WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RICHARD WILSON CLAYPOOL,
Grievant,

v. **Docket No. 2010-0751-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Grievant, Richard Wilson Claypool, filed this grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("DOH"), Respondent, on December 9, 2009, challenging his non-selection for the posted position of Highway Equipment Supervisor II. The relevant statement of grievance provides:

> Was not selected for a HESII position which I had been doing on a temp. basis without upgrade and have several more yrs. of supervisor experience than the selected employee.
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> Relief Sought:
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> Equal pay for the sharing of HESII shop duties plus back pay from when position was filled, and a letter of apology with a reason why I was not selected. Job Vacancy # DOT/1000204.

A hearing was held at level one on January 4, 2010, at which time Grievant had the opportunity to present facts underlying the grievance and submit any documents or statements deemed relevant to the grievance. Both parties participated in the level one hearing, presenting and cross examining witnesses. The grievance was denied at level one by a written decision dated January 11, 2010. A level two mediation session was held on May 18, 2010. Grievant appealed to level three on May 21, 2010. A level three hearing was scheduled to be held before the undersigned Administrative Law Judge on September

20, 2010. Nevertheless, the parties by their respective representative, agreed to submit this matter for decision based upon the record. Grievant was represented by Gordon Simmons, UE Local 170, WV Public Workers Union and Respondent was represented by its counsel, Barbara L. Baxter, Esq., DOH, Legal Division. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about November 23, 2010. Both parties submitted fact/law proposals.

Synopsis

This grievance was filed after Grievant was not selected for a Highway Equipment Supervisor II position with the Department of Transportation/Division of Highways. Subsequent to the interview process, an employee other than Grievant was deemed more qualified for the posted position. Grievant alleges that he should have been selected for the position because he has more seniority than the successful applicant. Grievant has not established by a preponderance of the evidence that Respondent's selection was improper. Respondent's selection decision was not arbitrary and capricious or clearly wrong. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact based upon the evidence developed at level one and the parties proposed fact/law documents submitted at level three.

Findings of Fact

1. Grievant is employed by Respondent in Upshur County as a Highway Equipment Supervisor I (HESI). His primary duty station is the Equipment Division located in Buckhannon, West Virginia.

2. Grievant began his employment with Respondent in 1973 as an Equipment Operator III and became classified as a Highway Equipment Supervisor I in 1995. Grievant *assisted* in the supervision of the cannibalization section of the Equipment Division beginning in December, 2005. In November 2006, Grievant began supervising the Equipment Division yard operation.

3. Predicated upon the impending retirement of the previous supervisor and pursuant to Equipment Division Director, Robert Andrew's August 18, 2009 Memo "Subject: Shop Former Duties," as of August 31, 2009, Richard Claypool and Todd Campbell would be sharing shop supervisory duties until the job could be posted.

4. Respondent posted a job vacancy for a Highway Equipment Supervisor II (HESII) position in the equipment shop at the Equipment Division on or about October 13, 2009. Resp. Ex. 8.

5. Grievant applied for the position. There were seven applicants who met the minimum qualifications for the posted position.

6. The panel responsible for the selection of the successful candidate was comprised of two voting members, Robert Andrew and Marcia Lee, hereinafter also referenced as the selection committee. Further, there was a third member of the panel who participated in the interview process by asking questions and recording the answers received.

7. Robert "Bob" Andrew is employed by Respondent in Upshur County as a Director. His primary duty station is the Equipment Division located in Buckhannon. Director Andrew was an interviewer and selecting official for the matter at issue.

8. Marcia Lee is employed by Respondent in Upshur County as a Highway Equipment Supervisor II (HESII). She is a supervisor over the Fleet Planning and Record Section. She was an interviewer and selecting official for the matter at issue.

9. Sandi Peck is employed by Respondent in Upshur County as a Comptroller, with accounting responsibilities. She is a payroll supervisor and due to an agency vacancy was, at the time of relevant events, temporarily assisting with personnel matters. Ms. Peck was present throughout the interview process, she was an interviewer and responsible for recording the responses to questions posed.

10. The selection committee interviewed each applicant pursuant to WV Division of Personnel (WVDOP) and DOH procedures. All candidates were asked the same questions and were scored. Questions posed included four questions created by Director Andrew.

11. Grievant and the selected candidate for the position were both qualified for the position of HESII.

12. The selection committee determined Todd Campbell to be the most qualified applicant for the posted position of HESII and selected him as the successful candidate.

