THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GARY McCOY,

Grievant,

v. **DOCKET NO. 2008-1442-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Gary McCoy ("Grievant") challenges the decision of Respondent Department of Transportation/Division of Highways ("DOH"), denying him the position of Transportation Crew Supervisor 1. The April 9, 2008, "Statement of Grievance" provides that "[c]rew supervisor position awarded to individual with less experience & qualification than myself." As relief, Grievant seeks backpay from April 1, 2008, to November 1, 2008.[1]

This grievance was denied at Level One on May 20, 2008. A Level Two mediation, conducted on August 28, 2008, was unsuccessful. A Level Three hearing was held before the undersigned Administrative Law Judge ("ALJ") on February 23, 2009, in Charleston, West Virginia. Grievant appeared by and through his representative, Gordon Simmons, Steward, UE Local 170. Respondent appeared by and through its counsel, Barbara L. Baxter, Esquire.

This matter became mature for decision on or about March 16, 2009, the deadline

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[1] In his initial grievance filing, the Grievant requested "crew supervisor position or better (may consider another organization). Back pay and seniority in position. To be made whole [*sic*]." However, at the Level Three hearing, the Grievant amended his request without objection from the Respondent. In November of 2008, Grievant received a promotion, apparently to a supervisor position.

for submitting proposed findings of fact and conclusions of law. Both parties submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant was not the successful applicant for the position of Transportation Crew Supervisor 1 and challenges his non-selection. Each applicant was interviewed and asked the same general questions. The successful applicant received higher ratings than the Grievant in "Knowledge, Skills & Abilities" and "Interpersonal Skills." There is no indication that these ratings were unreasonable.

Grievant has not established, by a preponderance of the evidence, that he was the most qualified applicant. There is no indication 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 has been an employee of the DOH since June, 1976.

2. DOH posted a vacancy for a Transportation Crew Supervisor 1 on December 10, 2007.[2]

3. The designated selection panel for this position consisted of Cabell County Highway Administrator Charlene Pullen, Maintenance Assistant Gregory Surber and District 2 Administrative Services Manager Harold Jones. *See* Level Three, Joint Exhibit 2.

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[2] Neither the job posting nor the specific requirements for the position was submitted as evidence by either party.

4. On December 18, 2007, Grievant applied for the Transportation Crew Supervisor 1 position. *See* Level Three, Joint Exhibit 4.

5. Three applicants were interviewed for the position. All interviews were conducted on February 28, 2008. Level Three, Joint Exhibit 1.[3] Grievant was interviewed by Charlene Pullen and Harold M. Jones.

6. Gregory Surber did not participate in all of the interviews. He came in late on the day of February 28, 2008. Mr. Surber did not participate in the Grievant's interview.[4] Mr. Surber arrived mid-way through the interview of the successful applicant, Dwayne Scarberry.

7. During the interviews, applicants were asked a series of uniform, general questions. Applicants were scored across six dimensions: (1) "Education;" (2) "Relevant Experience;" (3) "Possess Knowledge, Skills & Abilities;" (4) "Interpersonal Skills;" (5) "Flexibility/Adaptability;" and (6) "Presentability." For these dimensions, applicants could receive scores of "Does Not Meet," "Meets" or "Exceeds" expectations. *See* Level Three, Joint Exhibit 4.

8. It is important for a Transportation Crew Supervisor 1 to have good interpersonal skills. A Transportation Crew Supervisor must communicate with the public and have knowledgeable responses to public inquiries. Level One, Transcript, 19. Likewise, a Transportation Crew Supervisor must communicate with and direct his or her crew of

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[3] Four individuals applied for the position; however, Mr. David Bartley withdrew his application and was not interviewed. Level Three, Joint Exhibit 4.

[4] As indicated by the applicant score sheet, Mr. Surber did not rate the Grievant. Level Three, Joint Exhibit 4.

workers.

9. Grievant was asked numerous questions concerning specific DOH policies and procedures. When asked whether he knew what an OM-41 was, Grievant was unsure and replied "maybe." An OM-41 is a supervisor's weekly planning schedule.

