THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROY STEVEN DIXON,

Grievant,

v. **Docket No. 2011-1658-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant Roy Steven Dixon filed a grievance against his employer, Respondent, Division of Highways ("DOH"), on May 5, 2011, stating as follows: "I believe the job in question was giv[en] out because of favoritism instead of qualifications. Plus I have 18 to 20 year seniority. I filled in for 1 year before the current supervisor came here." As relief sought, the Grievant states, "I request the decision be overturned and the job awarded to me."

A Level One hearing was conducted on May 31, 2011. The grievance was denied by decision dated June 14, 2011. Grievant perfected his appeal to Level Two on June 24, 2011. A Level Two mediation was conducted on November 9, 2011. Grievant appealed to Level Three on November 16, 2011. A Level Three hearing was held on April 3, 2012, before the undersigned administrative law judge at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared in person, *pro se*. Respondent appeared by counsel, Jason C. Workman, Esquire.

This matter became mature for decision on May 7, 2012, upon the receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant applied for the position of Transportation Crew Supervisor II. He was one of two applicants for the position. However, Grievant was not selected for the position. Grievant asserts that he was the more qualified candidate, and that the other applicant was selected not based upon his qualifications, but because of favoritism; therefore, the selection process was arbitrary and capricious. Respondent denies Grievant's allegations, asserting that the selection process was conducted properly, and that the most qualified candidate was selected. Grievant failed to meet the burden of proving his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

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 employed as a Transportation Crew Supervisor I in District Nine with the Division of Highways. He has been employed by the DOH since April 10, 1978.[1]

2. Greg Sibold is employed by Respondent as a Highway Administrator 2 in District Nine. Mr. Sibold has served in this position for the past three years.

3. At the time of the events at issue in this matter, Kenny Brewer was employed by Respondent as a Transportation Crew Supervisor I in District Nine, the

[1] *See,* Respondent's Exhibit 1; Level One Respondent's Exhibit 2.

same classification as Grievant. Prior to that, he was an Equipment Operator III. Mr. Brewer has been employed by Respondent since May 3, 1993.[2]

4. At the time of the events detailed herein, Mr. Sibold supervised both Grievant and Mr. Brewer.

5. A vacancy for a Transportation Crew Supervisor II was posted on February 28, 2011.

6. Grievant and Mr. Brewer were the only applicants for the position.

7. Interviews for the Transportation Crew Supervisor II position were conducted on April 5, 2011, by an interview panel comprised of Bruce Dunlap, Nathan Thomas, Greg Sibold, and Melinda Gibson. Mr. Dunlap, Mr. Thomas, and Mr. Sibold had each supervised both applicants at different times.

8. During their interviews, the candidates were asked the same set of questions, and were rated with respect to the following qualifications: education, relevant experience, knowledge, skills, and abilities, interpersonal skills, flexibility/adaptability, "presentability," maintenance knowledge and management skills.

9. The ratings for each of the candidates' qualifications were recorded on a DOT Applicant Evaluation Record.

10. The interview committee completed a single DOT Applicant Evaluation Record for each candidate.

11. The interview committee rated Grievant as "Meets" for each of the qualifications evaluated. Overall, Grievant's evaluation was rated as "Meets."[3]

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[2] *See,* Level One Respondent's Exhibit 2.

[3] *See*, Respondent's Exhibit 1.

12. The interview committee rated Mr. Brewer as "Meets" for all except two of the qualifications evaluated. The committee rated Mr. Brewer as "Exceeds" for "interpersonal skills & abilities" and "flexibility/adaptability." Overall, Mr. Brewer's evaluation was rated as "Meets."[4]

13. The following is written in the "comments" section on Grievant's Applicant Evaluation Record: "[a]pplicant has a significant amount of DOH experience but also has a proven work history of being an average employee. Lacks drive when it comes to work performance and achieving production from his crews."[5]

14. The following is written in the "comments" section on Mr. Brewer's Applicant Evaluation Record: "[w]hile applicant's years of service are not as high as others he possesses all of the attributes you look for in a supervisor/leader. Always maintains a positive attitude, first to step forward accepting new task and has exceptional interpersonal skills."[6]

15. Following the interviews, the interview committee reviewed several of the candidates' employee evaluations scores from past years. In those reviewed, Mr. Brewer had higher scores than Grievant.[7] However, it is noted that for the past three years, Mr. Sibold was the person who evaluated both Mr. Brewer and Grievant.[8]

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[4] *See*, Respondent's Exhibit 1.

[5] *See*, Respondent's Exhibit 1.

[6] *See*, Respondent's Exhibit 1.

[7] *See*, testimony of Bruce Dunlap and Level One, Respondent's Exhibit 2.

[8] *See*, testimony of Bruce Dunlap.

16. The interview committee found that Mr. Brewer's interpersonal skills and flexibility/adaptability were superior to those of Grievant. Further, the committee believed that such skills were vital to the position of Transportation Crew Supervisor II.[9]

17. The interview committee unanimously selected Mr. Brewer for the position of Crew Transportation Supervisor II.[10]

18. Prior to his application for the position of Transportation Supervisor II, Kenny Brewer had been afforded more opportunities to attend training sessions, or "schools," than other Transportation Crew Supervisor Is. He attended at least some of these training sessions with Mr. Sibold.[11] These training sessions were not offered to the other crew supervisors.

19. Grievant received a written reprimand for unprofessional conduct in September 2010.[12] Mr. Brewer has no record of disciplinary action. Such was considered by Mr. Sibold when making the selection for the position of Transportation Crew Supervisor II.[13]

Discussion

As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89 DHS-72 (Nov. 29, 1990). "A preponderance of the

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[9] *See*, testimony of Nathan Thomas and Bruce Dunlap.

