WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES N. JONES,
Grievant,

v. **Docket No. 2008-1833-DOT**

WEST VIRGINIA DIVISION OF MOTOR VEHICLES,
Respondent.

D E C I S I O N

Grievant, James N. Jones, filed this grievance against his employer, the West Virginia Division of Motor Vehicles, on June 17, 2008, challenging the selection of another employee for a posted Supervisor III position. The statement of grievance reads: "On June 9, informed of non selection for supervisor 3 position." As relief, Grievant sought: "Request to be made whole including selection for position, back pay from time working as acting supervisor."

A hearing was held at level one on September 3, 2008, and a decision denying the grievance at that level was issued on September 11, 2008. Grievant appealed to level two on December 22, 2008. Mediation transpired at level two on February 20, 2009, but the agreement reached was later determined impermissible.[1] On March 11, 2009, Grievant filed an expedited grievance at level three of the grievance process. A level three hearing was held before the undersigned Administrative Law Judge on June 17, 2009, in the Grievance Board's Charleston office. Grievant was represented by Gordon Simmons, UE

---

[1] A settlement cannot include terms that grant an employee benefits that have not been earned and accrued unless benefits earned and accrued were wrongly withdrawn from the employee. The proposed settlement agreement contained one or more provisions which was deemed contrary to West Virginia Legislative Rule 143 CSR 14.3 by the West Virginia Division of Personnel.

Local 170, WV Public Workers Union and Respondent was present by David H. Bolyard, Director of Driver Services and by counsel Gretchen A. Murphy, Assistant Attorney General. This case became mature for decision on July 17, 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 when Grievant was not selected for a Supervisor III position in the Respondent's Driver License Section. Grievant had served as a customer service representative lead in that section of Driver Services for several years. After the interview process, an employee deemed more qualified, with less seniority than Grievant, was selected for the position. Grievant has not established by a preponderance of the evidence that the Respondent's selection of another applicant was arbitrary and capricious. This selection decision was not clearly wrong.

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

Findings of Fact

1. Grievant has been employed with the West Virginia Division of Motor Vehicles since 1991, with his most recent employment as a Customer Service Representative (CSR) Lead in the Driver License Section of Driver Services.

2. On or about February 29, 2008, Respondent posted an employment opening for a Supervisor III position in the Driver License Section (Bulletin # 616.). Resp. Ex. 5.

3. The job posting contained a brief sketch of the job duties of the Supervisor III position. In relevant part, the document stated:

> Responsible for daily supervision of employees which includes assignment of duties, evaluation job performance, approval of leave. Make recommendations for disciplinary actions as necessary. Communication with Regional Offices and Call Center about policies, procedures and laws relating to Driver License & Commercial Driver License. Train new employees and implement policy, procedures and regulations. Answer inquiries and solve problems for and with customers and subordinates. Work with public officials at the state and federal level. Travel may be required. Speak at various functions. Perform related duties as necessary.

(Resp. Ex. 5)

4. Three applicants applied for the posted position. All three applicants, Michael May, Larry Cavender and the Grievant, were employed in Respondent's Driver Services Section.

5. All three applicants were deemed qualified for the position; however applicant Larry Cavender and Grievant were seriously considered for the position.

6. The interview and selection panel for the posted position was comprised of David Bolyard, Director of Driver Services and Doug Thompson, Manager of the Driver License Section.

7. Each applicant supplied an employment application, each applicant was interviewed, and each applicant was asked the same pre-determined questions. An Application Evaluation Record was completed for each applicant at the time of the interview.

8. Pursuant to the March 31, 2008, interview for the posted position, Manager Thompson rated Grievant as "exceeds" in several categories: relevant experience, possess knowledge, skills and abilities, flexibility/adaptability, and overall evaluation. Manager Thompson preferred Grievant for the Supervisor III position.

9. Pursuant to the March 31, 2008, interview for the posted position, Director Bolyard rated applicant, Larry Cavender, as exceeds in relevant experience, possess knowledge, skills and abilities, interpersonal skills, flexibility/adaptability, and overall evaluation. Director Bolyard preferred Mr. Cavender over Grievant for the Supervisor III position.

10. In addition to the interview meeting(s), Director Bolyard inquired of several Regional Offices regarding applicants Cavender and Grievant. Additional information and comments were received regarding both candidates as a result of this inquiry.

11. Linda Ellis was a Transportation Services Manager for fourteen (14) years in the DMV's Kanawha City Office. As such, she had repeated contact with Grievant over the years, and found his interactions with her employees to be "rude and that he treated them in a demeaning manner." Ms. Ellis estimated that at least eighty percent of the time, her employees delegated contact with the Grievant to her because the Grievant was so unhelpful. Level three hearing.