10. At the time of the interview, Grievant was employed by the DOH as an Equipment Operator 3. He had held this position since September,1992. Prior to September, 1992, from May, 1988, to August, 1992, Grievant held the position of Equipment Operator 2 with the DOH. Prior to May, 1988, Grievant had held the positions of Craftworker 1, Equipment Operator and Laborer, all with DOH.

11. Grievant had some experience serving as an *acting* crew supervisor.

12. The selection panel scored the Grievant as "Meets" expectations in all categories except "Relevant Experience." In the "Relevant Experience" category, Grievant received a score of "Exceeds."[5]

13. Grievant was not selected for the position. The selection panel unanimously selected Dwayne Scarberry.[6] Level Three, Joint Exhibit 3.

14. The successful applicant, Mr. Scarberry, received the score of "Exceeds" expectations in three categories: (1) "Relevant Experience," (2) "Possess Knowledge, Skills & Abilities" and (3) "Interpersonal Skills." He received a rating of "Meets" expectations in the categories of "Education," "Flexibility/Adaptability" and "Presentability."

15. At the interview, Mr. Scarberry demonstrated and articulated great knowledge

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[5] The Grievant did not testify at the Level One or Level Three hearing.

[6] The record indicates that Mr. Scarberry and the Grievant are cousins.

of DOH policy and procedure. Specifically, he understood the "Core Maintenance Plan" of DOH,[7] knew what an OM-41 document was, and knew what the DOT-12 document was. Further, Mr. Scarberry knew what the straight-line book was used for. Level Three, Joint Exhibit 5.

16. At the time of the interview, Mr. Scarberry was employed as a Transportation Worker 3, Equipment Operator. He had held this position since September, 2003. He was the primary operator of a dump truck and the secondary operator of " the Gradall." He assisted in the scheduling of maintenance and repair projects and assignments, coordinated equipment and determined materials needed for projects.

17. Mr. Scarberry had some experience serving as an *acting* crew supervisor.

18. From February, 1996, to September, 2003, Mr. Scarberry worked as a Transportation Worker 2, Equipment Operator.

19. From June, 1994, to February, 1996, Mr. Scarberry worked as a laborer with the DOH.[8]

20. Respondent DOH did not raise the issue of timeliness at or before Level Two of the grievance procedure.

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[7] Mr. Surber testified that Mr. Scarberry was the only applicant who knew what the "Core Maintenance Plan" was. *See* Level One, Transcript, 19.

[8] Mr. Scarberry's application included certificates indicating that he received the required training on the following pieces of equipment: enloader, excavator and backhoe. Level Three, Joint Exhibit 5.

Discussion

Timeliness

The DOH's argument that this grievance must be dismissed for untimeliness is unpersuasive because the DOH did not raise this argument at or before Level Two of the grievance procedure. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *See Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25,1996). WEST VIRGINIA CODE § 6C-2-3 provides that "[a]ny assertion that the filing of the grievance at level one was untimely *shall* be made at or before level two." (Emphasis added). Upon review of the file and the Level One transcript, the DOH did not raise the issue of timeliness at or before Level Two. The only mention of timeliness appears in the DOH's *Proposed Findings of Fact and Conclusions of Law*. The DOH has not meet its burden of proving its timeliness argument was raised at or before Level Two. Therefore, its motion to dismiss based upon timeliness is denied.

Merits

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 DOH'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 Transportation Crew Supervisor 1 position, DOH must first look to qualifications and record of performance. If the qualifications and records of performance are substantially

equal, it must then look to seniority and use it as *a* factor.

Upon consideration of the applications and the answers given by the applicants during the interview process, the interview committee unanimously selected Dwayne Scarberry as the most qualified applicant, as indicated by his qualifications and record of performance. Mr. Scarberry received higher ratings than the other applicants. He was rated as "Exceeds Expectations" in three categories. The testimony of both Mrs. Pullen and Mr. Jones indicate that Mr. Scarberry exhibited great knowledge of DOH rules and procedure.

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).

The testimony indicates that the selection committee considered the applicants' personality traits and communication style. Specifically, committee members testified that Mr. Scarberry had the best verbal communication during the interview. Verbal communication is an important aspect of the Transportation Crew Supervisor 1 position. Level One, Transcript, 19 (Testimony of Greg Surber). Moreover, one member of the

interview committee, Mrs. Pullen, previously served as supervisor to *both* the Grievant and Mr. Scarberry. She maintained that the successful applicant was a very conscientious worker who would stay out on a job site until the end of a work-day to complete the job. There is no indication that the DOH's selection was clearly wrong or unreasonable.

