

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DONNIE PREAST and ADAM BURKHOLDER,

Grievants,

v.

Docket No. 2016-1532-CONS

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievants, Donnie Preast and Adam Burkholder, filed level one grievances against their employer, Respondent, Division of Highways ("DOH"). Grievant Preast's statement of grievance was dated March 29, 2016, and stated as follows: "Grievant passed over for equipment certifications." As relief sought, Grievant Preast seeks the following: "[t]o be made whole in every way including training and upgrades." Grievant Burkholder's statement of grievance was dated March 30, 2016, and stated as follows: "Grievant denied equipment training and pay upgrades." As relief sought, Grievant Burkholder requested "[t]o be made whole in every way including training and upgrades." At level one, the two grievances were consolidated and given the Docket Number 2016-1532-CONS.

A level one conference was conducted on April 18, 2016. The consolidated grievance was denied by decision dated May 5, 2016. Grievants appealed to level two on May 9, 2016. A level two mediation was conducted on July 15, 2016. Grievants perfected their appeal to level three of the grievance process on July 25, 2016. A level three hearing was conducted by the undersigned administrative law judge on April 11, 2017, at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievants

appeared by their representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Jessica R. Church, DOH Legal Division. This matter became mature for decision on May 22, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants signed up to be considered for selection to attend three heavy equipment trainings at the Respondent's Equipment Operators Training Academy. Grievants were not selected for the training. Respondent selected three other employees who had fewer years of service with DOH, and questionable experience. Grievants argue that Respondent failed to follow its policy for selecting employees for these trainings, and that its decisions were arbitrary and capricious. Respondent denies Grievants' claims, asserting that it followed its policy, and its selection decisions were proper. Grievants proved by a preponderance of the evidence that Respondent failed to follow its policy in selecting employees for the training, and that its decisions were arbitrary and capricious. Therefore, the grievance is GRANTED.

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 Preast and Burkholder are employed by Respondent in the classification of Transportation Worker 2, in Respondent's District 9 in Nicholas County, West Virginia. Grievant Preast has been employed by Respondent for approximately ten years. Grievant Burkholder has been employed by Respondent for approximately eight years.

2. Charles Reel is employed by Respondent as the Highway Administrator for Nicholas County, and is Grievants' direct supervisor. One of Mr. Reel's responsibilities is to select employees to attend the equipment training offered through Respondent's Equipment Operators Training Academy.

3. Steve Cole is employed by Respondent as District 9 Engineer. Mr. Cole receives the selections made by Mr. Reel, and if he concurs with the same, he forwards the same to human resources so that the selected employee can be scheduled for training.

4. Attending a training at the Equipment Operators Training Academy and receiving certifications enables employees to advance to higher pay tiers. Also, employees selected for these trainings receive pay upgrades for the operation of equipment during and after training.

5. The West Virginia DOH Administrative Operating Procedure, Section IV, Chapter 9, "Equipment Operators Training Academy," pertains to the selection of employees for training in Buckhannon, West Virginia.¹

6. The West Virginia DOH Administrative Operating Procedure, Section IV, Chapter 9, "Equipment Operators Training Academy," Section III B "Applying for Basic and Pre-Certification Equipment Operator Courses," states, in part, as follows:

1. When there is a need for additional employees to operate equipment requiring certification and consistent with the classifications of Transportation Worker II or III, the organization supervisor will:
 - a. post a notice to that effect on the organization's bulletin board for ten working days; and

¹ See, Respondent's Exhibit 1.

- b. ensure that employees are informed of the opportunity for training and that they are given the opportunity to tell him or her of their interest.
2. Qualified and interested employees will advise the organization supervisor of their interest within ten working days of the posting.
3. After ten working days from posting the notice, the organization supervisor will:
 - a. consider all interested employees based on their work experience, general abilities, valid CDL and work history including the amount of time employed with the agency;
 - b. make a list of his or her choices based upon the preceding criteria; and
 - c. send the list of choices, along with the names of all other interested employees, to the District Engineer or Division Director.
4. The District Engineer or Division Director will review the supervisor's choices and the names of other interested employees and will:
 - a. decide which of the employees are to be trained; and
 - b. provide an approved list to the organization supervisor and the Training Coordinator. No employees will be notified that they have been selected for training until approved by the District Engineer or Division Director. . . .²

7. On February 23, 2016, sign-up sheets for equipment training opportunities at the Equipment Operators Training Academy for the following three pieces of equipment were posted in District 9: Rubber-Tired Excavator (gradall), Backhoe, and Motor Grader.

² See, Grievants' Exhibit 1.

