THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ISMAIL S. LATIF,
Grievant,

v. **DOCKET NO. 2011-0924-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Ismail S. Latif, filed this grievance against his employer, the Division of Highways, on December 23, 2010, challenging the selection of other employees for five newly created Regional Program Manager positions. The statement of grievance reads: "I applied for the Regional Program Manager (DOT 1000634) positions that were posted on May 10, 2010. Several positions were filled in the same category throughout the state. I was not selected for these positions despite my good qualification[s] and experience." As relief, Grievant sought: "I should be given the Regional Program Manager job stationed in either Clarksburg or Morgantown."

A conference was held at level one on January 10, 2011, and a decision denying the grievance at that level was issued on February 1, 2011. Grievant appealed to level two on February 16, 2011, and a mediation session was held at level two on April 25, 2011. Grievant appealed to level three on May 5, 2011. A level three hearing was held before the undersigned Administrative Law Judge on September 8, 2011, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Krista D. Black, Attorney, Legal Division. The parties presented oral argument at the

conclusion of the hearing, declining to submit written argument, and this matter became mature for decision at the conclusion of the level three hearing, on September 8, 2011.

Synopsis

This grievance was filed when Grievant was not selected for any of the newly created Regional Program Manager positions. The qualifications of the applicants were evaluated by the persons conducting the interview, and the top five applicants were selected for the positions. While it was important that the applicants have engineering experience, it was also critical that the applicants have excellent communication skills, and the ability to diffuse conflicts. Grievant did not demonstrate that he was one of the best five candidates, or that there was any flaw in the selection process. The selection decision was not arbitrary and capricious or clearly wrong.

The following Findings of Fact are made based upon the evidence developed at level three.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") as a Highway Engineer, "District Traffic Engineer," in District 7. He has been employed by DOH for 18 years, and is a Registered Professional Engineer. He has also worked for DOH as a Bridge Design Engineer. Prior to his employment with DOH he conducted bridge engineering research as an Engineering Scientist employed by West Virginia University, for 3 years. He also had 4 years of construction experience as an engineer in India and Saudi Arabia almost 25 years ago.

2. On May 10, 2010, DOH posted five Highway Engineer positions. These newly created positions would serve as Regional Program Managers. The duties listed in the posting included "independently reviewing complex project specific and program level needs in conjunction with critical path scheduling through different software programs including Primavera. This includes assisting the districts in preparation of detail scopes of work and schedule preparation and measuring project and program performance." The positions would be located either at the DOH Central Office or at the District Level. Each position would be responsible for 2 of the 10 DOH Districts.

3. Anthony Carovillano, Unit Leader within the Program Planning and Administration Division at DOH's Central Office in Charleston, West Virginia, supervises these new Regional Program Manager positions, and participated in all the interviews. The people chosen for these positions would help Mr. Carovillano gather information related to programming,[1] construction schedules, and costs, among other things, which would assist him in preparing the statewide transportation and improvement program document (the "STIP" document), which covers a six year period, four years of which are required by the federal government. The individuals in these positions would be working with a database, working with a project tracking system, and trying to get the Primavera software up and running. He was looking for individuals who had a broad range of experience, as they would be dealing with the evaluation of schedules and budgets in the three phases of engineering, right-of-way acquisition, and construction. Mr. Carovillano was looking for

[1] The term programming in this context refers to the process by which a project is developed, reviewed, and placed into the statewide transportation and improvement program document.

five individuals who had diverse experience, and who would complement each other. In particular, he was focusing on design experience, construction experience, right-of-way acquisition experience, and software experience, particularly with Primavera.

4. The posting stated "[a]pplicants should have excellent interpersonal and management skills and be results oriented." Mr. Carovillano felt that the ability to effectively communicate was paramount to this position, and he asked questions during the interviews which would help him to assess how the individuals interviewed would communicate and function in difficult situations. He was looking for someone who would be able to sit down with the local construction engineers and make them feel comfortable enough to talk openly about projects. These positions would serve as a liaison between the Main DOH Headquarters in Charleston (the "Central Office") and the Districts. He was trying to find people who could break down the barrier between the Central Office and the Districts, and head off conflict.

5. The minimum qualifications for these positions was a West Virginia license as a Registered Professional Engineer, and "seven years of professional highway engineering experience involving the design, construction, or maintenance of highways." A Master's Degree in Civil Engineering could be substituted for one year of work experience.

