WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RICK G. CHAPMAN,
Grievant,

v. **Docket No. 2011-1298-DOT**

DIVISION OF HIGHWAYS,
Respondent,
and

LARRY E. THACKER, JR.,
Intervenor.

D E C I S I O N

Grievant, Rick C. Chapman, filed this grievance against his employer, the West Virginia Department of Transportation, Division of Highways ("WVDOH"), Respondent on March 10, 2011, protesting his non-selection for a posted crew leader position. The statement of grievance reads:

> I am filing this grievance for the position "Crew Leader" being denied for the second time. My complaints are as followed:
>
> 1. Pre-selection: the name for crew leader was mentioned on the job by supervision to several employees before all applications were filed and interviewed.
>
> 2. Falsification: given false qualification requirements for the position in question, therefore, causing discouragement to advance within the company.
>
> 3. Discrimination: against my age, seniority and qualifications.
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> I have been an employee of DOH for 20+ years, for the last several (5) years I have been overlooked for advancement. My years and experience with the DOH gives me more than enough qualifications for this position. I feel that experience, working knowledge and coworkers respect is the key to good leadership and I have that qualification to allow me to advance within the department.

Grievant requested the following remedy:

"Crew leader position or pay grade."

A hearing was held at level one on April 1, 2011, and was denied at that level on April 19, 2011. Grievant appealed to level two on April 20, 2011, and a mediation session was held on July 5, 2011. Grievant appealed to level three on September 21, 2011. Pursuant to a Public Employees Grievance Board Order dated October 17, 2011, intervenor status was granted to Larry E. Thacker, Jr. A level three hearing was held before the undersigned Administrative Law Judge on May 18, 2012, in the Grievance Board's Charleston office. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Robert Miller, Legal Division, WV DOH. This matter became mature for decision on June 15, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Respondent and Grievant submitted fact/law proposals. Intervenor, the successful applicant, did not present any formal position.

Synopsis

Grievant is classified as a Transportation Worker 2 Equipment Operator with the Department of Transportation/Division of Highways, Respondent. Grievant applied for a Transportation Crew Supervisor 1 position and was not the successful applicant. Grievant contends that he should have been the successful applicant.

Subsequent to the interview process, an employee other than Grievant, was deemed more qualified for the posted position. Grievant has not established by a preponderance of the evidence that Respondent's selection was improper or a case of

discrimination and/or favoritism pursuant to applicable grievance procedure. Grievant failed to demonstrate that the selection decision made was arbitrary, capricious or clearly wrong. Most importantly, Grievant did not demonstrate he was the most qualified applicant. Accordingly this grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is classified as a Transportation Worker 2 Equipment Operator in Cabell County, District Two (D-2) with the Division of Highways ("WVDOH"), Respondent. Grievant began full-time employment with WVDOH on July 26, 1990.

2. Larry E. Thacker, Jr., (hereinafter also "Intervenor") was a Transportation Worker 3 Equipment Operator from October 1, 2006, until his promotion to Crew Supervisor on March 1, 2011. He has been employed with WVDOH since March 15, 1995.

3. A vacancy for a Transportation Crew Supervisor 1 (TRCRSV1-DOT 1100206) was posted on August 23, 2010.

4. Grievant applied for the posted Transportation Crew Supervisor 1 position on August 31, 2010.

5. Interviews were held on December 1, 2010, and conducted by Greg Surber and Dave Harper. Gregory Surber is a Maintenance Assistant in D-2 and has been employed with DOH since June 24, 1985. Dave Harper is a Highway Administrator 2 in District One and has been employed with DOH since January 5, 2009.

6. Harold Jones sat in on the interviews, but did not participate in the questioning process. Harold Jones is an Administrative Service Manager 1 in D-2 and has been employed with DOH since September 6, 2006.

7. There were five internal applicants.

8. All candidates were asked a series of questions. All of the candidates were asked the same series of questions.

9. A form entitled "Application Evaluation Record" is used throughout DOH during interviews to summarize interviews comments in written form. The "Application Evaluation Record" indicates whether the applicant meets, does not meet, or exceeds the minimum requirements for the job posting. Additionally, there is a "comments" section for the interviewers to note any pertinent information during the interview.