12. Pete Lake, Director of the Regional Offices and the Call Center at DMV, pointed to a specific incident where he, as Director, had a particularly unpleasant experience with Grievant, and the unfortunate disposition of documents belonging to a state official's son serving overseas.

13. Ultimately, applicant Cavender was recommended by the interview panel for promotion to the Supervisor III position. It was articulated that applicant Cavender was more suited for the posted position than Grievant. Respondent deemed applicant Cavender more qualified for the job than Grievant, who held more seniority with the agency.

14. Applicant Larry Cavender was offered and accepted the position of Supervisor III in the Driver License Section of Respondent's Driver Services Unit.

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); *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). 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).

Grievant contends he is entitled to the Supervisor III position posted by Respondent on or about February 29, 2008. The posted position in discussion is a supervisory position. While the interview panel did not initially agree as to who should be awarded the promotion, it was subsequently determined that applicant Cavender possessed and had demonstrated the skills, perceived by Respondent, to be highly beneficial, desirable and efficient in the performance of the posted position's duties. Promoting an employee to a supervisory position is within the discretionary authority of an employer.

David Bolyard, Director of Driver Services and the point person responsible for the hiring and firing of CSRs, thought Larry Cavender was a better fit for the position than Grievant. Director Bolyard's articulation as to why he believed this included the rationale that CSR worker Cavender was better at managing people, more efficient at accomplishing tasks (getting the job done) and that there were no complaints regarding his performance either from employees or the public.

When asked "what were you looking for in a Supervisor III position," Director Bolyard stated, "I was looking for someone that had good communication skills that could get along well with all people, not only the employees in the unit but also the regional offices,

someone that had been proven that they could get along with people." Level three testimony. This is consistent with the job duties of the position. *See* Finding of Fact 3 and Resp. Ex. 5. Conversely, Respondent was concerned that Grievant did not have the leadership skills or personality preferred in handling day to day operations and personnel management. These concerns were not without some basis.[2]

The distinctions in the two applicants' skill sets is of record and was relevant with regard to measuring the qualification of the two applicants. There were specific instances regarding Grievant's interacting with the public and coworkers that lead Respondent to be concerned with Grievant's ability to efficiently perform the essential duties of the Supervisor III position. This included intangibles such as the opinion of coworkers and demonstrated proficiency to perform assigned duties in an effective manner. Grievant asserts that he had supervisory experience which was in excess of the successful applicant and said experience was not properly considered. This contention is not evident from the record. What is evident is that other skill sets were deemed more valuable or appraised at a higher premium. Respondent's decision is not unreasonable, or arbitrary and capricious. Respondent has not ignored important aspects of the selection process, explained its decision in a manner contrary to the evidence, or reached a decision that is so implausible that it cannot be ascribed to as a difference of view.

---

[2] Pete Lake, Director of the Regional Offices and the Call Center at DMV, testified that he had repeated complaints from 10 out of the 23 offices regarding Grievant. These complaints were regarding unusually long approval times and inconsistency in the information provided by Grievant. Director Lake indicated, he personally likes Grievant; however, there were some issues with his dealings with the regional offices at times. Grievant's supervisor, Doug Thompson acknowledged that others have felt that Grievant comes across as abrupt/rough over the phone. Various CSRs throughout the offices expressed a desire not to communicate with Grievant.

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 panel concluded that

Larry Cavender's qualifications and skills exceeded those of Grievant. Respondent was not required to consider the seniority of the applicants in making a selection. Specifically, it was determined that the successful applicant was more suited (better qualified) than Grievant.

In review of Grievant's qualifications, interview scores and employment history with Respondent, it cannot be said that the Respondent's selection of applicant Cavender was without due consideration, and/or in disregard of pertinent facts and circumstances of the job responsibilities. The distinctions in the applicants' skill sets were deemed to constitute a discernable degree of qualification. Respondent assessed applicant Cavender more suited for the job than Grievant.

The demeanor of testifying witnesses and their responses under both direct and cross-examination revealed no animosity toward Grievant. There is no allegation nor indication that Respondent's witnesses either fabricated or embellished their testimony. The testimony of the witnesses was substantially consistent, and given in a trustworthy demeanor. 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 applicant. Respondent was concerned that Grievant did not have the leadership skills or personality preferred in handling day to day operations and personnel management. These skill sets are legitimate concerns of an employer in filling a supervisory position. Subsequently, 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 DMV's choice of the successful applicant was an abuse of discretion.

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 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 applicant Cavender 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 panel ultimately concluded that Mr. Cavender's qualifications exceeded those of Grievant's. Respondent was not required to consider the seniority of the applicants in making a selection.

9. Grievant has failed to establish that the selection of the successful applicant Larry Cavender for the Supervisor III position was unlawful and contrary to applicable rules and regulations.

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 22, 2009

Landon R. Brown
Administrative Law Judge