THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOHN ROBERT VANCE,
Grievant,

v. **Docket No. 2009-0409-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, John Robert Vance, 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 Transportation Engineering Technologist with District Eight Construction alleging "discrimination, favoritism, and reprisal." His relief sought is "to be made whole; any and all of the entitlements of the position; no reprisals against Grievant or Representative."

This grievance was filed at level one on September 24, 2008. A level one hearing was conducted on October 20, 2008, and a letter dated December 11, 2008, was issued by Respondent's designee denying the grievance. A level two mediation session was conducted on May 9, 2009. Appeal to level three was perfected on May 22, 2009. A level three hearing was conducted before the undersigned Administrative Law Judge on February 3, 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 Division of Highways appeared by its counsel, Barbara

L. Baxter, Esquire, Legal Division. This matter became mature for consideration upon the receipt of the parties' proposed findings of fact and conclusions of law on March 22, 2010.

Synopsis

Grievant claimed the selection for the position for which he applied was based on personal bias and an unwillingness to consider relevant experience which rendered the selection process arbitrary and capricious. None of the Grievant's claims were substantiated by the evidence. The successful applicant had worked in all facets of materials responsibility and possessed the required training and certifications for the position. While Grievant was qualified for the position, he had not worked in the Materials Section for the past six years. Nothing about the selection decision was arbitrary and capricious, nor did Grievant prove favoritism. The grievance is denied.

After a review of the record developed at level one and level three, the undersigned makes the following findings of fact.

Findings of Fact

1. Grievant is classified as a Transportation Engineering Technician Senior in District Eight Maintenance with the Division of Highways ("DOH"). Grievant began working for DOH in December 1988.

2. Grievant and two other employees, including the successful applicant, Bradley Schmidt, applied for the Transportation Engineering Technologist position in District Eight Construction as posted on Bulletin #623. This could be basically described as the materials supervisor at District Eight Construction. Respondent's Exhibit No. 1, Level One Hearing.

3. All three applicants were qualified for the position and were interviewed by Kyle Hall, District Eight Construction Engineer, and Steven Schumacher, Area Engineer, District Eight Construction.

4. All candidates were asked the same written questions and rated on the same qualifications including education, relevant experience, knowledge, skills and abilities, interpersonal skills, flexibility/adaptability and presentation. Mr. Schmidt was rated as "meets" minimum requirements in the flexibility/adaptability and presentation qualifications and "exceeds" in the other qualifications, for an overall rating of "exceeds." Grievant was rated as "exceeds" minimum requirements in the education and knowledge, skills and abilities qualifications and "meets" minimum requirements in the other qualifications for an overall rating of "meets."

5. Grievant has nearly twenty years of experience with the DOH, approximately fifteen of which were in the Materials Section in District Eight Construction. For the past six years, however, Grievant has been working as the Permit Supervisor in District Eight Maintenance. Grievant has approximately twenty-one years of experience in the private sector performing materials testing and other technician duties prior to employment with the DOH.

6. Grievant worked in a supervisory capacity in the private sector for approximately sixteen years and on a part-time basis with the US National Guard for twenty-five years. Grievant supervises two Office Assistants as Permit Supervisor in District Eight Maintenance. Grievant earned an Associate's Degree in Military Management.

7. Bradley Schmidt has six years of experience with the DOH in District Eight Construction Materials Section. He has approximately nine years of experience in the private sector performing materials testing and other technician duties prior to employment with the DOH. Mr. Schmidt has earned sixty college credit hours in engineering materials construction. Mr. Schmidt has worked all job areas within the District Eight Materials Section.