10. Both Grievant and Intervenor met all requirements for the position of Transportation Crew Supervisor 1.

11. The comment written on the "Applicant Evaluation Record" dated December 1, 2010 with regard to Intervenor Thacker provided that Intervenor "articulated his answers during the interview better than the other applicants." Mr. Surber and Mr. Harper confirmed that they were both in agreement regarding the comment.

12. When asked specific questions relating to the crew supervisor position, Intervenor's answers were more accurate and gave more details than Grievant' s regarding the responsibilities of the position.

13. Grievant did not have any comments written on his "Application Evaluation Record."

14. Intervenor, Larry Thacker was chosen for the Transportation Crew Supervisor 1 position in District 2.

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 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)).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

"Also, as the Grievance Board has held many times, when a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp.*, Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen, supra*; *See Ball v. Dep't of Transp.*, Docket No. 04-DOH-423 (May 9, 2005)." *Freeland v. Dep't of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008).

Grievant asserts the selection process in association with the posted Transportation Crew Supervisor 1 position in discussion for District Two was flawed.

Grievant infers and alleges several allegations contending he is improperly being hampered from advancement within the department. Grievant alleges that he was discriminated against because of his age and that "pre-selection" took place prior to the interviews. However, he provided little, if any, significant evidence to substantiate his claim of discrimination or "pre-selection." The Grievance Board is authorized by statute to provide relief to employees for discrimination, and favoritism as those terms are defined in W. VA. CODE § 6C-2-2. "Discrimination" is defined by statute 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). "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);
>
> (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 (Feb. 14, 2005); *Harris v. Dep't of Transp*., Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant has not established that he was treated differently from any other applicant. Grievant did not established a prima facie case of discrimination or favoritism. Respondent provided testimony that age was not a factor in the selection. In fact, Mr. Surber and Mr. Harper (Interviewers) were not completely sure of Intervenor's age and had no knowledge of any "pre-selection" conversation taking place prior to the interviews. (Level One testimony.)

When considering qualifications and records of performance, Intervenor had recent and relevant experience with the Department of Transportation/Division of Highways. Interviewers testified that they believed that Grievant's lack of experience in dealing with the public and his lack of equipment experience would be an obstacle in the crew leader position. The interviewers were in complete agreement that the best qualified candidate, Larry Thacker, was chosen for the Transportation Crew Supervisor 1 position. Both testified that Grievant was their fourth choice among the five internal applicant, *see* pgs. 37 and 55, Level One Testimony.

It is true, as Grievant highlights, that he had more seniority than the individual selected and W. VA. CODE § 29-6-10(4) provides for an employer to consider seniority in selection decisions. However, Grievant may be misinterpreting the weight of his seniority. Contrary to Grievant's inferred proposition, seniority is not the primary consideration or sole factor to be evaluated. Seniority with an agency is a consideration; however, seniority is not the only criteria for awarding opportunity for advancement in the work place.

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 eligibility or qualifications of the candidates, as determined by Respondent's Administrative personnel, were not so similar that seniority was the definitive factor. An employer may determine that a less senior applicant is more deserving of a particular benefit and not invalidate the selection. Grievant's seniority with Respondent is relevant, but in the facts of the present grievance, it was not definitive.

Thus, in conclusion, while Grievant may truly believe his allegation of impropriety, the contentions were not persuasive as presented. Grievant testified and cross-examined Respondent's witnesses. The fact that one employee has more years of service than another, with a particular agency does not automatically mean that the more senior individual is entitled to a promotion rather than the less senior employee. "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." *Allen v. Dep't of Transp.*, Docket No. 05-DOH-230 (Sept. 23, 2005); *Ferrell v. Dep't of Transp.*, Docket No. 04-DOH-240 (Dec. 20, 2004). Grievant failed to establish that

Intervenor Thacker was given preference or an advantage during the interview process. Grievant did not prove that Respondent's selection for the Crew Leader position in District Two was arbitrary and capricious, or that discrimination played a part in Respondent's decision. Most importantly, Grievant failed to demonstrate he was the most qualified applicant.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. 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).

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 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.

6. Grievant failed to demonstrate an unlawful flaw in the selection process.

7. 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 (Feb. 14, 2005); *Harris v. Dep't of Transp*., Docket No. 2008-1594-DOT (Dec. 15, 2008).

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

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

10. Grievant has failed to establish that the selection of the successful applicant for the crew leader position was improper, arbitrary and capricious, 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: December 10, 2012

Landon R. Brown
Administrative Law Judge