[10] *See*, testimony of Bruce Sibold.

[11] *See*, testimony of Patricia Allen.

[12] *See*, Respondent's Exhibit 2.

[13] *See*, testimony of Greg Sibold.

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). "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 and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence supports both sides equally, the Grievant has not met his burden. *Id.*

Grievant argues that the selection of the candidate for the position of Transportation Crew Supervisor II was flawed because the successful candidate was chosen not for his qualifications, but because of favoritism. Grievant further argues that he performed the job informally for at least one year, and that he has more experience and seniority than the successful candidate; therefore, he should have been selected for the position. Respondent denies Grievant's allegations, and asserts that it followed all of the appropriate rules and procedures in filling the position, and that the candidate selected, Kenny Brewer, was the most qualified candidate.

In a selection case, the grievant must prove, by a preponderance of the evidence, that he was the most qualified applicant for the position in question. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). Further, 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 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 Hospital v. Health and Human Serv.,* 789 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). 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." *Id. (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 a board of education." *See generally, Harrison v. Ginsberg,* [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)*." Trimboli, supra*.

From the evidence presented, it appears that Grievant and Mr. Brewer were treated the same during their interviews. They were asked the same questions by the same interviewers, and were evaluated using the same criteria. It appears that Mr. Brewer had a better interview, and scored higher than Grievant in the areas of interpersonal skills and flexibility/adaptability. The interview committee felt that the person selected for the position needed such skills to deal with the public and to best communicate with the workers. Apparently, Mr. Brewer distinguished himself from Grievant with these skills at the interview. Several witnesses, including Mr. Sibold, testified that Mr. Brewer could talk to anyone and that he had an excellent personality. Prior to his application for the position, it had been Mr. Brewer's habit to communicate with Mr. Sibold on a daily basis. Mr. Sibold indicated that these interactions with Mr. Brewer showed Mr. Brewer's drive, interest, and initiative. Clearly, this benefited Mr. Brewer at his interview. Grievant was not one to communicate with Mr. Sibold in this manner.

While it concerns the undersigned that Mr. Sibold afforded Mr. Brewer the opportunity to attend training sessions that Grievant and other Crew Supervisor Is were not, and that Mr. Sibold had somewhat of a personal relationship with Mr. Brewer outside of work[14], such is not enough to demonstrate by a preponderance of the

[14] Mr. Sibold testified that he had invited Mr. Brewer and another worker to a cookout at his house sometime after the interviews were conducted. Mr. Brewer attended, but the

evidence that the selection process was arbitrary and capricious, or clearly wrong. It appears that Respondent followed the proper rules and procedures in conducting the candidates' interviews and selecting the successful candidate.

Grievant argues that his seniority should have been considered, as well as his having performed that position, unofficially, for over a year prior to Mr. Sibold being hired in District Nine. Although management disputed Grievant's assertions about performing the job before Mr. Sibold was hired, several of Grievant's co-workers testified that Grievant was acting supervisor, and was left in charge after Bill Hoover retired.[15] From the evidence presented, the interview committee considered Grievant's experience and his abilities to do the job. However, seniority alone does not dictate which candidate should have been selected.

WEST VIRGINIA CODE § 29-6-10(4) states as follows:

> 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.

Id. Seniority is to be considered as a "tie breaker," not the primary factor. *See, Vance v. Dep't of Highways,* Docket No. 2009-0409-DOT (June 3, 2010). In this case, the interviewers determined that Mr. Brewer's qualifications exceeded those of Grievant.

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other worker did not. However, it was not disputed that Mr. Sibold and Grievant had known each other since high school.

[15] *See*, testimony of Patricia Allen; testimony of Jamie Crislip; testimony of Mark Hoke.

"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." *McKinney, et al., v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0316-CONS (Dec. 27, 2007). The interview committee determined that Mr. Brewer's interpersonal skills were better than Grievant's, and that these skills were particularly desirable for such a supervisory position.

Favoritism is defined by WEST VIRGINIA CODE § 6C-2-2(h) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee." W. VA. CODE § 6C-2-2(h). In order to establish a 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.

See, Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant has not met his burden of proving that he was treated differently than the successful applicant. Both were interviewed by the same people and given the same interview questions. Further, the same qualifications were evaluated for each candidate. While it remains troubling that Mr. Brewer was granted certain training opportunities that other Crew Supervisor Is were not, the undersigned cannot find that, based upon a preponderance of the evidence, such resulted in Mr. Brewer being awarded the position at issue. Grievant could have filed a grievance over the training

opportunities at the time they occurred. Further, the undersigned cannot find that Mr. Brewer was selected for the Transportation Crew Supervisor II position because of favoritism.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89 DHS-72 (Nov. 29, 1990).

2. In a selection case, the grievant must prove, by a preponderance of the evidence, that he was the most qualified applicant for the position in question. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). Further, 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. 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)).

4. "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 a board of education." *See generally, Harrison v. Ginsberg,* [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)*."* *Trimboli, supra*.

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." *McKinney, et al., v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0316-CONS (Dec. 27, 2007).

6. Grievant did not meet his burden of proving that the he was the more qualified candidate for the Transportation Crew Supervisor II position. Further, Grievant did not meet his burden of proving that the selection process was flawed, or that Respondent's selection of Mr. Brewer was arbitrary and capricious.

7. In order to establish a 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.

See, Frymier v. Higher Education Policy Comm., 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 meet his burden of proving that his non-selection was the result of favoritism.

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 (eff. July 7, 2008).

DATE: October 12, 2012.

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Carrie H. LeFevre
Administrative Law Judge