6. Grievant applied for the posted positions, as did Beth Dawkins, Ben Shaffer, Ryland Musick, Adrian "A.J." Bernatowicz, Elizabeth Lilly, Donny Donlen, Paul Hicks, and Jason Nelson, all of whom were DOH employees. All of these employees were qualified for the positions. There were two other applicants, but one of these two was not qualified for the positions, and the other withdrew his application prior to the interviews.

7. Each of the remaining applicants was interviewed by two people. Anthony Carovillano participated in all the interviews. Robert Pennington, Director of the Program Planning and Administration Division for DOH, participated in four of the interviews, and other individuals participated in the remaining interviews with Mr. Carovillano. Each applicant was asked the same questions.

8. Mr. Carovillano did not ask the applicants any technical questions to evaluate their engineering skills because he did not feel he needed to do so. He had the applications in front of him, and was familiar with what engineers employed by DOH would be doing in the various positions. He was more interested in the experience of the applicants in programming a project, and in the way they interacted with him.

9. After the interviews Mr. Carovillano discussed the applicants with the individuals who had participated in the interviews with him. Mr. Carovillano rated the applicants in the areas of education, relevant experience, knowledge, skills and abilities, interpersonal skills, flexibility/adaptability, presentability, and overall evaluation.

10. Mr. Carovillano gave Grievant a rating of exceeds in the area of education on the interview rating form, because he has a Masters Degree in Civil Engineering, which was more than the minimum requirement. Grievant was assigned a rating of "meets" in all other categories. Grievant's Exhibit Number 1.[2] Mr. Carovillano saw nothing in Grievant's application, and heard nothing during the interview, which was anything above and beyond what he would expect of any engineer employed by DOH. His conclusion was that

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[2] The undersigned failed, through oversight, to admit Grievant's Exhibit Number 1 at the level three hearing. Respondent had no objection during the hearing to the admission of this exhibit, and it is ORDERED ADMITTED into evidence.

Grievant's experience was centered on bridge design, and that he did not have the well-rounded background he was looking for. Grievant did not convey to Mr. Carovillano that he had any experience going out in the field on projects.

11. Mr. Donlen was recommended by Mr. Carovillano for one of the positions, but he withdrew his application. Mr. Carovillano then recommended Ms. Dawkins, Mr. Shaffer, Mr. Musick, Mr. Bernatowicz, and Ms. Lilly for the five positions. These recommendations were approved by Mr. Pennington, after reviewing the candidates to make sure they were from various regions of the state. These were Mr. Carovillano's top five choices. He did not assign an individual ranking to these five top candidates.

12. Mr. Carovillano and Mr. Pennington reviewed the background of the candidates to determine which candidate would be the best fit for each District, and made initial District assignments based upon this. Then they talked to the candidates about which Districts they would prefer. Ms. Dawkins was assigned to Districts 3 and 7; Ms. Lilly was assigned to Districts 1 and 2; Mr. Shaffer was assigned to Districts 5 and 8; Mr. Bernatowicz was assigned to Districts 4 and 6; and Mr. Musick was assigned to Districts 9 and 10.

13. All the applicants interviewed had some experience in budgeting projects.

14. Ms. Lilly received a rating of exceeds on the interview form in the categories education and knowledge, skills, and abilities. She received a rating of meets in all other categories. Ms. Lilly has a Masters Degree in Civil Engineering, and has worked for DOH for 10 years as an Engineer and Engineer-in-Training, and she worked for the Army Corps of Engineers for a year. Ms. Lilly's experience is varied. She has been working out of the Central Office in the Program Planning Section, and was familiar with how the unit

functioned. Her recent experience was in research, “pre-engineering,” which would be helpful to the investigations the positions would conduct, and she has experience in construction and design. Ms. Lilly knew several of the people already that she would be working with, she understood and had worked with Metropolitan Planning Organizations and knew how the approval process worked with projects subject to these groups, and she knew several instructors at research institutions. She was the only applicant with pre-engineering experience.

15. Mr. Bernatowicz received a rating of exceeds on the interview form in the categories relevant experience, knowledge, skills and abilities, and interpersonal skills, and in overall evaluation. Mr. Bernatowicz has worked for DOH for 10 years. He has what Mr. Carovillano considered to be a very good construction background, and in supervising projects, particularly bridges. He has worked with right-of-way acquisition, has worked with schedules and budgets, and has been involved in all aspects of a project from start to finish. He is familiar with the Primavera software, had a good interview, and came highly recommended.

