

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ROBERT NEWLON and MATT JOHNSON,
Grievants,**

v.

Docket No. 2016-1604-CONS

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Grievants, Robert Newlon and Matt Johnson, separately filed grievances against their employer the Department of Transportation/Division of Highways (hereinafter "DOH"), Respondent on April 7, 2016, protesting their individual non-selection for equipment training courses. The original grievances individually provide "Grievant passed over for backhoe assignments." The relief sought states, "To be made whole in every way including selection for backhoe." The two grievances were consolidated at level one on April 26, 2016.

A level one conference was held on May 3, 2016, and the grievance was denied at that level on May 25, 2016. Grievant appealed to level two on May 29, 2016, and a mediation session was held on August 9, 2016. Grievant appealed to level three on August 12, 2016. After a period of time including an agreed continuance, a level three hearing was held before the undersigned Administrative Law Judge on February 28, 2017, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent DOH was represented by counsel Xueyan Palmer, Division of Highways Legal Division.

This matter became mature for consideration on March 28, 2017, upon receipt of the last of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievants are Transportation Worker 2 Equipment Operators employed by the Division of Highways, Respondent. Grievants claim their employer's selection of individuals to attend training courses for equipment operation is flawed. Grievants also tend to allege that they are victims of favoritism in not being selected for equipment operator certification training. Grievants' claims were not substantiated by the evidence. Seniority is a factor, but not the sole consideration for granting employment benefits. It was not established that the training selection decisions were arbitrary and capricious, nor did Grievants prove favoritism. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. It is the responsibility of Respondent to ensure that employees who operate rolling equipment are properly trained to do so safely, efficiently and effectively. The primary mission of the Equipment Operators Training Academy is to provide such training through a combination of classroom instruction, practical exercises and, when required, certification. WVDOH Administrative Operating Procedure, R Ex 1

2. Robert Newlon is classified as a Transportation Worker 2 Equipment Operator (TW2EQOP) with the Division of Highways (DOH) in District Two (D-2) and has been employed since December 17, 2012.

3. Matt Johnson is classified as a TW2EQOP in D-2 and has been employed since April 9, 2013.

4. John Ramey, Acting County Supervisor, was responsible for selecting the workers for backhoe training. John Ramey is a Transportation Worker 4 Welder in D-2 in Organization 0298 (Bridge Department), and has been employed with Respondent since April 9, 2002. Mr. Ramey testified at the level three hearing regarding why and how he selects various employees for heavy equipment training at the DOH Training Academy in Buckhannon, West Virginia.

5. DOH routinely offers its employees training certification for heavy equipment at the Training Academy.

6. A "Notification of Training" for a Backhoe was posted in Organization 0206 in March 2016. R Ex 2

7. Approximately eight employees signed up for the training opportunities in discussion.

8. Supervisor Ramey reviewed each applicant's qualifications and work experience while taking several other factors into consideration before making the selections.

9. WV DOH Administrative Operating Procedure, Section IV, Chapter 9, "Equipment Operators Training Academy," prescribes the manner in which employees

apply for and supervisors select employees to attend basic and pre-certification equipment operator courses. R Ex 1

10. Respondent's policy on Equipment Operators Training Academy, provides, in relevant part, that "the organization supervisor will: a. consider all interested employees based on their work experience, general abilities, valid Commercial Drivers License (CDL) and work history including the amount of time employed within the agency." R Ex 1 The supervisor selects employees to attend the training based upon these criteria and submits his selection to the District Engineer/Manager who reviews the choices and decides which employee(s) will be trained.

11. Seniority is a factor in selecting a candidate for training, but it is not the only factor, nor necessarily the primary factor in the training selection process.

12. Brian Shaffer and Robert Hunter were selected to attend the Training Academy.

13. Brian Shaffer has been employed with the DOH since November 1, 2013, and Robert Hunter since December 26, 2012.

14. Mr. Ramey completed a DOH-20 for each chosen candidate and forwarded the forms to the Training Academy on April 4, 2016, with all the necessary paperwork to allow the employees to obtain "seat time" prior to the official start date of training.¹

¹ A DOH-20 is a form known as the "WVDOH Operator's Qualification Report" and allows the employee to operate equipment until they attend formalized training. This form is required to be completed for any operator who has been newly assigned to operate DOH equipment, prior to allowing the employee to operate that equipment. The form indicates the experience level, employee discussed safety features and whether or not they possess a valid Commercial Driver's License.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the 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). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievants believe the selection process for training is not being handled properly in their organization. Grievants believe that they should have been selected to attend the training because they have more seniority and/or experience. Respondent maintains that the decision as to who was selected to attend Equipment Operating Training Academy was lawful.

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 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 his judgment for that of the authoritarian agency. *See generally, Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (W. Va. 1982).

Respondent has established procedure to select workers for the Equipment Operators Training Academy. See WV DOH Administrative Operating Procedure, Section IV, Chapter 9. R Ex 1 This process, regrettably it seems, is not readily understood by the majority of the workers. Respondent might do well to make the procedure more transparent. Nevertheless, the decision as to whom is selected to attend is a series of evaluations of multiple facts by agency administrators. Some factors are more quantitative than others. R Ex 1 One of the factors is the amount of time the person has been employed; however, it is **not** the definitive element. Another factor properly considered by Respondent is an assessment as to whom Respondent believes will most readily benefit the agency.

