

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**WILLIAM SWINDLER and VICKIE JO HANSHAW-STOWERS,
Grievants,**

v.

Docket No. 2022-0496-CONS

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Grievants, William Swindler and Vickie Jo Hanshaw-Stowers, are employed by Respondent, Division of Highways. On December 13, 2021, Grievants filed individual grievances, assigned docket numbers 2022-0456-DOH and 2022-0496-DOH, against Respondent stating, protesting their non-selection for one of two Transportation Worker 3 Crew Chief positions. For relief, Grievants seek “[t]o be made whole in every way including reconsideration for position applied for utilizing hiring policy.”

Following the December 27, 2021 level one conference, a level one decision was rendered on March 16, 2022, denying the grievance. Grievant appealed to level two on March 28, 2022. Mediation was delayed due to a continuance requested by Grievants. Following mediation, Grievant appealed to level three of the grievance process on July 11, 2022. A level three hearing was held on April 17, 2023, before the undersigned at the Grievance Board’s Charleston, West Virginia office. The level three hearing was delayed due to separate requests for continuance by Respondent and Grievants. Grievants appeared in person and were represented by Gordon Simmons and Scot Shapero, UE Local 170. Respondent appeared by Taylor Freeland, Human Resources Manager, and was represented by counsel, Jack E. Clark. This matter became mature

for decision on June 16, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants are employed by Respondent as Transportation Worker 3 Equipment Operators. Grievants grieve their non-selection for Transportation Worker 3 Crew Chief. Grievants assert Respondent failed to consider seniority, that the selection decision was a result of favoritism, and was otherwise arbitrary and capricious. Grievants failed to prove Respondent was required to consider seniority, that the decision was a result of favoritism, or that the decision was otherwise arbitrary and capricious. 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. Grievants are employed by Respondent as Transportation Worker 3 Equipment Operators. Grievant Swindler has been employed since 2008 and Grievant Hanshaw-Stowers has been employed since 2009.

2. On October 18, 2021, Respondent internally posted job openings for two Transportation Worker 3 Crew Chief positions.

3. Crew Chiefs lead a crew of workers by scheduling projects, assigning work, coordinating equipment and materials, and completing reports. Crew Chiefs also investigate citizen complaints. Crew Chiefs are working supervisors, and are required to also be able to operate equipment, but their primary duty is to lead.

4. Fourteen employees applied for the open positions, including Grievants and the ultimately successful candidates, Brian Shaffer and Paul Walker.

5. An interview panel was created to make the selection decision consisting of John Martin, County Administrator, and Brodus “Bobby” Brown, Maintenance Assistant. Sherri Parsons, District One Human Resources Manager, was present but did not rate the applicants or participate in the interview; she, instead, served as a record keeper.

6. The interview panel interviewed all fourteen applicants. The panel asked each interviewee the same questions from the *West Virginia Department of Transportation Interview Questions* form and Ms. Parsons made notes of the interviewee’s answers to the questions. In addition to questions regarding strengths and weaknesses, management philosophy, conflict resolution, and communication, the interviews included practical questions such as identification of the purpose of various forms that would be used as Crew Chief and a word problem to calculate the tonnage of asphalt required for a project.

7. Mr. Martin and Mr. Brown together completed a *Department of Transportation Applicant Interview Checklist* and an *Application Evaluation Record* for each applicant. Each individually completed a *DOHC Interview Candidate Rating Sheet* for each applicant.

8. The *DOHC Interview Candidate Rating Sheet* (“sheet”) rates candidates on five categories: Education, Relevant Experience, Leadership Qualities, Communication, and Professionalism. Each category is to be rated from 1 to 5, with 1 being “Very Poor” and 5 being “Excellent.” The sheet also provides a section to explain the numerical ratings and a section for interview notes.

9. The *Applicant Evaluation Record* (“record”) also rates Education and Relevant Experience in addition to Possess Knowledge, Skills & Abilities, Interpersonal Skills, Flexibility/Adaptability, Presentability, and Overall Evaluation. These categories are rated as “Does Not Meet,” “Meets,” or “Exceeds.”

10. The interview panel considered the application and the interview in its decision. Mr. Martin also relied on his observations of the job performance of the applicants and discussions with the previous Highway Administrator. Mr. Brown also discussed with employees the performance of the candidates when they had substituted as Crew Chief.

11. Mr. Martin previously worked with Mr. Walker for one year approximately twenty-five years ago. Mr. Martin also considered Mr. Walkers's job performance from that time.

12. Mr. Martin did not and does not have a personal relationship with Mr. Walker.

13. Mr. Shaffer had been employed by Respondent since May 2017 as a Transportation Worker 2. Mr. Shaffer had previous supervisory experience as a service manager with Almost Heaven Auto Repair and with Charleston Lincoln Mercury for a combined total of eleven years.