16. Mr. Musick received a rating of exceeds on the interview form in the areas of education, relevant experience, and knowledge, skills and abilities, and in overall evaluation. He received a rating of meets in the remaining areas. Mr. Musick has a Masters Degree in Engineering, and is working toward his doctorate. He has worked as an engineer for DOH for 16 years, as the Regional Design Engineer in District 10, and as a staff engineer in the design section and in the maintenance department. He has experience in the programming side, experience with the STIP document, understands

scheduling issues, is familiar with prioritizing projects and keeping on schedule, and has experience working in the Central Office.

17. Mr. Shaffer received a rating of exceeds on the interview form in the areas of education, relevant experience, and interpersonal skills, and was rated overall as exceeds. He is working on his Masters Degree in Civil Engineering. He has worked for DOH for 9 years, and worked as a research assistant for West Virginia University Asphalt Tech. Lab one year prior to his employment with DOH. He has worked in the design section at DOH as a design engineer, has been in charge of the road slide program, has assisted in developing, and has maintained, the project priority list, and is familiar with the STIP document. He has experience using databases.

18. Ms. Dawkins received a rating of exceeds in the areas relevant experience, knowledge, skills and abilities, and interpersonal skills on the interview form, and an overall rating of exceeds. She has worked for DOH for 12 years as an engineer and engineer-in-training. She has worked as an area construction engineer and project engineer, and has been responsible for keeping contractors on track, has overseen inspectors, has been responsible for day-to-day reporting and calculations, and has been responsible for making sure contractors were meeting deadlines and getting paid. She also has knowledge of the Primavera software.

19. Mr. Carovillano observed during the interviews that the five successful applicants had excellent communication skills and people skills. He believed they demonstrated the ability to make people feel at ease, and to communicate both with upper management at the Central Office and those doing the work at the District level.

20. Grievant did not convey to Mr. Carovillano during the interview that he had the interpersonal skills he was seeking in the candidates, or that he could put his own emotions aside and resolve and head off conflicts.

21. Mr. Carovillano had observed Grievant in another situation a few years earlier, and was concerned that Grievant would not be able to take direction and move on if he disagreed with Mr. Carovillano. Grievant had appeared at a DOH committee meeting to promote his proposal for a research project. Mr. Carovillano was a committee member. None of those who were proposing research projects had been invited to this meeting. Despite the fact that Grievant essentially crashed the meeting, he was allowed to present his proposal. He was told by the committee that, while his proposal was certainly something that DOH needed to explore, it was not a research type project. Grievant would not accept this, remained in attendance, and two times after that, when there was a lull in the discussions of other proposals, he brought up his own proposal again. After he was told a third time that his proposal was not the type of project the committee was interested in, he gathered his things and left, disrupting the meeting. This left Mr. Carovillano with a concern that instead of diffusing situations, Grievant would create controversy. In addition, Mr. Carovillano did not have the time to continually revisit the same issue over and over.

22. Mr. Carovillano spoke to a supervisor in District 4 after he had already decided on his recommendations, because he was concerned about taking two engineers from that District. He was told that he would be getting two very good people in Mr. Bernatowicz and Ms. Dawkins. Mr. Carovillano did not ask Grievant's supervisor for a recommendation.

23. Someone at DOH, other than Mr. Carovillano, had marked on the Interview Log that Grievant's Ethnic class was Mid-Eastern, while he is Asian. Mr. Carovillano was not aware of this until it was pointed out to him at the level three hearing.

Discussion

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). A preponderance of the evidence is defined as evidence which is 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. *Leichliter v. W. Va. Dep't of Health and 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).

Grievant made several arguments. Grievant first asserted he was the most qualified applicant because he had the most experience. He argued that the ratings on the interview forms demonstrate that his qualifications and experience were ignored, because he had the most experience of the successful applicants, but was not given a rating of exceeds. He also argued that the category knowledge, skills and abilities could not have been rated correctly because he was asked no technical questions to test his knowledge, skills and abilities. Grievant further argued that the selection process was flawed because Mr. Carovillano knew some of the applicants, and he talked to the supervisors of two of the candidates. Finally, Grievant asserted that the five candidates selected had to be ranked, and that the interviews were not properly conducted because the same people were not involved in all the interviews. With regard to these last arguments, Grievant produced nothing other than his opinion to support his assertions. In particular, although Grievant asserted that DOH policy requires that the same two people participate in all interviews, he did not place into evidence any policy, procedure, rule, or regulation which requires that the same people participate in all interviews, nor did he produce any document which would require that the candidates be ranked. Grievant did not demonstrate that this constituted a flaw in the selection process.