13. Interviewers filled out application evaluation data pertaining to applicants per procedure. Each candidate is rated "Does Not Meet," "Meets" or Exceeds" in six qualification areas.[1]

14. Grievant received "Meets" in all six qualification areas.

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[1] The six areas of identified qualification are: (1) Qualifications, (2) Relevant Experience, (3) Possess Knowledge, Skills & Abilities, (4) Interpersonal Skills, (5) Flexibility/Adaptability, and (6) Presentability.

15. The successful applicant, Todd Campbell received four " Meets" minimum qualifications and two "Exceeds" minimum qualifications.

16. Todd Campbell has 13 years of service with Respondent. Mr. Campell has participated in a significant amount of training and certification courses in areas of training related to his employment with Respondent. Accumulated over a period of time, applicant Campbell has accrued training in a variety of specialized training relevant to the duties of the position in discussion and beneficial to a supervisor for a state agency.[2]

17. Interviewers Andrew and Lee both agreed that applicant Campbell is the best candidate for the position. Applicant Campbell was found by the selection committee to exceed expectations in the areas of "relevant experience" and "possesses knowledge, skill and ability."

18. Successful applicant, Todd Campbell, has more computer diagnostic experience than Grievant. Mr. Campell has supervisory experience and a positive employment history with Respondent.

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). "A preponderance of the evidence

[2] Applicant Campbell obtained ASE certification from automobile specialty areas, identified in part as: welding certification, two certificates for tire technician training, NAPA auto technician class on Duramax Diesel Engines, HAZMAT training for supervisors, SPCC regulations, underground storage tank problem training, and brake inspector seminar. Further, he also took training required by the Division of Personnel for supervisors working for the State of West Virginia.

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). 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)).

Grievant contends he should have been selected for the posted position of Highway Equipment Supervisor II. Grievant asserts he is qualified, has supervisory experience, and has more seniority than the successful applicant. It is Grievant's proposition that Respondent unlawfully deprived him of the position by not equitably assessing pertinent information and relevant factors. Further, Grievant's Representative strongly alluded that pursuant to agency directive and statute, Respondent is obligated to select Grievant as the most senior applicant for the posted position, in that such change in employment (a promotion) constitutes an employment benefit.[3]

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*

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[3] In relevant part, a Division of Highways' 2004 Memorandum reminds supervisors and managers of the provisions of WEST VIRGINIA CODE § 29-6-10(4) and applicable requirements regarding seniority. In relevant part the document states:

> Please make special note that the law says "*any benefit.*" That phrase is to be construed broadly and should not be considered limited to the examples provided. The most instructive language noted in the law is *"a choice is required."* That indicates to supervisors and managers that when we must choose between employees in any decision affecting employees' conditions of work that can be construed as benefits, the level of seniority must be considered when two or more of the employees are substantially equally or similarly qualified. This is also true where qualifications are irrelevant to the benefit at issue.

February 20, 2004, Statement on Seniority under the signature of then Secretary/ Commissioner Fred Van Kirk. (Emphasis added in Original) .

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).

In support of its determination that Todd Campbell was the most qualified applicant, Respondent, among other rationale, highlighted the number of certificates of training received by candidate Campbell. The successful applicant, Todd Campbell, had numerous (thirty or forty) certificates of completed training to the Grievant's five certificates.[4] All of Mr. Campbell's training was achieved after 2004, and it was perceived that he is more knowledgeable of newer type engines than Grievant. Further, Mr. Campbell has more computer diagnostic testing equipment experience than the Grievant. It was established that applicant Campbell took specialty training to further his knowledge base. He prudently availed himself of opportunities for professional growth on a regular basis. He obtained ASE certification from automobile specialty areas and Ms. Lee listed those as: welding

[4] The exact number is not identified with great specificity. Ms. Lee tends to identify thirty while Mr. Andrew cites forty, nevertheless both amounts are far in excess and more recent than Grievant's five.

certification, two certificates for tire technician training, NAPA auto technician class on Duramax Diesel Engines, HAZMAT training for supervisors, SPCC regulations, underground storage tank problem training, and brake inspector seminar. Additional certificates were attached to candidate Campbell's application. In comparison, Mr. Andrew testified that Grievant's knowledge was of older equipment, not the newer equipment. Grievant had certifications from 1993, 1994, and 1989. He had two newer certificates in Personnel training, but neither of these had to do with equipment or with mechanic's work.

It was established that the selection committee was impressed by the training that applicant Campbell had in working with new techniques required by new equipment, for example, the diagnostic computer and diagnostic testing equipment. This training created an advantage for Mr. Campbell over Grievant, in that it was perceived Mr. Campbell could more readily assist or guide mechanics who "got into problems with a piece of equipment" or the "new type engines." Director Andrew was concerned about Grievant's lack of current training.