14. On the record, the panel rated Mr. Shaffer as “Exceeds” in Possesses Knowledge, Skills & Abilities, Interpersonal Skills, Presentability, and Overall Evaluation. They noted he had an excellent interview with some knowledge of forms, knowledge of personnel policies and procedures, and that he had filled in as Crew Chief. On the sheet, Mr. Brown awarded Mr. Shaffer 19 points and rated him “Good” in Relevant Experience,

Leadership Qualities, Communication, and Professionalism. Mr. Brown noted Mr. Shaffer gave an excellent interview, had knowledge of forms, and some computer experience.

15. Mr. Walker had been employed by Respondent since March 2019 as a Transportation Worker 2. Mr. Walker had relevant prior experience as the owner of his own construction business for eight years, in which he employed twelve employees. He had further relevant experience as a foreman with Nitro Windows and Siding, for approximately eight years, supervising fourteen employees.

16. On the record, Mr. Martin and Mr. Brown ranked Mr. Walker as “Exceeds” in Possesses Knowledge Skills & Abilities, Interpersonal Skills, Presentability, and Overall Evaluation. They noted Mr. Walker had a very good interview, that he had knowledge of forms, policies, and procedures, that he had filled in as a Crew Chief, and that had knowledge of calculating material. On the sheet, Mr. Brown awarded Mr. Walker 17 points, rating him “Good” in both Leadership Qualities and Communication. Mr. Martin awarded Mr. Walker 18 points, rating him “Good” in leadership Qualities, Communication, and Professionalism. Mr. Martin noted particularly Mr. Walker's ownership of his own business and his years of leadership experience.

17. Grievant Hanshaw-Stowers has been employed as a Transportation Worker 3 Equipment Operator since August 2009. Although she was not in a supervisory role, she claimed on her application that she supervised eight employees ,explaining that she supervised up to eight employees periodically since 2015 when the foreman was off. Grievant Hanshaw-Stowers had no other supervisory experience listed on her application.

18. On the record, Mr. Martin and Mr. Brown rated Grievant Hanshaw-Stowers as “Meets” on all categories and made no comments. Mr. Brown awarded Grievant

Hanshaw-Stowers 13 points on the sheet, noting she had limited computer experience and had filled in as Crew Chief. Mr. Brown stated Grievant Hanshaw-Stowers had “decent answers but I didn't feel qualified for position.” Mr. Martin also awarded Grievant Hanshaw-Stowers 13 points on the sheet. Mr. Martin noted she gave a good interview and had filled in as crew chief, but that she lacked computer experience, had little knowledge of forms, and no knowledge of calculating material.

19. Grievant Hanshaw-Stowers was very nervous during the interview.

20. Grievant Swindler had been employed as a Transportation Worker 3 Equipment Operator since October 2008. He also claimed that he supervised seven employees and did not clarify that supervision was when he filled in as Crew Chief. Mr. Swindler had prior supervisory experience as a foreman with Trees Inc. for six years, supervising four employees, and as a supervisor with Asplundh for eight years, supervising thirty-five employees.

21. Mr. Brown and Mr. Martin rated Grievant Swindler as “Meets” for all categories on the record and made no comments. On the sheet, Mr. Brown awarded Grievant Swindler 14 points with “Poor” in Leadership Qualities. Mr. Brown noted Grievant Swindler had worked as Crew Chief, but that he had limited computer skills and admitted he would have to “change attitude if selected.” Mr. Martin awarded Grievant Swindler 13 points rating him as “Poor” in Leadership Qualities and Professionalism. Mr. Martin noted that Grievant Swindler had filled in as Crew Chief, that he had some knowledge of forms, but that he was lacking computer experience. Although not noted on the rating sheet, Grievant Swindler also failed to correctly answer the asphalt calculation question.

22. Grievant Swindler had been previously counseled for calling a worker “stupid.”

23. At the time of the interviews, Mr. Martin had served as the Highway County Administrator for approximately one month. At that time, two of the three Crew Chief positions were vacant and employees were substituting in those positions on a rotating basis.

24. Grievants and the successful candidates all had experience substituting as Crew Chief and Mr. Martin had observed all of them while they served as substitute Crew Chief.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.*

Grievant asserts the selection decision was arbitrary and capricious, a result of favoritism, that Respondent failed to consider seniority, and that Respondent improperly considered undocumented negative factors against Grievant Swindler. Respondent asserts it had discretion without regard to seniority, that the selection decision was within the policy provisions of the agency, and the decision was not arbitrary and capricious.

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).

“[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 argues the selection decision was flawed because Respondent failed to consider Grievants’ seniority. In support of this argument, Grievants cite West Virginia Code § 29-6-10, which refers to the requirements for the administrative rule of the Division of Personnel. In 2017, the Division of Highways was removed from the oversight of the Division of Personnel and Respondent was no longer required to comply with the provisions of West Virginia Code § 29-6-1, *et seq.*¹ W. VA. CODE § 17-2A-24(d). As Respondent was not subject to the statute cited, Grievants failed to prove Respondent was required to consider seniority in the hiring decision.

