THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GREGORY A. SMITH,
Grievant,

v. **DOCKET NO. 2008-1014-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

DECISION

Gregory A. Smith ("Grievant") challenges his non-selection for the position of Engineer IV by his employer, Respondent Department of Environmental Protection ("DEP"). The January 3, 2008, "Statement of Grievance" provides as follows:

> My grievance is that I have been inappropriately passed over for the Engineer IV position (Posing #DEP0700093) for which I applied. The description (Attachment 2) of the duties for this position are essentially identical to the duties that I perform. Consider the following facts. [sic] I officially served in this position when it became vacant until it was filled. Furthermore, I continued to perform the majority of these duties even after it was filled and I am performing these duties even now. I have an established knowledge of the procedures associated with this position. Also, consider that this is the second time in a row that I have been passed over for this position. Therefore, the selection process is deficient in that a qualified candidate is passed over without cause or justification. I have been unfairly denied advancement in job classification and thereby, have been denied due compensation for the services I have provided and continue to provide to WVDEP. I have demonstrated my ability to fulfill the duties and expectations associated with this position as reflected in my employee performance evaluations. I contend that I am the victim of a hiring process that has circumvented the basic principle of rewarding dedicated service with job advancement.

As relief, the Grievant seeks for the DEP to "re-evaluate the selection process for this position, and to provide the job advancement properly due to me."[1]

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[1] It is noted that the classification scheme for the engineer classification was altered by the West Virginia Division of Personnel on or about May 1, 2008, nearly four months

This grievance was denied at Level One on March 8, 2008. A Level Two mediation was held on June 2, 2008. A Level Three evidentiary hearing was held before the undersigned Administrative Law Judge ("ALJ") on August 10, 2009, in Elkins, West Virginia.[2] The Grievant appeared pro se. Respondent DEP appeared by and through its counsel, Raymond S. Franks, Esquire.[3] This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about October 2, 2009.

Synopsis

Grievant was not the successful applicant for the position of Engineer IV and challenges his non-selection. Each applicant was interviewed and asked the same general questions. The successful applicant received higher ratings than the Grievant. The successful applicant has a greater level of education and greater personnel management experience. There is no indication that these ratings were unreasonable or otherwise arbitrary and capricious.

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after the filing of this grievance. The classification of Engineer IV is now contained within the Senior Engineer classification. The position is referred to as an Engineer IV position throughout this Decision.

[2] This grievance was originally submitted upon the Level One record by the parties. However, upon consideration of the Level One proceedings and transcript, the record was too inadequate for this ALJ to make the necessary findings of fact and conclusions of law. After a May 15, 2009, telephonic hearing on the issue, an *Order Requiring Level Three Evidentiary Hearing* was entered on May 18, 2009.

[3] Mr. Franks left the Level Three hearing midway through the Grievant's rebuttal testimony due to a scheduled hearing before the Circuit Court of Kanawha County. Upon his departure, DEP had no representative in the hearing. Mr. Franks gave no prior notice that he needed to leave the hearing early. This ALJ afforded DEP the opportunity to continue the hearing. A continuance was deemed unnecessary by DEP, and the hearing proceeded in the absence of DEP's counsel or a DEP representative.

Grievant has not established, by a preponderance of the evidence, that he was the most qualified applicant. Nor has he established a significant flaw in the selection process occurred. Accordingly, 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 by DEP as an Engineer, assigned to the Philippi satellite office as a Project Manager for the Office of Abandoned Mine Lands ("AML").

2. On August 24, 2007, DEP posted an opening in Grievant's section for a vacant Engineer IV position to serve as the Design Administrator for AML projects. Grievant, then classified as an Engineer III, had previously been appointed as Design Administrator on an interim basis. He applied for the posted opening.

3. Charles J. Miller, now retired, was the Assistant Director for AML and placed in charge of the hiring process. Mr. Miller conducted interviews for the position. When interviewing candidates and choosing the successful applicant, Mr. Miller used DEP's standard Interview Comment, Evaluation and Vacancy Tracking ("ICE") form.

4. Candidates were scored across five categories: key experience, education, knowledge, skills and abilities. Applicants' scores on a "Profile XT Assessment (Overall Job Match)" were also considered. The Profile XT Assessment is a standardized assessment used by DEP to measure an applicant's overall compatibility with the management and personality attributes demanded by the particular position.

5. On the ICE form, specific evaluation ratings were given for each candidate in

each of the five categories.[4] For each category, an applicant could receive a maximum score of five points. Twenty-five points was the maximum number of points an applicant could receive.

6. Mr. Miller individually interviewed each candidate. Interviews were conducted on or about September 26, 2007. Mr. Miller asked each candidate the same general questions.

