maxon's qualifications exceeded those of the other applicants. They were not required to consider the seniority of the applicants in making a selection.

9. In order to establish a 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 any favoritism in the selection process.

Accordingly, this grievance is **DENIED**.

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: August 4, 2009