Grievants assert they had more relevant experience because they had worked as Transportation Workers approximately ten years longer than the successful candidates. Although a Crew Chief must be able to do the work of a regular Transportation Worker as

¹ W. VA. CODE § 17-2A-24 was repealed effective January 1, 2022, but was the governing statute at the time of the selection decision and grievance filing.

they are working supervisors, the most relevant experience is that relating to the supervisory duties of the position. As a result, Grievants and the successful candidates were all rated as 3 of 5 and “meets” for relevant experience except Mr. Shaffer, who Mr. Brown rated as 4 of 5. Grievants were given consideration for their years of experience as Transportation Workers and the successful candidates were given consideration for their experience gained outside of the agency. All had experience substituting as Crew Chief, although Grievants had more experience substituting. It could be argued that Grievant Swindler should have received an additional point for relevant experience, as he also had prior supervisory experience. However, relevant experience was not the determinative factor in this selection decision.

In this case, the selection decision hinged not on experience but on considerations relating to leadership and communication. When a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep’t of Transp.*, Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen v. Dep’t of Transp./Div. of Highways*, Docket No. 05-DOH-230 (Sept. 23, 2005); *Ball v. Dep’t of Transp.*, Docket No. 04-DOH423 (May 9, 2005); *Freeland v. Dep’t of Health and Human Res.*, Docket No. 2008-0225- DHHR (Dec. 23, 2008).

Grievants scored lower than the successful candidates in Leadership and Communication. Overall, Grievants were rated as “poor” in these categories while the successful candidates were rated “very good.” The panel explained their ratings in their level three testimony. Grievant Swindler had previously been counseled for calling

another employee “stupid.”² This prior misconduct properly impacted both his Leadership And Professionalism scores. Grievant Hanshaw-Stowers admits she was “a wreck” during the interview. It appears this did impact her score. Relating to Leadership scores for both, the interview panel also considered knowledge of forms, computer experience, and the practical question regarding asphalt calculation. These are proper considerations based on the job posting and duties of the position. Grievants had limited knowledge of forms and limited computer experience. Neither were able to correctly answer the calculation question. The successful applicants correctly answered the question and had better knowledge of form and more computer experience.

Grievants assert both Mr. Martin and Mr. Brown’s higher ratings for the successful applicants were due to favoritism and bias. “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).

Mr. Martin and Mr. Walker did not and do not have a personal relationship, so Mr. Martin was not motivated by bias. Mr. Martin admits that he considered his knowledge of Mr. Walker’s job performance from when they worked together for one year approximately 25 years ago. Although it was not proper for Mr. Martin to consider this information, Mr. Martin’s scores for Mr. Walker were only partially based on that information and his score was only one point higher than Mr. Brown’s score. Mr. Brown rated Mr. Walker based on

² Grievant Swindler argues that relying on this “undocumented” negative factor was a fatal flaw in the process. This negative factor was not “undocumented.” Grievant admits he had been counseled for this behavior.

his demonstrated experience as a business owner, his performance in the interview, and the information he gained from talking to employees about the candidates. Specifically, Mr. Brown testified that employees had stated that Mr. Walker was “really good to work for” and that he took time to teach. Ultimately, although it was improper for Mr. Martin to consider his prior observation of Mr. Walker, this error did not result in preferential, exceptional or advantageous treatment of Mr. Walker in the hiring decision because Mr. Martin’s score of Mr. Walker was only one point higher, the selection of Mr. Walker was supported by other evidence, and did not ultimately change the outcome. There is no evidence of bias or favoritism from Mr. Brown.

The interview panel interviewed all candidates using the same questions and rated them using the required scoring documents. The panel kept appropriate records of the scoring documents, applications, and the candidates’ answers to the questions. The panel had discretion to consider leadership ability and communication more important than Transportation Worker experience, and to consider knowledge of forms, computer ability, and demonstrated ability to calculate materials. The panel explained why Grievants were rated lower than the successful candidates. The ultimate selection decision was reasonable based on these criteria and was not the result of favoritism.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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. 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).

3. 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).

4. “[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).

5. When a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep’t of Transp.*, Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen v. Dep’t of Transp./Div. of Highways*, Docket No. 05-DOH-230 (Sept. 23, 2005); *Ball v. Dep’t of Transp.*, Docket No. 04-DOH423 (May 9, 2005); *Freeland v. Dep’t of Health and Human Res.*, Docket No. 2008-0225- DHHR (Dec. 23, 2008).

6. “‘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).

7. Grievant failed to prove Respondent was required to consider seniority.
8. Grievant failed to prove the selection decision was a result of favoritism.
9. Grievant failed to prove the selection decision was arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.³ 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: August 1, 2023

Billie Thacker Catlett
Chief Administrative Law Judge

³ 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.