The postings listed the “date up” as February 23, 2016, and the “date down” as March 8, 2016. These sign-up sheets were signed by Charles Reel as Supervisor.³

8. In addition to requiring the employees’ signatures, these sign-up sheets requested the following information from the employees: last four digits of social security number; organization number; job classification; valid CDL (yes or no); DOH service years/months; and, experience on equipment requesting training years/months.⁴

9. Thirteen employees, including Grievants, signed the February 23, 2016, sign-up sheet to be considered for Rubber-Tired Excavator training at the Equipment Operator Training Academy. There was only one position for this training available.

10. Eleven employees, including Grievants, signed the February 23, 2016, sign-up sheet to be considered for Motor Grader training at the Equipment Operator Training Academy. There was only one position for this training available.

11. Fourteen employees, including Grievants, signed the February 23, 2016, sign-up sheet to be considered for Backhoe training at the Equipment Operator Training Academy. There was only one position for this training available.

12. On the Rubber-Tired Excavator training sign-up sheet, in the “DOH Service Years/Months” column, Grievant Preast wrote 9 years, and Grievant Burkholder wrote 7 years. In the “Experience on Equipment Requesting Training Years/Months” column, Grievant Preast wrote “none,” and Grievant Burkholder wrote “none.”⁵

13. John Lawson was one of the thirteen employees who signed up to be considered for the Rubber-Tired Excavator training. Mr. Lawson indicated on the sign-up

³ See, Respondent’s Exhibits 1, 2, and 3, sign-up sheets.

⁴ See, Respondent’s Exhibits 1, 2, and 3, sign-up sheets.

⁵ See, Respondent’s Exhibit 1, sign-up sheet.

sheet that he had one year and four months of service at DOH. In the “Experience on Equipment Requesting Training Years/Months” column, Mr. Lawson listed the following: “some.”⁶

14. Mr. Lawson never quantified his length of experience on the Rubber-Tired Excavator to Mr. Reel. Mr. Lawson would not go so far as to say that he had several years of experience; he would only say “some.” Mr. Reel justified the same by explaining that Mr. Lawson was a very religious man, and could not say for sure how many months or years of experience he had, and he did not want to lie.⁷

15. Charles Reel selected employee John Lawson to attend the Rubber-Tried Excavator training, and Steve Cole approved the same.

16. On the Motor-Grader training sign-up sheet, in the “DOH Service Years/Months” column, Grievant Preast wrote 9 years, and Grievant Burkholder wrote 7 years. In the “Experience on Equipment Requesting Training Years/Months” column, Grievant Preast wrote “none”, and Grievant Burkholder wrote “none.”⁸

17. Randy Neal was one of the eleven employees who signed up to be considered for the Motor Grader training. Mr. Neal indicated on the sign-up sheet that he had one year of service at DOH. In the “Experience on Equipment Requesting Training Years/Months” column, Mr. Neal listed the following: “6 years.”⁹

18. Charles Reel selected employee Randy Neal to attend the Motor Grader training, and Steve Cole approved the same.

⁶ See, Respondent’s Exhibit 1, sign-up sheet.

⁷ See, testimony of Charles Reel.

⁸ See, Respondent’s Exhibit 2, sign-up sheet.

⁹ See, Respondent’s Exhibit 2, sign-up sheet.

19. On the Backhoe training sign-up sheet, in the “DOH Service Years/Months” column, Grievant Preast wrote 9 years, and Grievant Burkholder wrote 7 years. In the “Experience on Equipment Requesting Training Years/Months” column, Grievant Preast wrote “2 month”, and Grievant Burkholder wrote “1 year.”¹⁰

20. Michael Albrecht was one of the fourteen employees who signed up to be considered for the Backhoe training. Mr. Albrecht indicated on the sign-up sheet that he had five years of service at DOH. In the “Experience on Equipment Requesting Training Years/Months” column, Mr. Albrecht listed the following: “5 with DOH was precertified, 10 before DOH before transfer.”¹¹

21. Charles Reel selected employee Michael Albrecht to attend the Backhoe training, and Steve Cole approved the same.

22. In selecting the employees to attend the trainings, Mr. Reel did not consider all of the criteria, or qualifications, listed in the applicable policy, such as length of service, or seniority, at DOH, and instead relied on criteria not contemplated by the policy.¹²

23. Charles Reel did not score or rank the employees who were seeking to be selected for the three trainings.

24. Charles Reel improperly allowed at least some of the successful applicants “seat time” on the equipment referenced herein, meaning he allowed them to run the equipment thereby gaining experience, before they had been selected for training or certified. Therefore, Mr. Reel allowed employees to run equipment on which they had not

¹⁰ See, Respondent’s Exhibit 3, sign-up sheet.

