THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DANNY LEE GOULD,
Grievant,

v. **Docket No. 2010-0021-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Danny Gould, filed this grievance against his employer, Division of Highways, challenging his employer's decision which resulted in the selection of another candidate for the position of Highway Equipment Supervisor II. His statement of grievance reads as follows:

> It is my honest opinion that my work history, including my annual evaluations, past duty and work assignments were overlooked and/or not considered at all during the recent interviews and selection process for the posted position of HESII in vacancy bulletin # 648.[1]

Grievant requests the following relief:

> I be awarded an increase in pay equal to, in dollar and cents to that which was awarded to the recipient of the HESII position posted in vacancy bulletin # 648. I also wish to receive an interview packet for this job vacancy bulletin # 648.

This grievance was denied at level one, following a hearing on the grievance, on August 17, 2009, by the Respondent's designee. A level two mediation session was conducted on November 9, 2009. Appeal to level three was perfected on that same date. A level three hearing was conducted before the undersigned Administrative Law Judge on

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[1]Grievant's attachment to this statement goes on to allege favoritism and discrimination.

March 5, 2010, at the Grievance Board's Elkins office location. Grievant appeared in person and by his representative, Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Robert Miller, Esquire, Legal Division. This matter became mature for consideration upon the receipt of the last of the parties' proposed findings of fact and conclusions of law on April 19, 2010.

Synopsis

Grievant is employed as a Highway Equipment Supervisor I with the Division of Highways ("DOH"). He applied for a Highway Equipment Supervisor II and was not the successful applicant. Nothing in the record of this grievance establishes that Respondent's selection of another applicant was arbitrary and capricious, nor did Grievant prove that he was the victim of favoritism. The grievance is denied.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievant has been employed by DOH for some twenty-three years, his current position is that of Highway Equipment Supervisor I.

2. On March 24, 2009, DOH filed Vacancy Report #648 for a Highway Equipment Supervisor II position. Grievant and Marcia Lee applied for the position. The primary function of this position was to prepare specifications for the purchase of new equipment; maintain, monitor and coordinate the preventive maintenance system; supervise the completion of these duties; monitor the preventive maintenance and warranty system; supervise the statewide mechanic training program, above ground storage tank

program and equipment records section.

3. The interviews for this position were held on May 19, 2009, after which, Ms. Lee was chosen for the position.

4. The interview committee included the director of DOH's equipment division, Robert Andrew, DOH's retail communication systems manager, Dick Burnside, and acting administrative secretary, Michele Wright.

5. Robert Andrew had worked with Marcia Lee for the eleven years that he had been the Director of the Equipment Division. Mr. Andrew recommended Ms. Lee in large part because he was familiar with her experience and qualifications. Shortly after Mr. Andrew came to work for DOH, his secretary left her job and Ms. Lee applied for it. Ms. Lee worked for Mr. Andrew in a secretarial or administrative assistant position until January of 2009. At that time, Don Weese retired from the position that Ms. Lee now holds. Mr. Andrew made his recommendation for the promotion of Ms. Lee due to her experience in monitoring the equipment budget on a daily basis; working with Mr. Andrew on equipment replacement and the selection of equipment for replacement; handling personnel issues including interviewing and hiring; working with cities and towns on the sale of surplus equipment; and evaluation of the equipment bids that were prepared by Mr. Weese.

6. Dick Burnside, Communication Supervisor at the Engineering Section, also participated in the interview of the applicants on May 19, 2009. He concluded that Ms. Lee had more experience in both purchasing and supervision, and that these were necessary for the position.

7. Ms. Lee had attained more than eleven years of supervisory experience during her employment with DOH, as well as more than twenty-nine years of equipment

purchasing and inventory management experience in the functions of the position.

8. While the level one evaluator made a finding that Grievant possessed no purchasing/inventory management experience, it appears from the record that Grievant does have experience in the purchasing of equipment as it relates to pilot field reporting and whether equipment meets specifications. Field reporting requires travel to different locations where any new equipment has been delivered from the manufacturer in order to obtain a description, serial number, make, model, and year. Once a piece of equipment is field reported, Grievant does a fair market value appraisal. Subsequently, this information is given to the records section to be entered into the agency's computer system and made a part of the tracking file until that equipment is sold or junked.