8. The interview committee came to the conclusion that Mr. Schmidt exceeded expectations in the categories of education, relevant experience, relevant knowledge, skills and abilities, and interpersonal skills. This conclusion was reached based upon his application, interview, and the experience Mr. Schmidt had gained while working as the assistant to the Materials Supervisor. Mr. Schmidt's leadership abilities also made an impression with the interviewers when he came to the interview with a plan of improvement 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 he should have been evaluated higher than the successful applicant in education, relevant experience, and interpersonal skills. By refusing to adequately weigh Grievant's qualifications, a result of favoritism by the interviewers, Respondent's evaluations inflated the ratings for Mr. Schmidt and deflated those for Grievant. Grievant goes on to assert that even if Grievant and Mr. Schmidt had been found to be essentially equal in qualifications, Grievant's seniority should have secured him the selection for the position. Respondent counters that Grievant failed to prove that the selection of Mr. Schmidt for the Materials Supervisor position was based on favoritism or was 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's main assertion in support of his argument that the selection was flawed is that Mr. Hall, a supervisor who has participated in nearly one hundred selection decisions, "could not reasonably explain the evaluations used as the basis of a promotion beyond a personal knowledge and familiarity of one candidate that he admits he did not possess of another - considerably more senior, experienced and educated - candidate. A more fitting example of what is meant by subjective, not to mention 'arbitrary and capricious,' would be difficult to find." Grievant's Proposed Findings of Fact and Conclusions of Law, pages 10-11.

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 all the applicants were reviewed. Mr. Hall indicated that all three candidates were fully-qualified with backgrounds and certifications in materials. Each candidate had worked in the private sector, as well as for DOH, and each candidate had performed materials testing. As a result, the selection decision was not based on who could perform the best job from a technical standpoint, but the decision was based on which candidate would be the best fit, which included their interest in the work, ability to work well with others, and other interpersonal skills. The interviewers rated the successful applicant higher than Grievant on the qualifications of relevant experience and interpersonal skills in large part to his having learned all facets of the Materials Section, including the duties

of Office Manager, and working well with other employees in the District and on construction projects.

In support of this decision the record established that Mr. Schmidt started his work for DOH in the field, then moved to plant inspection. Thereafter, he moved into the office manager/lab coordinator position. This position assisted the Materials Supervisor position. In that assistant position, Mr. Schmidt was able to learn and become acquainted with the job of supervisor. By contrast, Grievant sought advancement with DOH through another avenue in the Permits Section some six years before the position in question was open. During that time period he has done no work in the Materials Section, and the record further established that within the Materials Section developments are made and different contact people are in place. This inescapable fact limits the amount of relevant experience that Grievant has with the Materials Section when compared with Mr. Schmidt.

It is true, as Grievant contends, that he had more seniority than Mr. Schmidt. West Virginia Code § 29-6-10(4) requires an employer to consider seniority in selection decisions "if some or all of the eligible employees have substantially equal or similar qualifications[.]" In other words, seniority is a "tie breaker," not a primary consideration. In this case, the qualifications of the candidates, as determined by the interviewers, were not so similar that seniority needed to be used as anything other than evidence of past experience. "An employer may determine that a less senior applicant is more qualified for the position in question on the basis of particular qualities or qualifications that it determines are specifically relevant." *McKinney, et al., v. Dep't of Transp./Div. of Highways,* Docket No. 2008-0316-CONS (Dec. 27, 2007). Grievant's seniority with Respondent was relevant and

considered, but it was not particularly helpful, since it did not include duties relevant to the position within the past six years.

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. Mr. Schmidt had a natural advantage because he was already working in the Materials Section as an assistant to the supervisor and had experience with essentially the job that was posted, but there is no requirement that an employer ignore relevant, applicable job experience just because other candidates do not have it. Rather, it has a duty to employ the best qualified candidate. In this case, by all objective and subjective criteria, Mr. Schmidt 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);[1] *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock 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, Mr. Schmidt had been employed in the Materials Section for almost the entirety of his employment with DOH. Grievant has spent the last six years in the District Eight Maintenance Permits Section. The record indicates that Mr. Schmidt took the initiative to be familiar with all aspects of the Materials Section and kept current with the procedures and systems. 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 Mr. Schmidt.

Grievant's remaining claims of discrimination and reprisal were not argued at either level one or level three. They are 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.

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[1]Although these cases addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions were virtually identical to those contained in the current statute.

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,
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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); *Chaddock 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 Mr. Schmidt for the Materials Supervisor 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: June 3, 2010

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Ronald L. Reece
Administrative Law Judge