

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMIE WATKINS,

Grievant,

v.

Docket No. 2023-0214-DOT

DIVISION OF HIGHWAYS,

Respondent,

DECISION

Grievant, Jamie Watkins, is employed by Respondent, Division of Highways, as a Transportation Worker 3 Equipment Operator. On September 12, 2022, Grievant grieved his non-selection for a Transportation Worker 4 Crew Chief position, claiming he was the most qualified. Grievant also claims that the selected candidate, Justin Miller, misrepresented his years of experience, rendering the selection process arbitrary and capricious. As relief, Grievant seeks a Crew Chief position with back pay and interest.

Coworker James Williamson also grieved his non-selection for Crew Chief, resulting in the consolidation of grievances under docket number 2023-0216-CONS. Justin Miller, the selected candidate, was granted intervenor status on October 3, 2022. A level one hearing was held on October 19, 2022. An order denying the grievance was issued on November 10, 2022. The matter was appealed to level two on November 21, 2022. Mediation occurred on February 16, 2023. After an attorney took on representation of James Williamson, the grievances were bifurcated. On February 22, 2023, Grievant appealed to level three of the grievance process. On October 11, 2023, Justin Miller was, at his request, dismissed as intervenor.

On January 10, 2024, a level three hearing was held at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and was represented by attorney Anthony Brunicardi and the West Virginia School Service Personnel Association. Respondent appeared by Kathleen Dempsey and was represented by counsel, Brian Maconaughey. The case matured for decision on February 9, 2024, after each party submitted Proposed Findings of Fact and Conclusions of Law. The grievance was thereafter reassigned to the undersigned administrative law judge.

Synopsis

Grievant grieves his non-selection for Crew Chief by Respondent, Division of Highways, and requests instatement over the selected candidate, Justin Miller, who misrepresented his experience. Career Services reviews written applications and only permits eligible candidates to be considered for selection by an interview panel. Career Services deemed Mr. Miller eligible because he had the requisite 5 years of paid construction experience. The interview panel interviewed eligible candidates, including Grievant and Mr. Miller. The panel scored Mr. Miller highest and Grievant fifth. At the level three hearing, Mr. Miller admitted to having misrepresented to Career Services his experience as "7 years to 9 years" and that he only had 6 years of requisite experience. Grievant failed to prove that Mr. Miller lacked the requisite qualifications to be interviewed or that his misrepresentation played a role in his selection. Grievant did not prove that the selection process was 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. Grievant, Jamie Watkins, is employed as a Transportation Worker 3 Equipment Operator Respondent with Respondent, Division of Highways (DOH), in District 2, Cabell County, West Virginia.

2. Grievant was employed by Respondent for 12 years when he applied for the District 2 supervisory position of Transportation Worker 4 Crew Chief at issue in this grievance.

3. In the 2 years prior to the position posting, Grievant frequently served as acting crew chief and never had any negative reviews for his supervisory work.

4. Respondent posted this Crew Chief position in June 2022. The posting required 5 years of “paid experience in roadway construction or roadway maintenance, or in bridge or structural steel construction comparable to the work performed by the Department of Transportation.”

5. The selected candidate, Justin Miller, was first employed by Respondent starting in October 2021. As such, he was employed by Respondent for less than a year when he applied for the Crew Chief position. Mr. Miller was first employed in construction work in the private sector in May 2016. It is unclear whether this was the roadway, bridge, or structural steel work mandated in the posting.

6. A candidate is granted an interview only when the candidate meets the minimum position requirements as determined by Respondent’s Career Services through reviewing the candidate’s written application.

7. By July 2022, each applicant for Crew Chief had completed the written application, which contained fifteen agency-wide questions and seven job specific

supplemental questions. After answering the questions, each applicant signed off on the accuracy of answers “under penalty of law” and attested “that any false information may be grounds for rejection and or dismissal.” The application also stated that Respondent “reserves the right to amend any answers marked by the applicant that are not supported by the employment history listed on the application.”

8. This written application provided the following “experience” categories: “reading and interpreting detailed plans for use in the field,” “highway construction or maintenance,” “bridge or structural steel construction,” “supervising highway or construction crews,” and “fabrication, installation, or maintenance of highway signs.”

9. The applicant could select for each one of the following responses: “0 to 5 years,” “5 years to 7 years,” “7 years to 9 years,” “9 years to 12 years,” or “12 years or more.”

10. Mr. Miller selected “7 years to 9 years” for each of the above “experience” categories.

11. However, during the level three hearing, Mr. Miller admitted that he only had 6 years of paid construction experience, having first been hired in May 2016 in the private sector, and that he should have selected “5 years to 7 years” of paid experience for each.

12. After the applicants completed their applications, Career Services reviewed them to determine whether the applicants had, on paper, met the minimum requirements to be eligible for the interview stage. Mr. Miller’s stated experience of “7 years to 9 years” was inconsistent with his stated beginning date in the industry of May 2016. Neither Career Services nor the interview panel noticed this inconsistency or independently verified the accuracy of Mr. Miller’s written answers. The interview panel deemed it the

job of Career Services to verify that the information provided on the application was accurate.

13. Career Services credited Mr. Miller with “7 years to 9 years” of requisite experience.

14. Regardless of this oversight, Grievant does not contend that Mr. Miller lacked the requisite 5 years of construction experience or that this experience should not count towards the requisite 5 year minimum of “paid experience in roadway construction or roadway maintenance, or in bridge or structural steel construction comparable to the work performed by the Department of Transportation.”

15. Career Services determined that eight applicants, including Grievant and Mr. Miller, were eligible to fill the Crew Chief position.