¹¹ See, Respondent’s Exhibit 3, sign-up sheet.

¹² See, testimony of Charles Reel.

been officially trained and certified. Mr. Cole and Mr. Reel stopped this practice around the time of the subject postings in February 2016.

25. John Lawson was allowed to run the Rubber-Tired Excavator (gradall) for one year before the posting for training on that piece of equipment came out.¹³

26. Grievant Preast, Grievant Burkholder, and Level One Grievance Evaluator Sandra Castillo are the only people noted as present during the level one conference in the decision issued on May 5, 2016. While Grievant Preast testified that another person was in attendance, who he thought was a lawyer from the state, the identity of that person is unknown. However, it is certain that Mr. Reel and Mr. Cole were not present.

27. The level one decision states, in part, as follows: “Mr. Reel thoroughly reviewed each applicant’s qualifications, experience (previous included), and overtime worked before making the selections”¹⁴ Further, the Grievance Evaluator stated as follows:

[i]n making his decision, Mr. Reel considered the essential needs of the organization. He reviewed the applicants’ previous and current work experience, general abilities, and considered whether the employees are dependable and routinely do not miss much work and are available for scheduled and unscheduled overtime, and finally the amount of time the employee has with the agency. While years of service were considered, it was not the sole factor in rendering the decision in determining who is selected to attend training. Grievants’ seniority is merely a factor to be considered, and is not determinative, as per policy, DOH retains the discretion to select a less senior applicant to attend certification training unless the employees are ‘similarly situated.’ The selected candidates have more experience based on their previous employment than the Grievants *and also held a considerable amount of leave at the time of the selection decision.*¹⁵

¹³ See, testimony of Donnie Preast.

¹⁴ See, Level One Decision, pg. 2, paragraph #6.

¹⁵ See, Level One Decision, pg. 4 (emphasis added).

28. As the level one proceeding was a conference, there is no transcript of what transpired. However, Grievants testified that they were told that their leave balances were, at least in part, why they were not selected. Such corresponds, in part, with what is written in the Level One Decision.

29. Charles Reel initially denied that he considered the applicants' leave balances in making the selection decisions. Mr. Reel eventually testified that leave was not really a factor in his decision, but that dependability, such as who can be depended upon to respond to emergency call-outs, was a big factor. Grievants are seldom called-out for emergencies by their crew leaders or supervisor.

30. Mr. Reel testified that he had no conversations with Level One Grievance Evaluator Sandra Castillo as far as he could recall. Mr. Reel testified that he did not recall speaking to her at all, and that the name "Sandra" did not ring a bell with him. Mr. Reel further testified that he did not consider overtime in making his selection decisions.

31. As of the date of the level three hearing, all three employees selected by Charles Reel to attend the trainings at issue herein had completed their pre-certification training in Buckhannon, West Virginia, and were awaiting training at Medina to complete their certification. Those employees had been receiving temporary upgrades when running the equipment which resulted in pay increases.¹⁶

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-

¹⁶ See, testimony of Charles Reel.

1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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).

Grievants argue that Respondent's selection of who would attend three heavy equipment trainings at the Equipment Operators Training Academy posted in February 2016 was improper and arbitrary and capricious. Respondent asserts that it followed its policy for selecting employees to attend the training, and that its selection of John Lawson, Randy Neal, and Michael Albrecht for the three trainings was proper.

Many facts are disputed in this matter. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). 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 & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied 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.

HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED

STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 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 Id., Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

West Virginia DOH Administrative Operating Procedure, Section IV, Chapter 9, "Equipment Operators Training Academy," as controlling. Section III B "Applying for Basic and Pre-Certification Equipment Operator Courses," states, in part, as follows:

1. When there is a need for additional employees to operate equipment requiring certification and consistent with the classifications of Transportation Worker II or III, the organization supervisor will:
 - a. post a notice to that effect on the organization's bulletin board for ten working days; and
 - b. ensure that employees are informed of the opportunity for training and that they are given the opportunity to tell him or her of their interest.
2. Qualified and interested employees will advise the organization supervisor of their interest within ten working days of the posting.
3. After ten working days from posting the notice, the organization supervisor will:
 - a. consider all interested employees based on their work experience, general abilities, valid CDL and work history including the amount of time employed with the agency;
 - b. make a list of his or her choices based upon the preceding criteria; and

- c. send the list of choices, along with the names of all other interested employees, to the District Engineer or Division Director.
- 4. The District Engineer or Division Director will review the supervisor's choices and the names of other interested employees and will:
 - a. decide which of the employees are to be trained; and
 - b. provide an approved list to the organization supervisor and the Training Coordinator. No employees will be notified that they have been selected for training until approved by the District Engineer or Division Director. . . .¹⁷

It has been consistently held that “[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.” Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep’t of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994). Therefore, the issue becomes whether Respondent complied with this policy in making the selection decisions for the three trainings.

