THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CLINTON DRAINER,

Grievant,

v. **Docket No. 2022-0706-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Clinton Drainer, is employed by Respondent, Division of Highways. On April 5, 2022, Grievant filed this grievance against Respondent stating,

> I have again been denied a promotion to a TW3 position based on the employer discriminating against me because of my age. Training for TW3 positions (bull dozer and boom max operator) were posted and I applied. WV DOH selected younger and less experienced individuals for said positions on March 28th and March 31st, 2022.[1]

For relief, Grievant seeks "back pay, and be promoted to the TW3 position, along with other damages and remedies available under the law."

Following the April 19, 2022 level one conference, a level one decision was rendered on May 11, 2022, denying the grievance. Grievant appealed to level two on May 13, 2022. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on July 22, 2022. A level three hearing was held on October 25, 2022, before the undersigned at the Grievance Board's Charleston, West Virginia office via videoconferencing. Grievant appeared personally and was represented by counsel, Ambria M. Britton, Klie Law Offices, PLLC. Respondent appeared by Robert D. Petrel,

[1] Grievant clarified at the level three hearing in this matter that he grieved his non-selection for training and not his non-selection for a position.

Assistant County Superintendent, and was represented by counsel, Regenia Mayne. This matter became mature for decision on November 29, 2022, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Transportation Worker 2 Equipment Operator. Grievant grieves his nonselection for training, alleging discrimination or favoritism and asserting he was not selected due to his age. Respondent denies discrimination or favoritism and asserts the selection decisions were made according to the needs of the agency. Grievant failed to prove discrimination, favoritism, or that the selection decisions were arbitrary and capricious or unreasonable. Accordingly, the 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 by Respondent as a Transportation Worker 2 Equipment Operator ("TW2EQ") in Taylor County.

2. Respondent requires that operators of certain large pieces of equipment, including graders and bulldozers, be certified to operate the equipment. Other pieces of equipment, such as boom max tractors, have a certification process but certification is not required. Certification on equipment is one of the considerations for promotion from TW2 to TW3.

3. To become certified, equipment operators must complete training through the Equipment Operator Training Academy.

4. Equipment operators are selected for training on equipment, for which certification is required, through a sign-up process. A sign-up sheet is posted on which interested employees list their CDL status, seniority, and experience on the equipment.

5. Training space is limited so the sign-up process for training is competitive.

6. The County Administrator in each county selects which employees receive training.

7. On pieces of equipment for which certification is not required, the selection decision for training may be made without a sign-up process.

8. Grievant seeks promotion to a TW3 so has applied for multiple trainings.

9. Grievant previously applied for grader training, was initially selected, and then removed from the training by former County Administrator, John Corio. Mr. Corio stated he removed Grievant from the training because he wanted a younger employee to receive the training. Mr. Corio was disciplined for this discrimination and Grievant was reinstated to the training. Grievant completed the training and was certified on the grader.

10. Former County Administrator Corio is no longer employed by Respondent.

11. In the absence of a County Administrator, Assistant County Administrator, Robert Petrel, has served as the acting County Administrator and has made the selection decisions for the trainings at issue in this grievance.

12. Respondent's crews need a variety of employees trained on equipment rather than one person certified on multiple pieces of equipment that require certification to provide flexibility. Crews need to be able to run more than one certified piece of equipment at a time, which can only occur if different employees are certified on each piece of equipment.

13. In December 2021, Grievant signed up for bulldozer training. Nine other employees also signed up.

14. Fred Wittek was selected for the training. Mr. Wittek is also a TW2EQ who had two years of seniority, twenty-three years of experience, and held no certifications.

15. Grievant had three years of seniority, thirty-five years of experience, and held one certification.

16. Another employee, TW3EQ, Kevin Dalton, had twelve years of seniority, thirty years of experience, and held two certifications.

17. Although they had more experience, Assistant County Administrator Patrel selected neither Grievant nor Mr. Dalton because each already held a certification while Mr. Wittek did not.

18. Assistant County Administrator Patrel was later allotted two training slots for the boom max tractor, a piece of equipment that does not require certification.

19. Assistant County Administrator Patrel did not post the boom max tractor training for sign-up. Instead, Assistant County Administrator Patrel selected two members of the existing mowing crew, Wayne Queen and Keith Pizzano.

20. Mr. Queen and Mr. Pizzano served as pilot drivers for the boom max crew so were already familiar with the boom max route.

21. Grievant is sixty-two years of age. Mr. Wittek is in his late forties. Mr. Queen is in his mid-forties. Mr. Pizzano is in his mid-thirties.