Grievant objects to Respondent's perception. Grievant is of the opinion that he has and does maintain adequate knowledge related to newer equipment by communicating with dealers, manufacturers and other mechanics. The undersigned was not persuaded Grievant's knowledge was equal to that of applicant Campbell's.

It is recognized by all parties that supervisory responsibilities and tenure with an agency are not synonymous time periods in the facts of this case.[5] Nevertheless, Grievant contends that due deference to his longevity and alleged superior supervisory experience

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[5] Respondent and Grievant may have a difference of opinion regarding the amount of supervisory experience Grievant has accrued over the years.

was not adequately credited to him over that of the successful applicant. This difference in recognized supervisory experience was not the determining factor of Respondent's determination. Robert Andrew, Director of the Highways' Equipment Division, who was Grievant's direct supervisor in 2009, had an opportunity to compare Mr. Campbell's supervisory work with that of Grievant's experience. Director Andrew testified, based on what he knew from working with both employees, that Mr. Campbell was the more qualified person to supervise the shop because the job was to "oversee" and "direct" the employees in the shop. Grievant's supervisory experience was taken into consideration in accessing Grievant's suitability for the position, just not given the weight Grievant believes it is due.

Lastly, Grievant maintains his tenure of thirty-six years with the agency is or should be sufficient to warrant him the position over Mr. Campbell. The issue of seniority is not new to selection cases. 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[.]" Grievant's position does not acknowledge or adequately recognize an agency's discretion in selection decisions. 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).

Grievant's interpretation of the principles discussed in the 2004 Memorandum; seniority rights, employment benefits, WEST VIRGINIA CODE § 29-6-10(4), and Agency decisions, as applicable to the instant matter is faulty. Neither the Memorandum nor the WV Statute cited in the document require that the most senior applicant be selected for all benefits.

Respondent is not required to consider the seniority of the applicants as the decisive factor in making every selection decision. 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." *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-304 (July 18, 2008); *McKinney, et al., v. Dep't of Transp./Div. of Highways,* Docket No. 2008-0316-CONS (Dec. 27, 2007); *Allen v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-230 (Sept. 23, 2005); *Ferrell v. Dep't of Transp.*, Docket No. 04-DOH-240 (Dec. 20, 2004). Specifically, it was determined that the successful applicant was more qualified than Grievant.

In summation, the successful applicant, Todd Campbell, had thirty to forty certificates of completed training to Grievant's five certificates. All of Mr. Campbell's training was achieved after 2004, and it was perceived that he is more knowledgeable of newer type engines than the Grievant. Mr. Campbell has more computer diagnostic testing equipment experience than the Grievant. Grievant failed to establish the essential elements to demonstrate that Respondent acted arbitrarily or capriciously in making the instant selection.

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. In review of Grievant's qualifications, interview scores and employment history with Respondent, it cannot be said that the Respondent's selection of applicant Campbell was without due consideration, or in disregard of pertinent facts and circumstances of the job responsibilities. Although it is understandable that Grievant would perceive his lengthy employment and knowledge of the department as making him abundantly qualified, the ultimate decision is based upon a determination as to which candidate would do the best job. Grievant's perception awards more weight for factors beneficial to his interest. Grievant's contentions were not proven. Seniority is not the primary consideration. In this

case, the interview/selection panel explained their reasoning in determining that applicant Campbell was more qualified than Grievant, and the undersigned does not find abuse of the ample discretion afforded Respondent regarding this decision. 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 DOH's choice of the successful applicant was an abuse of discretion.

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).

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. 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. *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-304 (July 18, 2008); *McKinney, et al., v. Dep't of Transp./Div. of Highways,* Docket No. 2008-0316-CONS (Dec. 27, 2007); *Allen v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-230 (Sept. 23, 2005); *Ferrell v. Dep't of Transp.*, Docket No. 04-DOH-240 (Dec. 20, 2004).

6. 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).

7. Respondent's determination that the selected candidate was the best qualified applicant for the position at issue was based upon relevant factors, and was not arbitrary or capricious, or clearly wrong.

8. 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). In this case, the interview panel concluded that the qualifications of applicant Campbell exceeded those of Grievant. 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 for the posted Highway Equipment Supervisor II position was arbitrary and capricious, unreasonable or clearly wrong.

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: August 31, 2011

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Landon R. Brown
Administrative Law Judge