The evidence presented establishes that notices of the trainings were posted for ten days, and numerous employees, including Grievants, expressed interest by signing the same. After the tenth day, the sign-up sheet was taken down. This part of the selection process appears to comply with the West Virginia DOH Administrative Operating Procedure, Section IV, Chapter 9, “Equipment Operators Training Academy.” Thereafter, Charles Reel, as Highway Administrator, selected John Lawson, Randy Neal, and Michael Albrecht to attend the three trainings. However, whether Mr. Reel

¹⁷ See, Respondent’s Exhibit 1.

considered the factors specified in this policy in making his selection decisions is disputed.

At the hearing, Mr. Reel testified that he considered the factors the policy said to consider, especially experience, and the needs of the organization, or what is best for the organization. However, Mr. Reel never gleaned exactly how much experience Mr. Lawson had on his piece of equipment, and “some” experience was, apparently, good enough. Further, Mr. Reel testified that he did not consider the applicants’ seniority, despite the language of the policy stating that applicants’ time with the agency is to be considered. Instead, he testified that such was only to be considered as a tie-breaker. That is not what the applicable policy says. Thereafter, he appeared to testify that he did consider the applicants’ time with the agency. The Level One Grievance Evaluator was led to believe that the applicants’ leave balances were a factor considered in making the decisions, as is noted in her decision. She also listed all the factors Mr. Reel considered in arriving at his selection decisions, including “essential needs of the organization,” as well as “dependability,” and whether the employees “routinely do not miss much work.” She further noted that Mr. Reel considered whether the employees were available for “scheduled and unscheduled overtime.” None of these factors are listed in the policy.

At the level three hearing, Mr. Reel denied speaking to the Level One Grievance Evaluator, and denied that leave balances were a factor in his decision. Thereafter, he testified that the applicants’ leave balances were not really a factor, but “dependability” was a big factor, and whether applicants responded to emergency call-outs. It is very easy to see from his testimony that “dependability” would imply attendance, which can be measured by leave taken, thereby making accrued leave balances a consideration. Mr.

Reel denied considering overtime worked in making his decision, but mentioned that showing up for emergency call-outs was a consideration. Grievants testified that they are seldom called for emergency call-outs, and such was the decision of their crew leaders and supervisor. It would seem that an emergency call-out could be the same as the “unscheduled overtime,” noted by the Level One Hearing Examiner. Despite Mr. Reel’s claim that he never spoke to the Level One Grievance Evaluator, some of his testimony about the criteria he considered corresponds with what she wrote in her decision. She even used some of the same phrases and words that Mr. Reel used during his testimony, such as “needs of the organization” and “dependable,” which are not listed in the applicable policy as criteria to be considered.

Mr. Reel displayed the proper demeanor at the level three hearing. Nonetheless, Mr. Reel made the decisions being challenged in this grievance. As such, he has an interest in this matter, and motive to be untruthful. Mr. Reel made a number of confusing and inconsistent statements during his testimony. Such made it somewhat unclear as to what he actually considered in making his decisions. Further, Mr. Reel’s denial of communicating with the Level One Grievance Evaluator is implausible. Much of what she noted in the Level One Decision corresponds with Mr. Reel’s testimony. Of course, Mr. Reel denied considering applicants’ accrued leave balances in making his decision. When asked where she could have got her information if not from him, Mr. Reel had no answer. Additionally, Mr. Reel’s explanation why Mr. Lawson listed his length of experience as “some,” and what that meant, is also implausible, at best. Mr. Reel appears to have improperly allowed Mr. Lawson to run the equipment for at least one year, thereby gaining experience, and then gave him credit for the same in his decision. Mr. Reel knew

Mr. Lawson's experience firsthand, and that is why "some" was good enough. Based upon all of this, Mr. Reel was not credible.

Given that the controlling policy states that work experience, work history, including time employed with the agency, valid CDL, and general abilities are to be considered in making the selection, it does not appear that Mr. Reel followed the same. Further, 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). "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).

