

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RAY OWENS,
Grievant,

v.

Docket No. 2022-0635-DOT

DIVISION OF HIGHWAYS,
Respondent and

MATTHEW CHIPPS,
Intervenor.

DECISION

Grievant, Ray Owens, filed this action against his employer, Division of Highways, on or about February 21, 2022, contesting his non-selection for a position as a Transportation Worker 3 Equipment Operator. Grievant seeks the position and seniority. Matthew Chipps was granted intervenor status by order entered March 4, 2022. This grievance was denied following a level one conference on March 17, 2022, by decision dated April 7, 2022. A level two mediation was conducted on July 18, 2022. A level three evidentiary hearing was held before the undersigned on January 13, 2023, by Zoom video originating from the Grievance Board's Westover office. Grievant appeared *pro se*. Respondent appeared by its counsel, Regina L. Mayne, Legal Division. This matter became mature for consideration upon receipt of Respondent's proposals on March 9, 2023.

Synopsis

Grievant is classified as a Transportation Worker 3 Mechanic. Grievant applied for the position of Transportation Worker 3 Equipment Operator posted on February 4, 2022. Following the selection process, Grievant was not offered the position. Grievant

did not prove that the reasons for selecting the successful applicants were not reasonably related to the position being filled. Grievant failed to demonstrate by a preponderance of the evidence that the Division of Highways violated its rules and regulations or was legally insufficient on posting and filling the Transportation Worker 3 Equipment Operator position. The decision to not offer Grievant the position was not arbitrary or capricious.

The following Findings of Fact are based on the record of this case.

Findings of Fact

1. Grievant is a Transportation Worker 3 Mechanic in District 6 of the West Division of Highways. Grievant applied for a position as a Transportation Worker 3 Equipment Operator and was interviewed for that position on February 16, 2022. Grievant did not get that position and filed this grievance on February 21, 2022.

2. Mandy Crow, Human Resources Director for District 6, identified the job posting for the Transportation Worker 3 Operator for Brooke County, the Internal Application and Interview Log for Grievant, and the Referred List Report with the names of the preferred candidates.

3. The record reflects that Grievant was interviewed by two people for District 6. Ron Castellucci, Maintenance Assistant for District 6, noted that Grievant possessed experience with equipment in keeping it running well; however, he lacked experience working with a crew on a highway. Mr. Castellucci noted that this was vital experience for any Transportation Worker Equipment Operator which Grievant lacked.

4. Mr. Castellucci also noted Grievant's dislike of long hours. This dislike was acknowledged by Grievant in his application.

5. Burl Williams, County Administrator for District 6, also noted Grievant's admitted dislike of long hours. Mr. Williams pointed out that while Grievant is usually on call during the time the crews are out working overtime, Grievant spends his time in the garage, not at the worksite.

6. Mr. Williams explained that the topic of long hours was important because during Snow Removal and Ice Control (SRIC) season, long hours are the standard expectation. In addition, during times of severe storms with falling trees or power lines in the roads, working extra hours to clear the roads is to be expected.

7. The record also reflects the suggestion from Mr. Castellucci and Mr. Williams that Grievant move from a Transportation Worker 3 Mechanic to a Transportation Worker 3 Equipment Operator. The advice was to apply for a Transportation Worker 2 Equipment Operator position and become familiar with the Equipment Operator job at that level, which would put Grievant in a position to be promoted to a Transportation Worker 3.

8. Mr. Chipps, one of the successful applicants, was on track to get a certificate for operating a Track Hoe after completing the introductory training. Mr. Chipps was well versed in filling out the necessary paperwork each job requires, such as who operated what equipment for what amount of time each day. Mr. Chipps impressed the interview team with his emphasis on safety, as well as his willingness to take on more work. Mr. Chipps was familiar with how crews are put together and how they are expected to work together.

9. Mr. Teeters, the other successful applicant, was certified on the Backhoe since 2019, and had experience on roadway work. Mr. Teeters was also familiar with the long hours sometimes expected on the road crews.

10. Grievant has worked for the Division of Highways for ten years. Grievant has sometimes operated equipment, but his past jobs were primarily as a mechanic.

Discussion

This grievance does not involve a disciplinary matter. Consequently, 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 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

Grievant argues that he was involved in running equipment for most of his working life, and since this was considered when he was hired, it should be considered for the Transportation Worker 3 Equipment Operator position at issue. Respondent concedes that while Grievant has operated equipment, his past jobs were primarily as a mechanic. In a selection case, 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 Rehab. 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. *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); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

The limited record of this case supports a finding that the candidates were rated on the basis of their qualifications and the quality of the interviews. It is not arbitrary or capricious for the Division of Highways to conclude that while Grievant has a great deal of experience with keeping equipment running, he lacks actual experience working with a crew on the highway. In addition, Grievant lacks experience or training in the supervision of employees. As Respondent aptly points out, all these qualifications would be expected for a Transportation Worker 3 Equipment Operator. The successful

applicants had many years of experience building and maintaining roads, supervising employees, and running equipment.

Respondent was also concerned with Grievant's interview. Grievant acknowledged in his application and during his interview a dislike of long hours. This concern is understandable. During Snow Removal and Ice Control, and in the event of severe storms, extra hours are required to clear the roads. Grievant presented no evidence that the selection process was based on any unfair criterion. When a supervisory position, such as a Transportation Worker 3 Equipment Operator, is being filled, it is appropriate for the employer to consider factors such as personality traits and abilities which are necessary to successfully motivate and supervise employees. *Pullen v. Dep't of Transp.*, Docket No. 06-DOH-121 (Aug. 2, 2006).

The record supports the finding that the positions were properly filled. The interview team reviewed the same material for each candidate, asked each candidate the same list of questions, had each candidate follow the same instructions to fill out the skills assessments, and ranked each candidate on the same qualifications. The successful applicants were qualified, and did well on their interviews, impressing the interview team with their confidence and ability to do the job. The interview team found that the successful applicants' responses were more specifically related to their experience and demonstrated more leadership potential. The agency relied on criteria intended to be considered for filling the positions, so its decisions were not arbitrary and capricious.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. This grievance does not involve a disciplinary matter. Consequently, Grievants bear the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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. In a selection case, 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 Rehab. 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. *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).

4. 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); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

5. Grievant did not prove by a preponderance of the evidence that any flaws in the selection process influenced the outcome of the process.

7. Grievant did not prove by a preponderance of the evidence that the selection decision concerning the position in question was arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Intermediate Court of Appeals.¹ Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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

¹On 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 W. VA. 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.

appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: April 17, 2023

Ronald L. Reece
Administrative Law Judge