THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LARRY GENE HOSKINS,
Grievant,

v. **Docket No. 2011-1386-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Larry Gene Hoskins, is employed by Respondent, Division of Highways. On March 28, 2011, Grievant filed this grievance against Respondent stating, "Applied for crew leader training. Not selected despite past experience of being an acting crew leader, and given no notification of nonselection." For relief, grievant seeks "to be made whole including offer of crew leader training."

Following the May 6, 2011 level one hearing, a level one decision was rendered on May 23, 2011, denying the grievance. Grievant appealed to level two on May 26, 2011. Grievant perfected the appeal to level three of the grievance process on September 21, 2011. A level three hearing was held on March 26, 2012, before Administrative Law Judge Carrie H. LeFevre[1] at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Robert Miller. This matter became mature for decision on April 26, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

[1] This case was assigned to the undersigned Administrative Law Judge on August 3, 2012 for administrative purposes.

Synopsis

Grievant grieved his non-selection for crew leader training. Training is a benefit contemplated by W.VA. CODE § 29-6-10(4), therefore, Respondent is required to select applicants for training based on qualifications, with consideration of seniority given only if qualifications are substantially equal or similar. Respondent made the selection based solely on seniority without any consideration given to qualifications, which was unlawful and arbitrary and capricious because it did not rely on criteria required to be considered by statute. The evidence presented shows Grievant had superior qualifications to the selected applicants. Accordingly, the grievance is granted.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is currently employed by Respondent as a Transportation Worker 2 Equipment in District 3, working in Organization 0383, Section 1.

2. Grievant was previously employed by Respondent in District 4. While in that district, Grievant served as crew leader on a temporary upgrade from April 2008 through June 2008, and was promoted to a permanent crew leader from July 2008 through December 2009.[2] Grievant transferred to his current lesser position in District 3 due to the cost of his commute.

3. In March 2011, Respondent conducted crew leader training in District 3. The training was to prepare current and prospective crew leaders for crew leader

[2] Grievant's Exhibit #2 and Grievant's level three testimony.

responsibilities.[3] Space for the training was limited, and only two spaces were allotted for Grievant's section. Although Respondent ideally would offer the training annually, that has not been "practically doable" and it had been five years since the last training.[4]

4. Although the training is not a requirement for hiring a crew leader, it would be a consideration in deciding who to hire or temporarily upgrade to crew leader.[5]

5. Within Grievant's section, six workers applied for the training. The two workers chosen for the training were Terry Bruner and Russell Grimes, who are both also classified as Transportation Worker 2 Equipment.

6. Grievant's supervisor, John Barberio, made his recommendation of training attendees based solely on seniority[6], and the two successful applicants had more seniority than Grievant.

7. Final approval for the attendance at the training rested with Assistant District Engineer, David Brabham, who simply accepted the recommendation of Barberio, knowing the recommendation was based solely on seniority.[7]

8. Grievant was more qualified than the successful applicants, as he had previously served as a permanent crew leader for eighteen months and as a temporarily upgraded crew leader for two and a half months. The successful applicants had far less crew leader experience, each having served as crew leader only through temporary upgrades for a limited amount of time.

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[3] David Brabham, Assistant District Engineer's, level three testimony.
[4] *Id.*
[5] *Id.*
[6] *See* level one transcript at pages 16, 17, and 19.
[7] *See* level one transcript at pages 24, 25, and 26.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *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). "The 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).

In this case, Respondent's decision regarding selection for crew leader training should have been governed by W.VA. CODE § 29-6-10(4), which states:

> 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.

Although there appears to be no previous decision of the Grievance Board regarding whether training constitutes a "benefit" under this code section, it seems clear that the training at issue would be considered such. This is a training that was particularly sought-after, with approximately 103 applicants district-wide for only 48 openings. Most importantly, completion of this training will be used as a consideration in future hiring

decisions for crew leader openings and temporary upgrades. Therefore, as this training was clearly a benefit under the above statute, Respondent should have made its selection decision based upon the qualifications of the applicants, with consideration given to seniority only if the applicants had substantially equal or similar qualifications.