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 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

As a preliminary matter, on October 20, 2022, three business days prior to the hearing in this matter, Grievant, by counsel, filed *Grievant's Motion to Compel Discovery* and *Grievant's Motion to Continue*. Grievant alleged Respondent had failed to produce requested discovery and that continuance of the hearing was warranted to allow the motion to compel to be addressed. The undersigned denied the motion to continue and the parties were notified of the denial by email on October 21, 2022. At the beginning of the level three hearing, the undersigned addressed the motion to compel.

West Virginia Code provides that "[t]he parties are entitled to copies of all material submitted to the chief administrator or the administrative law judge by any party." W. VA. CODE § 6C-2-3(k). The Grievance Board's procedural rule provides the process for obtaining discovery. "The Board strongly encourages parties to participate in informal discovery prior to hearing. All parties must produce, prior to any hearing on the merits, any documents requested in writing by the grievant that are relevant and are not privileged. Further, if a party intends to assert the application of any statute, policy, rule, regulation, or written agreement or submits any written response to the filed grievance at any level, a copy is to be forwarded to the grievant and any representative of the grievant named in the grievance." W.VA. CODE ST. R. § 156-1-6.12 (2018). "The administrative judge shall have authority to order such additional discovery, by way of deposition,

interrogatory, document production, or otherwise, as considered necessary for a fair determination of the issues in dispute, consistent with the expedited nature of the grievance procedure. When a party serves another party with a discovery request, that request need not be filed with the Board." W.VA. CODE ST. R. § 156-1-6.12.1 (2018). "Parties shall attempt to resolve any discovery dispute among themselves before making a motion requesting an order compelling discovery. Any such motion must state that the parties have attempted to resolve the dispute, as well as the reason why the discovery is needed." W.VA. CODE ST. R. § 156-1-6.12.2 (2018).

Grievant served *Grievant, Clinton Drainer's Request for Production of Documents and Request for Interrogatories to Respondent Division of Highways* upon Respondent on or about October 10, 2022. Grievant failed to request an order for formal discovery prior to filing this request for formal discovery. Despite the lateness of the request for discovery and the improper request for formal discovery, Respondent responded to Grievant's request on October 19, 2020, providing Grievant's personnel file, which would have been discoverable during informal discovery, and objecting to the other requests. On October 20, 2022, Grievant filed *Grievant's Motion to Compel Discovery* by email.

Grievant was not entitled to formal discovery because he failed to request the same pursuant to the Grievance Board's procedural rule. Further, Grievant failed to request discovery in a timely manner. The grievance was initially filed in April 2022, and had already proceeded through a level one hearing and a level two mediation. The level three hearing had been noticed since August 2022. Grievant did not attempt to seek discovery until two months later, a mere two weeks before the scheduled hearing, leaving little time for compliance and no time for the undersigned to address the resultant motion

to compel. It would frustrate the simple and expeditious nature of the grievance process to allow Grievant to seek discovery at such a late date and delay the level three hearing in this matter. Therefore, the motion to compel and the motion to continue were denied. Grievant's objections to the same were noted and preserved for the record.

Regarding the merits of the case, Grievant argues Respondent discriminated against him when it failed to select him to receive training on two pieces of equipment. Grievant asserts Respondent has previously discriminated against him due to his age and has done so again with the latest decisions not to select him for training. Grievant asserts he should have been selected for training due to his experience. Respondent admits it discriminated against Grievant in the past, which situation was remedied, but that it did not discriminate against him in its selection decisions for the trainings at issue. Respondent asserts the selection decisions were made based on the needs of the agency.

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. *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).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v.*

Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "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. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Grievant does not assert that the selection decisions violated Respondent's policy or procedures. If such policy or procedures exist, neither party presented them as

evidence. Grievant asserts only that Respondent discriminated against him because of his age or favored the selected employees because of their age.

"The West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, W. Va. Code, 5-11-1, et seq.; nevertheless, the Grievance Board's authority to provide relief to employees for 'discrimination,' 'favoritism,' and 'harassment,' as those terms are defined in W. Va. Code, 18-29-2 (1992) [now W. Va. Code, 6C-2-2], includes jurisdiction to remedy discrimination that also would violate the Human Rights Act." Syl. Pt. 1, *Vest v. Bd. of Educ.,* 193 W. Va. 222, 223, 455 S.E.2d 781, 782 (1995). The Human Rights Act prohibits employment action motivated by prohibited factors such as age, race, and sex. The Grievance Board's definition of discrimination is different. "'Discrimination' means 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' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). Thus, a grievant is not required to prove an unlawful motivation to prove discrimination or favoritism in a grievance proceeding, although a grievant who proves that the difference in treatment had unlawful motivation would also prove that the difference in treatment was not related to the a grievant's job responsibilities.