7. At the start of the Grievant's interview, Grievant began with the explanation that he was stuck as an Engineer III and needed a raise. Further, he complained that he felt like his current supervisor was delegating most of his work to the Grievant.

8. Grievant has 33 years of experience with DEP and its predecessors, the last 20 of which have been with AML. He is a licensed engineer. Grievant holds a B.S. in civil engineering from West Virginia University. His supervisory experience is limited to several months in 2006 and 2007, when he was named Acting Design Administrator.

9. Based upon his experience, Grievant has a working knowledge of AML.

10 Grievant scored a 79% on the Profile XT Assessment. Grievant scored below the established position benchmarks for assertiveness, sociability and decisiveness.

11. With respect to the additional job criteria listed on the ICE form, Grievant received a score of 4 in key experience category and received a score of 3 in the education, knowledge, skills and abilities categories. Overall, Grievant was awarded 16 of the possible 25 points.

12. Grievant was not the successful applicant. Nick Estes was chosen for the

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[4] Additionally, specific written comments were included for each category.

position and accepted the position.

13. Mr. Estes holds B.S. degrees in both Math and Mining Engineering from West Virginia Institute of Technology. He is a licensed engineer. He also holds a Masters degree in Business Administration from West Virginia University. At the time of the interview, he had nearly five years of experience with DEP as an Engineer III in the Division of Mining and Reclamation. Mr. Estes has direct supervisory experience totaling more than eighteen years. He worked for approximately five years in private industry as the manager of numerous multi-million dollar projects in the mining sector.

14. During the interview, Mr. Estes exhibited a positive attitude. He scored 81% on the standardized Profile XT Assessment. He received a rating of 5 in the education category. He received a rating of 4 in the categories of knowledge, skills and abilities. Mr. Estes was awarded 21 out of a possible 25 points on the ICE form.

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 Public Employees Grievance Bd., W. VA. CODE R. § 156-1-3 (2008); *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). 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).

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). 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 Rehab. Serv*s., 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. Servs.*, Docket No. 98-RS-126 (Aug. 3, 1998).

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, 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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations 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)).

When determining whether the DEP's selection was unreasonable, the statutory language governing internal hiring and promotion must be examined. WEST VIRGINIA CODE § 29-6-10(4) provides:

> [f]or 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). Hence, pursuant to the statute, when considering the applicants for the Engineer IV position, DEP must first look to qualifications and records of performance. If the qualifications and records of performance are substantially equal, it must then look to seniority and use it as *a* factor.

In this case, Mr. Estes was found to be the successful applicant. He has a greater level of education when compared to the Grievant. Mr. Estes holds an MBA, while the

Grievant does not. The Grievant has more first-hand knowledge of the inner workings of AML based upon his years of service; however, Mr. Estes has a particular type of supervisory experience desired for the position. He has acted in a supervisory capacity in both the public and the private sectors. *See* Level Three, Respondent's Exhibit 3. Grievant has a limited amount of experience managing personnel. Level Three, Testimony of Gregory A. Smith (cross examination).

As recognized by the Grievance Board numerous 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 & Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008). *See also Morgan v. W.Va. Div. of Highways*, Docket No. 07-DOH-352 (Sept. 18, 2008). Hence, where a supervisory position is at issue, relevant "personality traits and abilities" are bound up within the analysis of "qualifications" and "record of performance" under WEST VIRGINIA CODE § 29-6-10(4). In this instance, DEP measured personality traits via a standardized test, the Profile XT Assessment, that measures the subject's personality profile against the needs for the particular position. In this case, the successful applicant's personality traits were found to be more compatible for the position. Mr. Estes received an 81% while the Grievant received a 79%.

Overall, when compared to the Grievant, the successful applicant received higher ratings in all but one category. In the experience, both Grievant and the successful applicant received a rating of 4. Accordingly, seniority need not be considered as a factor.

Upon due consideration of the evidence, the Grievant has not established, by a preponderance of the evidence, that he was the most qualified applicant or that a significant flaw in the selection process occurred. DEP's selection decision was not arbitrary and capricious. This grievance is denied.

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 of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd., W. VA. CODE R. § 156-1-3 (2008); *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). "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).

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). 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 Rehab. Servs.*, 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. Servs.*, Docket No. 98-RS-126 (Aug. 3, 1998).

3. "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 & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted).

4. 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).

5. 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 interviewer concluded that Mr. Estes' qualifications exceeded those of the other applicants. He was not required to consider the seniority of the applicants in making a selection.

6. Grievant has not established, by a preponderance of the evidence, that he was the most qualified applicant for the position. Nor is there any indication that a significant flaw in the selection process occurred.

7. The DEP's selection for the position in question was not clearly wrong or arbitrary and capricious.

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 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 (2008).

Date: October 16, 2009

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Mark Barney
Administrative Law Judge