THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ISMAIL S. LATIF,
Grievant,

v. **DOCKET NO. 2012-0137-DOT**

DIVISION OF HIGHWAYS,
Respondent,

and

FOUAD SHOUKRY,
Intervenor.

DECISION

Grievant, Ismail S. Latif, filed this grievance against his employer, the Division of Highways, on August 5, 2011, challenging the selection of Intervenor, Fouad Shoukry, for for the District Traffic Engineer position in District 4. The statement of grievance reads: "I applied for the Dist. Traffic Engineer position (DOT1100475) in District 4 that was posted on May 9, 2011. I have been in the same position in District 7 for the last twelve years. I have not been selected for this position despite my good qualification[s] and experience." As relief, Grievant sought: "I should be given the District Traffic Engineer job in District 4."

A conference was held at level one on August 18, 2011, and a decision denying the grievance at that level was issued on September 7, 2011. Grievant appealed to level two on October 14, 2011, and a mediation session was held at level two on January 24, 2012. Grievant appealed to level three on March 14, 2012. A level three hearing was held before the undersigned Administrative Law Judge on July 13, 2012, in the Grievance Board's

Westover office. Grievant appeared *pro se*, and Respondent was represented by Robert Miller, Attorney, Department of Highways Legal Division. The parties declined to submit written argument, however, Grievant requested the opportunity to submit an exhibit after the hearing, and was allowed until July 20, 2012, to do so. This matter became mature for decision on July 23, 2012, on receipt of Grievant's Exhibit Number 1.[1]

Synopsis

This grievance was filed when Grievant was not selected for the posted District Traffic Engineer position in District 4. The qualifications of the applicants were evaluated by the two persons conducting the interview, and the applicants were rated by the interviewers in six categories. While Grievant had the most experience as a District Traffic Engineer, having served in that position in District 7 for 12 years, Grievant did not demonstrate that he was the best qualified candidate overall, that there was any flaw in the selection process, or that he was entitled to be transferred into the position from District 7. 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. At the time this grievance was filed, Grievant had been employed by the Division of Highways ("DOH") as the Highway Engineer, District Traffic Engineer, in District 7, for 12 years, and he had been employed by DOH for 19 years.

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[1] Respondent had no objection to the admission of this exhibit. Grievant's Exhibit Number 1 is Ordered admitted into evidence.

2. On May 9, 2011, DOH posted a Highway Engineer position, District Traffic Engineer, to be located in District 4 Maintenance, in Harrison County, West Virginia. The minimum qualifications for the position were a Bachelor's Degree in Civil Engineering, a license as a Registered Professional Engineer, and seven years of professional highway engineering experience involving design, construction or maintenance of highways.

3. Grievant applied for the posted position, as did four other individuals.

4. Bryan Radabaugh, an Engineer employed by DOH for 16 years, and Jeff Piffer, an employee of DOH, interviewed the five applicants on June 8, 2011, and made the hiring recommendation. All applicants were asked the same questions during the interview. Mr. Radabaugh and Mr. Piffer ranked each applicant after the applicant's interview as exceeds, meets, or does not meet, in the categories education, relevant experience, knowledge, skills and abilities, interpersonal skills, flexibility/adaptability, presentability, and overall evaluation.

5. The applicants were not asked technical questions to test their knowledge.

6. Fouad Shoukry was selected for the position. Mr. Shoukry had been employed by DOH for seven years, had been serving as the Acting District Traffic Engineer in District 4 for approximately one year prior to his selection for the position, and was the Assistant to the District Traffic Engineer in District 4 prior to that. Mr. Shoukry has a Master's Degree in Civil Engineering with a focus on traffic engineering, 14 years of traffic engineering experience, including experience working in Egypt, and has a license as a Professional Engineer. Mr. Shoukry has extensive knowledge of three traffic engineering computer software programs, and has attended many training and educational seminars.

7. During the course of the interview, Mr. Shoukry presented a positive attitude, and his responses to the various questions left the impression on Mr. Radabaugh that Mr. Shoukry had a passion for highway engineering and loved his job. Mr. Shoukry stated during the interview that he had passed up other employment opportunities because he wanted to be in traffic engineering.