Certainly, Grievant is well educated and has many years of experience. All the applicants, however, had many years of experience, and had varied experience. DOH was fortunate to have so many excellent applicants for these positions. The fact that someone has more years of experience than someone else, however, does not automatically mean that the type of experience that person has is what is needed for the position. Regardless of whether Grievant was properly ranked in these two areas, Grievant did not demonstrate

that he was one of the five best candidates for these particular positions. In particular, Grievant failed to put forward any evidence whatsoever that he had the ability to resolve conflicts, or that he had good people skills. Mr. Carovillano's personal experiences with Grievant had demonstrated to him that Grievant did not possess the communication or people skills he felt were necessary to these positions, and Grievant did nothing in terms of evidence or his demeanor at the level three hearing to convince the undersigned that Mr. Carovillano was mistaken.

In particular, Grievant argued with the witnesses during the hearing, and his testimony was inconsistent. He testified that the reason he applied for the positions was so he would be able to work closer to home, as he lives in Morgantown and works in Weston. However, when asked by Respondent's counsel whether he would have accepted the position if the assignment were to Districts three or more hours' drive from Morgantown, Grievant's response was that he would have considered it if the job had been offered to him. The undersigned finds Grievant's responses to be disingenuous. Further, it is apparent that the only interest Grievant had in these positions was his personal interest in reducing his daily commute. It is clear that this is not the level of commitment to these new positions that Mr. Carovillano was looking for, and it is likely that this came across in the interview. Grievant failed to demonstrate that the selections were arbitrary and capricious or clearly wrong.

With regard to Grievant's assertion that the process was somehow flawed because Mr. Carovillano asked no technical questions of the applicants to test their skills, Grievant again produced nothing other than his own opinion that this was necessary. Mr. Carovillano's explanation that he did not need to test the skills of the applicants because

they were all engineers employed by DOH, and he knew what would be required of all the applicants in their jobs, and that he was more interested in their experience in programming and their interpersonal skills, represents a very rational approach.

Grievant's argument that the process was flawed because Mr. Carovillano knew some of the candidates, and spoke to the supervisors of two of the candidates is likewise rejected. All of the applicants were DOH employees. It is irrational to think that anyone conducting the interviews for these positions would not be familiar with at least some of the applicants. Grievant produced no evidence that Mr. Carovillano had a personal relationship of any type with any of the applicants that affected his judgement. To the contrary, Mr. Carovillano described in detail the qualities of the successful applicants which resulted in his choices, and his description of these individuals painted a picture of five well-qualified, capable, outstanding individuals. Grievant had the opportunity to convince Mr. Carovillano that he had the skills he was looking for, just like all the other applicants. As to the recommendations Mr. Carovillano received on two of the candidates, it is clear that these recommendations were not solicited by Mr. Carovillano, and were made after Mr. Carovillano had already made his decision as to who he was going to recommend, and this just verified that his choice was a good one. Grievant was not on Mr. Carovillano's final list of five, and there was no reason to check his references. Grievant did not demonstrate a flaw in the selection process.

Grievant also alleged discrimination in the selection process, based solely on the fact that someone at DOH had marked on the Interview Log that his Ethnic class was Mid-Eastern, while he is Asian. He opined that individuals of Middle Eastern descent are discriminated against generally. For purposes of the grievance procedure, discrimination

is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a claim of discrimination 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'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). All the applicants were asked the same questions by the interviewers, and each applicant was rated using the same factors. Grievant did not demonstrate that there was any discrimination in the selection process.

The following Conclusions of Law support the Decision reached.

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. Respondent's determination that Grievant was not among the five most qualified applicants for the positions at issue was based upon relevant factors, and was not arbitrary or capricious, or clearly wrong.

6. Grievant failed to demonstrate a flaw in the selection process.

7. In order to establish a claim of discrimination 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'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

8. Grievant did not demonstrate that there was any discrimination in the selection process.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: September 29, 2011