9. By way of contrast, Ms. Lee worked with Mr. Andrew in monitoring the age and condition of equipment, preparing specifications for bid on new equipment, working on the budget each year for the purchase of new equipment, supervising the records section which is responsible for the records of all of the DOH equipment throughout West Virginia, supervising those who work as liaison between the Equipment Division and those using DOH equipment throughout the State.

10. Both Grievant and Ms. Lee met the minimum qualifications for the position.

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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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 evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Grievant argues that with regard to skills, knowledge, relevant experience and education, any unbiased and objective weighing of the evidence would demonstrate Grievant as the best candidate. Mr. Andrew, by restricting his considerations to personal familiarity, made a decision that fits the definition of arbitrary and capricious.

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. *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 Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994).

The Grievance Board recognizes that selection decisions are largely the prerogatives of management. While the individuals who are chosen should be qualified and able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not

generally be overturned. *Skeens-Mihaliak v. Div. of Rehabilitation Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998); *Ashley v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-070 (June 2, 1995); *McClure v. W. Va. Workers' Compensation Fund,* Docket Nos. 89-WCF-208/209 (Aug. 7, 1989). 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 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. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). 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." *Id.* (*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 a board of education. *See generally, Harrison v. Ginsberg,* [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli*, *supra*.

Grievant has not established that the Respondent's selection of the successful applicant was arbitrary and capricious. The interviewers stated that the qualifications and experience of both applicants were reviewed. Respondent selected Ms. Lee for this position because she had the most experience supervising the seven employees in the Equipment Division, three of whom were Highway Supervisor I positions. In addition, the record establishes that Ms. Lee would seem to possess more experience in the preparation of equipment specifications for the DOH fleet and the associated responsibilities of equipment purchasing.

It is understandable that Grievant would seek to challenge this decision by Respondent due to his years of experience and, in particular, his experience in the purchasing of equipment as it relates to pilot field reporting and whether equipment meets specifications. The undersigned also concedes that Grievant exceeds the successful applicant in the category of education, having a bachelor of arts from Fairmont State University in industrial education. Ms. Lee's highest educational achievement is a high school diploma. Nevertheless, the selection of Ms. Lee for this position as the most qualified applicant cannot be viewed as clearly wrong or an arbitrary and capricious action.

Both applicants were given a fair opportunity to be hired. Their interviews were conducted similarly, and they were both given the same chance to identify their job skills and experience through their applications. Ms. Lee had a natural advantage because she

was already working in the Highway Equipment Supervisor II classification on a temporary basis following the retirement of Mr. Weese. Therefore, she had experienced essentially the job that was posted, and there is no requirement that an employer ignore relevant, applicable job experience just because other candidates do not have that same experience. Rather, it has a duty to employ the best qualified candidate. In this case, by all objective and subjective criteria, Ms. Lee was the best candidate.

Additionally, Grievant claimed that favoritism in the selection process rendered it flawed. "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities." W. VA. CODE § 6C-2-2(h). 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);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Grievant has not met his burden of proving he was treated differently than the successful applicant. Both were given the same interview questions, and both were given the same chance to submit an application form. In addition, Ms. Lee had been employed

in the Equipment Division for the entirety of her employment with DOH. The record indicates that Ms. Lee was familiar with all aspects of supervising the Equipment Division and provided daily support to various DOH districts as it relates to underground/above ground storage tank program, equipment recalls and mechanic training statewide. While the Grievant did demonstrate experience in the area of the preventive maintenance program, he did not share other qualifications with Ms. Lee. Because of their different qualifications, not only were they not treated differently in the interview process, it is also apparent that Grievant is not similarly situated to Ms. Lee.

Grievant's remaining claim of discrimination was not argued at either level one or level three. It is deemed abandoned. The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987).

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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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. 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. Grievant did not meet his burden of proving the selection process was insufficient or fatally flawed.

4. 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., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

5. Grievant did not meet his burden of proving he was the victim of favoritism.

Grievant failed to prove that the selection of Ms. Lee for the Highway Equipment Supervisor II position was based on favoritism or an arbitrary and capricious decision. For the forgoing reasons, the grievance is hereby **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 (eff. July 7, 2008).

Date: July 27, 2010

Ronald L. Reece
Administrative Law Judge