Grievant asserts the decision to select for training was based on age and not job responsibilities; that the men selected for training were selected because they were

younger and that Grievant was not because he was older. As evidence, Grievant presented the ages of the selected employees and himself and the previous instance where the former County Administrator removed him from training because of his age. Grievant asserts that he was similarly situated to the selected employees because they were also TW2EQ. Grievant also points to his many years of experience running equipment when he was employed in the mines as support that he should have been selected for the trainings.

Respondent offered the testimony of Assistant County Administrator Patrel that the selection decisions were made based on the needs of the agency. Assistant County Administrator Patrel testified that crews need a variety of employees trained on equipment rather than one person certified on multiple pieces of equipment that require certification. Assistant County Administrator Patrel explained that crews need to be able to run more than one certified piece of equipment at a time, which can only occur if different employees are certified on each piece of equipment. Regarding the boom max tractor, Assistant County Administrator Patrel testified that he chose the two employees who served as pilot drivers for the boom max because they were already familiar with the route. Assistant County Administrator Patrel's testimony was credible. His demeanor was calm and his testimony was forthright. The reasons given for his decisions are logical and plausible. He did not appear to hold any bias against Grievant or for the selected employees.

Grievant appears to argue that Assistant County Administrator Patrel's explanation is rebutted by the fact that Mr. Dalton holds two certifications. On the contrary, the non-selection of Mr. Dalton for the bulldozer training supports Assistant County Administrator

Patrel's testimony. Mr. Dalton had greater seniority than Grievant and comparable experience and was also not selected for the training because he already had certifications. That Mr. Dalton holds two certifications does not rebut Assistant County Administrator Patrel's assertion that it is preferable to train multiple employees because Mr. Dalton had been employed by Respondent for twelve years and it took many years to receive the two certifications.

Based on the evidence, the difference in treatment was based on job duties because the agency needs to have different people trained on different pieces of equipment. It does not appear that the selected employees received preferential, exceptional or advantageous treatment as Grievant had already received training and been certified on a piece of equipment while they had not. Further, it does not appear that Grievant was similarly situated to the selected employees. Grievant had already received training and been certified on the grader. The selected employees had not yet had the opportunity for training and certification on a piece of equipment. Therefore, Grievant failed to prove discrimination or favoritism or that the selection decisions were arbitrary and capricious or unreasonable.

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 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993),

aff'd, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "The parties are entitled to copies of all material submitted to the chief administrator or the administrative law judge by any party." W. VA. CODE § 6C-2-3(k).

3. "The Board strongly encourages parties to participate in informal discovery prior to hearing. All parties must produce, prior to any hearing on the merits, any documents requested in writing by the grievant that are relevant and are not privileged. Further, if a party intends to assert the application of any statute, policy, rule, regulation, or written agreement or submits any written response to the filed grievance at any level, a copy is to be forwarded to the grievant and any representative of the grievant named in the grievance." W.VA. CODE ST. R. § 156-1-6.12 (2018).

4. "The administrative judge shall have authority to order such additional discovery, by way of deposition, interrogatory, document production, or otherwise, as considered necessary for a fair determination of the issues in dispute, consistent with the expedited nature of the grievance procedure. When a party serves another party with a discovery request, that request need not be filed with the Board." W.VA. CODE ST. R. § 156-1-6.12.1 (2018).

5. "Parties shall attempt to resolve any discovery dispute among themselves before making a motion requesting an order compelling discovery. Any such motion must state that the parties have attempted to resolve the dispute, as well as the reason why the discovery is needed." W.VA. CODE ST. R. § 156-1-6.12.2 (2018).

6. 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. *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).

7. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

8. "'[T]he "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. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

9. "The West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, W. Va. Code, 5-11-1, et seq.; nevertheless, the Grievance Board's authority to provide relief to employees for 'discrimination,' 'favoritism,' and 'harassment,' as those terms are defined in W. Va. Code, 18-29-2 (1992) [now W. Va. Code, 6C-2-2], includes jurisdiction to remedy discrimination that also would violate the Human Rights Act." Syl. Pt. 1, *Vest v. Bd. of Educ.,* 193 W. Va. 222, 223, 455 S.E.2d 781, 782 (1995).

10. "'Discrimination' means 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).

11. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

12. Grievant failed to prove discrimination, favoritism, or that the selection decisions were arbitrary and capricious or unreasonable.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals.[2] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: January 17, 2023

Billie Thacker Catlett
Chief Administrative Law Judge

[2] On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.