16. Of the eight deemed eligible, six were interviewed by Respondent’s interview panel on August 15, 2022, after one withdrew and one was a no show. The interview panel rated each interviewee on a scale of 1 to 5 in five categories, including “education,” “relevant experience,” “leadership qualities,” “communication,” and “professionalism.”

17. The “relevant experience” category used by the interview panel differed from the “experience” category on the written application considered by Career Services.

18. The interview panel was made up of four members, including Kathleen Dempsey, the District 2 HR Manager. During every interview, each panel member filled in a three-page form containing 26 questions. Four questions were about experience, only one of which concerned length of experience. This length of experience related only to experience on seven pieces of equipment and not to paid construction experience. The

four interviewers were consistent in separately documenting the years of experience given by Mr. Miller for each piece of equipment, including that he had a CDL and 5 years on “Tandem or Dump trucks” (with one interviewer noting Mr. Miller started when he was 16 years old), 7 years for “Wheeled loader,” only “some” use for “Grader,” 8 years and certified for “Excavator,” 8 years on “Backhoe” starting with grandpa when a kid, 8 years on “Roller,” and 2 years on “Paver.” No issue was ever raised about the accuracy of this equipment experience.

19. The interview panel posed the same questions and used the same evaluation format for each candidate. The panel was impressed by the communication skills exhibited by Mr. Miller during the interview process. During the selection process, the interview panel was not aware that Mr. Miller had misrepresented his relevant experience in his written application to Career Services. It is unclear whether the interview panel would have deemed another candidate more qualified than Mr. Miller had it known he only had 6 years of requisite experience.

20. Each member of the interview panel came up with a total score for each candidate after tallying the candidate’s score in each category. The total scores from all panel members for a given candidate were then averaged for the candidate’s final score.

21. Mr. Miller had the highest final score of 18.75. Grievant’s final score was 14.0, which placed him fifth out of the six interviewees. The panel unanimously selected Mr. Miller.

22. On August 24, 2022, HR Manager Dempsey sent Natasha White, Respondent’s HR Director, a memorandum of justification for selecting Mr. Miller, noting

that even though Mr. Miller had been with Respondent for a short time, his outside experience was extensive and impressive.

23. Respondent first became aware of the inaccuracy in years of experience from Mr. Miller's written application at the level three hearing.

24. There was no evidence presented that Mr. Miller intentionally misled rather than miscalculated in choosing this response.

25. Neither party moved to keep the record open or attempted to thereafter submit evidence regarding any belated action by Respondent regarding Mr. Miller.

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.*

Grievant contends that he should have been selected as the most qualified candidate for a Crew Chief position because he frequently filled that role over the prior 2 years without issue. Grievant claims that the selection process was arbitrary and capricious because the selected candidate, Mr. Miller, misrepresented his experience.

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).

"Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that he should have been selected for the position, the position should be reposted and a new selection process undertaken. " *Forsythe v. Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009) (citing *Neely v. Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009).

The parties agree that Mr. Miller only had 6 years of requisite experience when he chose "7 years to 9 years" in response to each of the experience related questions on the written application used by Career Services to determine eligibility of candidates for consideration by the interview panel. The parties also appear to agree that Career Services did not detect the inconsistency in Mr. Miller's application between his selection of "7 years to 9 years" of experience and his given start date in the industry of May 2016.

Grievant contends that the interview panel was unaware of Mr. Miller's misrepresentation until the level three hearing and that its selection decision may have been different if it had been aware. Grievant points to the written application to highlight the seriousness of any misrepresentation. Mr. Miller signed off on the accuracy of his answers "under penalty of law" and acknowledged the warning "that any false information

may be grounds for rejection and or dismissal.” Yet, the application also states that Respondent “reserves the right to amend any answers marked by the applicant that are not supported by the employment history listed on the application.” The application does not mandate that Respondent reject the selected candidate for providing false information and allows Respondent some leeway in dealing with the situation. The evidence did not reveal that the misrepresentation was intentional. There is no evidence that Respondent failed to take remedial action after learning at the level three hearing of Mr. Miller’s misrepresentation.

Regardless, the role of the Grievance Board in reviewing a selection decision is not to automatically reverse a selection where the successful candidate provided incorrect information. Rather, the undersigned is limited to considering whether Grievant proved that the selection process was flawed and, if so, whether Grievant was the most qualified candidate. After Career Services determined that the interviewees met the minimum qualifications for the position, Respondent exercised its discretion in choosing the candidate that was the best fit under its chosen criteria. Grievant admitted that he interviewed poorly because he is not good with words. Grievant did not show that the chosen criteria were arbitrary and capricious or that the manner in which each candidate was scored under those criteria was flawed.

Ultimately, there is no dispute that Mr. Miller had the requisite 5 years of experience. Further, there is no evidence that any oversight by Career Services affected the selection process. The role of Career Services was simply to determine candidate eligibility. Career Services correctly determined that Mr. Miller and Grievant met the minimum eligibility for the Crew Chief position. Career Services did not rank any of the

candidates or declare that Mr. Miller was a better fit for the position. Rather, this was the role of the interview panel. The interview panel selected Mr. Miller as the best candidate without any input from Career Services. Further, the “experience” category used by the interview panel in questioning the candidates was different from the “experience” category used by Career Services to determine minimum eligibility in that the former was “experience” on various pieces of equipment. Grievant did not show that the five selection categories used by the interview panel in the interview process were chosen arbitrarily or applied in a capricious manner. Regardless of the proven inconsistencies and misrepresentation, Grievant failed to prove by a preponderance of evidence that the selection process was arbitrary and capricious.

Accordingly, this grievance is DENIED.

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. 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)).

4. Grievant failed to prove by a preponderance of evidence that the selection process 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 decision. W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its

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 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.

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: March 22, 2024

Joshua S. Fraenkel
Administrative Law Judge