In selecting the workers for the course in discussion, there were eight employees who signed up for the backhoe posting for two available training slots in Organization 0206. According to DOH, in making the selection decision, the supervisor considers the essential needs of the organization and several other factors. He/she will review the applicants' previous and current work experience, employee dependability, attendance, leave balances, EPA scores, prior AR13's, prior disciplinary actions, attitude, and finally the amount of time the employee has been with the agency.

While years of service are considered, it is not the sole factor in rendering the decision in determining who is selected to attend training. See *WVDOH Administrative Operating Procedures*, R Ex 1. Grievants' seniority is merely a factor to be considered, and is not determinative, as per the policy, DOH retains the discretion to select a less senior applicant to attend certification training unless the employees are "similarly situated." Also see W. VA. CODE § 29-6-10(4). The selection decisions are sent to the District Engineer/Manager for review and final approval. The District Engineer/Manager will then forward the proper paperwork to the Training Academy for another level of review. Ultimately, the selection decisions have ideally been reviewed by three levels of review before the employee is ever sent for training in Buckhannon. DOH stressed the importance of employee dependability in training selection decisions. There are many factors taken into consideration prior to making the selections.²

² The organization supervisor will consider all interested employees based on their work experience, general abilities, valid Commercial Drivers License and work history. Citing *WVDOH Administrative Operating Procedures*, R Ex 1

DOH highlighted the importance of attendance and dependability in the circumstance of this matter. Respondent presented testimony from John Ramey, Transportation Worker 4 Welder, Acting County Supervisor who was initially responsible for selecting the workers for backhoe training. Supervisor Ramey testified he followed Respondent's Administrative Operating Procedure for the selecting of workers for equipment training. Candidate Shaffer was selected because he came to work every day, was dependable and was better suited for the training because he did not have bad habits that had to be unlearned. Successful candidate Hunter had the most experience of all the applicants. Ramsey testified that Grievant Johnson was not selected because he was not dependable and, if his recollection was correct, Grievant Johnson was on leave restriction. Grievant Newlon was being considered for an alternative piece of equipment. Supervisor Ramey credibly testified how and why he selected the successful and unsuccessful applicants in the circumstance of this case.³

Grievants are of the belief that seniority is "*the*" key factor in training selection. The undersigned is well aware that seniority is "*a*" factor in granting a benefit to an employee (Emphasis added.) "Seniority with an agency is a consideration; however, seniority is

³ An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994). This Grievance Board applies the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

not the only criteria for awarding opportunity for advancement in the work place. An employer may determine that a less senior applicant is more deserving of a particular benefit, e.g., training opportunity and not invalidate the selection.” W.Va. Code § 29-6-10(4).

W. VA. CODE § 29-6-10(4) provides for an employer to consider seniority in selection decisions. Seniority is not the primary consideration or sole factor to be evaluated. W. Va. Code § 29-6-10(4) requires an employer to consider seniority in selection decisions “if some or all of the eligible employees have substantially equal or similar qualifications[.]” In other words, seniority is a “tie breaker,” not the primary consideration.

Additionally, Grievants allude that favoritism in the selection process rendered it fatally flawed. “Favoritism” is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities.” W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or 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.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

Grievants have not met this burden. They have not established that they were treated differently than the successful applicants. Grievants are frustrated in not being selected recently for additional heavy equipment training.⁴ The fact that an employee has expressed interest in additional or specific equipment training does not mandate Respondent to provide the training on the timetable most desired by the employee. It is the responsibility of Respondent to ensure that employees who operate equipment are properly trained to do so safely, efficiently and effectively. It is Respondent's prerogative, within the confines of applicable regulations, to determine the scheduling of such training. Grievant is not empowered to dictate when Respondent will provide him with additional educational opportunity.

Lastly, it is not established that Respondent has not properly presented its employees with opportunity for training on rolling equipment utilized by the agency. The primary mission of the Equipment Operators Training Academy is to provide such training through a combination of classroom instruction and practical exercises. Grievants failed to prove that the instant selection process for heavy equipment training was fatally flawed or was contrary to law, rule or a policy violation.

⁴ Grievants and employees alike are very interested in obtaining additional training due to the recently implemented Transportation Worker Apprenticeship Program and the possible increase in salary that comes with advancing in the program. DOH argued that it follows all applicable policies when determining which employees are selected for equipment training.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008);

2. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 f.2d 1017 (4th Cir. 1985). 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).

3. Grievants failed to prove that their non-selection for identified equipment training was an arbitrary and capricious decision.

4. In order to establish either a discrimination or 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.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

5. Grievants did not meet their burden of proving one or the other was the victim of favoritism.

6. Grievants did not establish the selection process for participation in agency equipment training courses was insufficient or fatally flawed as to invalidate the selection in discussion.

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 (2008).

Date: May 23, 2017

Landon R. Brown
Administrative Law Judge