This case is different from the factual scenario presented in *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009). In *Neely*, it was found that a significant flaw occurred in the selection process where the DOH selected an applicant based upon the applicants' friendliness or superciliousness, as perceived by the selection committee during the interview process. The interview committee found that the successful applicant was friendly and the grievant was arrogant. The *Neely* grievance was granted, in part, because the DOH's selection was not based upon reasonable grounds.[9] Unlike *Neely*, the selection committee in this instance asked specific, position-related questions. Answers to these questions were considered, and the method by which the applicants conveyed the position-related information was considered. Where each applicant is asked the same position-related questions and answers to such questions are considered by a selection committee for a supervisory position, such consideration is not unreasonable. *See generally Spears v. W. Va. Dep't of Health & Human Res.*, Docket No. 04-HHR-284 (July 27, 2005).

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[9] However, the *Neely* grievant was not granted the position because he did not establish, by a preponderance of the evidence, that he was the most qualified applicant. The *Neely* ALJ required the DOH to undertake the selection process again. Similar to this grievance, even assuming a flaw in the selection process, the Grievant has not established that he was the most qualified applicant when compared to the other applicants. Moreover, if this ALJ were to require the DOH to re-do the selection process, Grievant has expressed that he is not interested in the position at issue, just back pay for a finite period of time. *See* Footnote 1 *supra*.

Insofar as the Grievant argues that there was an error in the selection process because Mr. Surber did not participate in his interview, and Mrs. Pullen held animosity towards the Grievant, this ALJ finds no error. First, DOH policy only requires that two individuals conduct interviews. *See* Level One, Decision, 2. Even assuming all interviewers were required to be present, the interviewers who were present for all of the interviews voted unanimously for Mr. Scarberry.

Secondly, there is no indication that Mrs. Pullen held animus against the Grievant at the time of the selection. Grievant did not testify in this matter. However, his representative did question Mrs. Pullen about giving the Grievant a written warning in the past. Grievant requested annual leave during snow removal and ice control ("SRIC") season. Annual leave is generally not permitted when weather is poor. Grievant desired to take a vacation during SRIC and when annual leave was not immediately granted, he stated that he would just not come into work and take whatever punishment was given. Grievant was apparently written up by Mrs. Pullen based upon this incident. However, sometime after the written warning, the document was "lost" and never processed.

Grievant argues that by writing him up, there is a reasonable and required inference that Mrs. Pullen held animosity against him and such animosity tainted the selection process so as to poison the results. The facts of this case do not demonstrate animosity, but rather, simply demonstrate that in the past, Grievant requested annual leave during SRIC and stated that he would not show up if the leave were not granted. Grievant has not established that it is more likely true than not that Mrs. Pullen held animosity towards

him or that her opinion was somehow given greater weight by the selection committee.[10]

In recognition of the qualifications and records of performance of the Grievant and Mr. Scarberry, the DOH's selection was not clearly wrong or arbitrary and capricious. Grievant has not established, by a preponderance of the evidence, that there was a significant flaw in the selection process. Nor has the Grievant established, by a preponderance of the evidence, that he was the most qualified applicant. This grievance must be denied.

The following Conclusions of Law are appropriate:

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *See Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25,1996).

2. WEST VIRGINIA CODE § 6C-2-3 provides that "[a]ny assertion that the filing of the grievance at level one was untimely shall be made at or before level two."

3. Respondent DOH has not established that it raised the issue of timeliness at or before Level Two.

4. 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

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[10] Indeed, previous decisions specifically recognize that members of a selection committee may be familiar with an applicants work performance. *See generally Ward v. Dep't of Trans./Div. of Highways*, Docket No. 96-DOH-184 (July 24, 1997); *Delauder v. W.Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 07-HHR-326 (Jan. 28, 2009); *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-340 (July 18, 2008).

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).

5. 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).

6. "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).

7. 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.

8. The DOH'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* W. VA. CODE R. §156-1-6.20 (2008).

Date: May 21, 2009

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Mark Barney
Administrative Law Judge