The record in this case reveals Respondent's supervisory employees did not take the selection process seriously. Grievant's supervisor, Barberio, was very flippant in his level one testimony stating, "Well, if he has as much experience as he says he has, he really doesn't need training."[8] He further stated he simply picked the two most senior applicants because the training was probably going to be offered annually so it would be "just a matter of a few years" to get everyone trained. Brabham, who was ultimately responsible for the selection decision, made no independent review of the applications or personnel files and simply accepted the recommendation of Barberio.[9] Respondent had provided clear instruction by several memoranda to its supervisory employees regarding the statutory requirements when granting a benefit,[10] which was ignored in this case. It is particularly illustrative of the problematic nature of the selection process that Brabham, who was ultimately responsible for the selection decision, was not even familiar with the memoranda.[11]

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

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[8] Level one transcript at page 19.
[9] David Brabham's level 3 testimony.
[10] Grievant's Exhibit No. 3.
[11] David Brabham's level 3 testimony.

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 v. Div. of Rehab. Serv.,* Docket No. 93-RS-489 (July 29, 1994). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997).

In this case, Respondent is afforded no deference because it did not make a judgment based on qualifications. Although Respondent attempted to show through Brabham's level three testimony that seniority was only considered because the applicants were equal, in level one testimony both Barberio and Brabham admitted that they did not review the applications, personnel records, or consider qualifications at all at the time the selection was made. Barberio was not sure of the relative experience between the three, but "it didn't matter. I took the two oldest."[12] Brabham admitted, "we chose by seniority"[13] and, that in Organization 0383, they did not look at crew leader experience at all.[14] At the time the decision was made, seniority was the only criteria used in the decision. Respondent inappropriately awarded this benefit based solely on seniority when the law clearly requires seniority be the determining factor only when the

[12] Level one transcript at page 19.
[13] Level one transcript at page 25.
[14] Level one transcript at page 26.

applicants' qualifications are "substantially equal or similar." Therefore, the selection decision was unlawful and arbitrary and capricious because it did not rely on criteria required to be considered by statute.

As Respondent did not consider the applicants' qualifications, the undersigned must now make that determination based on the evidence presented in this matter. Evidence regarding qualifications was not extensive. It is noted that the original applications were not presented as evidence and are presumed missing. Regarding the qualifications of the successful applicants, Barberio and Brabham testified that, while both had many years of service, neither had ever served as permanent crew leaders. Both had previously received temporary upgrades to crew leader, but by definition those upgrades could only have been for a maximum of 6 months. Neither Barberio nor Brabham could testify to exactly how long each of the successful applicants had served in the temporary positions. In contrast, Grievant had served as a permanent crew leader in another district for eighteen months, and had served an additional two and a half months through a temporary upgrade.

According to the evidence presented in this matter, Grievant's qualifications are superior to the successful applicants'. While it is possible that, had Respondent properly weighed qualifications at the time of the selection, there may have been other information to legitimately find the qualifications of Grievant and the successful applicants to be substantially equal or similar, Respondent made no such determination. Barberio and Brabham did not consider qualifications at all, and the bare evidence presented at hearing shows Grievant's qualifications to be superior.

The following Conclusions of Law support the decision reached.

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. W. VA. CODE ST. R. § 156-1-3 (2008); *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). "The 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).

2. Respondent's decision regarding selection for crew leader training should have been governed by W.VA. CODE § 29-6-10(4), which states:

> 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.

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 v. Div. of Rehab. Serv.,* Docket No. 93-RS-489 (July 29, 1994). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997).

4. The Respondent’s selection decision was unlawful and arbitrary and capricious because it did not rely on criteria required to be considered by statute when it granted a benefit solely on seniority, without consideration to qualifications.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to provide equivalent crew leader training to Grievant prior to hiring the next crew leader in District 3, but no later than six months from the entry of this order, regardless.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: August 28, 2012

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Billie Thacker Catlett
Administrative Law Judge