8. Grievant has a Master's Degree in Civil Engineering, with a focus on structural engineering, and he has 12 years of experience as a District Traffic Engineer. He holds a license as a Professional Engineer. Grievant is familiar with two highway engineering computer software programs, and has attended some training and educational seminars, but not as many as Mr. Shoukry. Grievant's responses to the interview questions left Mr. Radabaugh with the impression that the only reason he was interested in this position was to decrease his commute time from his home in Morgantown, West Virginia.

9. Mr. Radabaugh and Mr. Piffer rated Mr. Shoukry as exceeds in education, because the focus of his Master's Degree was in traffic engineering. Mr. Shoukry was rated as exceeds in relevant experience, and as meets-plus in knowledge, skills and abilities due to his familiarity with the three software programs and the number of training and education seminars he had attended. Mr. Shoukry was rated as meets in flexibility/adaptability and presentability. Mr. Shoukry was given an overall rating of exceeds-minus.

10. Mr. Radabaugh and Mr. Piffer rated Grievant as meets-plus in education, with the plus indicating that the Master's Degree exceeded the minium requirement of a Bachelor's Degree. He was not given an exceeds in this category because his Master's

Degree did not have a focus on traffic engineering. Grievant was rated as exceeds in relevant experience, and meets in knowledge, skills and abilities, interpersonal skills, flexibility/adaptability, and presentability. Grievant was given an overall rating of meets-plus.

11. Mr. Radabaugh and Mr. Piffer were familiar with Mr. Shoukry's work. Mr. Piffer was Mr. Shoukry's supervisor.

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 as a District Traffic Engineer, and that he should have simply been transferred to this position because he applied for it. Grievant did not place into evidence any law, rule, regulation or policy which would demonstrate that he was entitled to be transferred into this posted position. In fact, Grievant placed very little evidence into the record, choosing only to present his own testimony.

Further, Grievant would have Respondent make its selection based only on experience, with no regard to any other criteria. Respondent, however, looked at several factors in evaluating the applicants, including overall performance in the interview. This is a standard method for evaluating applicants. A comparison of Grievant and Mr. Shoukry in all categories considered resulted in a slight edge to Mr. Shoukry, who also had many years of traffic engineering experience, including experience as the District Traffic Engineer. Grievant did not demonstrate that Respondent's decision to look at several factors constituted a flaw in the selection process, or that his experience alone made him the most qualified applicant.

Grievant also asserted that the process was somehow flawed because the interviewers asked no technical questions of the applicants to test their skills. As was pointed out when this same argument was raised by Grievant in a prior grievance (*Latif v. Div. of Highways*, Docket No. 2011-0924-DOT (Sept. 29, 2011)), Grievant produced nothing other than his own opinion that this was necessary. Mr. Radabaugh was familiar with Mr. Shoukry's work, and both Grievant and Mr. Shoukry were engineers and had been

employed by DOH for a long time. Grievant did not demonstrate that the interviewers were required to test the skills of the applicants by asking technical questions.

Grievant did demonstrate that Mr. Radabaugh misunderstood his response to one of the questions. Mr. Radabaugh thought that Grievant was only familiar with one traffic engineering computer software program. Grievant testified that he was familiar with two traffic engineering computer software programs, and that he had indicated the two programs during the interview. While this is an unfortunate misunderstanding, it was Grievant's responsibility to make sure he was clear in his responses during the interview and demonstrate why he was the best candidate. Further, Mr. Radabaugh stated that Mr. Shoukry received a meets-plus rating in knowledge, skills and abilities not only because he was familiar with three traffic engineering software programs, still one more than Grievant, but also because of all the training and educational seminars he had attended. This error does not rise to the level of a flaw in the overall selection process.

Finally, Grievant asserted that the interviewers did not carefully review the applications, and that Mr. Shoukry was selected because Mr. Radabaugh and Mr. Piffer knew him. Mr. Radabaugh admitted that he knew Mr. Shoukry and was familiar with his work. While Mr. Piffer was not called as a witness, Mr. Shoukry listed Mr. Piffer as his supervisor on his application for this position. Grievant stated that the interviewers wanted him to suffer for many reasons, but when asked to articulate these reasons, he did not do so. Grievant presented no evidence to support his assertions. The testimony of Mr. Radabaugh and the rating forms completed by Mr. Radabaugh and Mr. Piffer demonstrate that they did indeed review the applications carefully, and selected the applicant with the

highest overall rating based on the responses to the interview questions and the applications submitted by the applicants.

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 the best choice for the position 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.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel 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
Acting Deputy Chief
Administrative Law Judge

Date: August 28, 2012