In making his decisions, Mr. Reel did not consider Grievant Preast's nine years of service with DOH, or Grievant Burkholder's seven years as required in the policy. All three of the employee's selected for training had fewer years of service with DOH. Mr. Neal had one year, Mr. Lawson had one year and four months, and Mr. Albrecht had five years. While the policy does not state that time with the agency is the determining factor,

it states that the applicants' time with the agency is to be considered, and Mr. Reel testified that he did not consider the same in making his decisions. As far as experience, the Grievants listed that they had no experience on the Rubber-Tire Excavator and Motor Grader. Mr. Lawson, who was selected for training on this equipment, listed "some." What Mr. Lawson did not list on the sign-up sheet was that he ran that equipment for a year before the posting with permission from Mr. Reel. Mr. Reel more likely than not considered this experience given that he accepted "some" as sufficient experience. Grievants had not been given such an opportunity by Mr. Reel. Grievant Preast testified that when Mr. Reel was allowing people to run equipment before being pre-certified, which was later found to be improper and ceased, he had put up a sign-up sheet for all those interested, and everyone, including Grievants, had signed. However, they did not get the opportunity that Mr. Lawson got. It is further noted that another employee who had signed up to be considered for this training listed two years of experience on this piece of equipment before working at DOH, and had two years of service with DOH. Mr. Reel offered no explanation as to why that employee was not selected over Mr. Lawson, even though he had more time with DOH, actually quantified his experience, and such was greater than the experience Mr. Lawson is thought to have.

As for experience on the Motor Grader, the Grievants again list that they had no experience on that piece of equipment. Mr. Neal, the selected applicant, listed one year of service with DOH and six years of experience on the Motor Grader. Few others on the list had any experience running that equipment. Most applicants listed "none" for experience, but one employee listed two years of experience and one year and four months of service with DOH. Another wrote "some" experience and five years of service

with DOH. On the Backhoe sign-up sheet, Grievant Preast listed two months of experience on the equipment, and Grievant Burkholder listed one year. Mr. Albrecht, the selected applicant, listed five years of experience with DOH and that he was previously pre-certified, but not full certification, and ten years of experience before DOH. Several applicants listed “some” experience and two years of experience. One applicant listed “none with DOH, 2 years before.” Another applicant listed “5 years before DOH, some.”

Grievants lacked experience on the Rubber-Tired Excavator and Motor Grader, which put them at a disadvantage as others had experience. However, the evidence presented suggests that some of the experience the selected applicants had was the result of Mr. Reel improperly allowing them to run the equipment before pre-certification, and Grievants had not been afforded that opportunity. While experience is certainly a valid consideration which is listed in the policy as a consideration, that was just one factor to be considered. Moreover, Grievants were told at level one that lower leave balances and less experience were the reasons why they were not selected. Such is supported by the Level One Decision. Prior to the postings for the trainings, Grievant Burkholder had been off work due to medical conditions and had used nearly all of his accrued leave. Similarly, Grievant Preast had been off work because he had fractured his knee. He testified that his balances were lower, but he had not exhausted the same. The actual leave balances for Grievants and the other applicants are unknown. No one has alleged that either Grievant had attendance problems or were on any kind of leave restriction. They had simply used their earned and accrued leave for valid medical conditions.

While Mr. Reel denied considering the applicants’ accrued leave balances as a factor in his decision-making, the evidence suggests that he did and that such was a

deciding factor. “Dependability” is most likely a code word for “leave balances.” In the Level One Decision, “does not miss much work” is listed as one of Mr. Reel’s considerations. Obviously, Grievants had rightly missed a significant amount of work as a result of their medical conditions. Further, just prior to the level three hearing, but long after the Level One Decision was issued, the Grievance Board issued a decision that dealt with accrued leave balances being used as criteria in selecting DOH employees for training at the Equipment Operators Training Academy. In that decision, the DOH was found to have failed to follow the policy at issue in this case, and that basing the decision on accrued leave balances was improper and arbitrary and capricious. See *Womack & Means v. Div. of Highways*, Docket No. 2016-1577-CONS (Mar. 24, 2017). Given the evidence presented, the testimony of Mr. Reel, and the Level One Decision itself, it is more likely than not that, contrary to his testimony, Mr. Reel based his decision, at least in part, on the leave balances of the applicants in violation of policy. Further given the timing of the issuance of the *Womack & Means* decision and the level three hearing in this matter, it is more likely than not that Mr. Reel’s testimony was influenced by the same. The evidence presented demonstrates that Mr. Reel’s selection decisions were not based upon the criteria listed in the policy. Mr. Reel was unable to explain some of his decisions, selected an applicant without knowing exactly how much experience he had, counted experience that he improperly gave applicants, made inconsistent statements, and apparently relied on factors outside the criteria listed in the policy in making his decision. Accordingly, Mr. Reel failed to follow the policy for selecting employees for the Equipment Operators Training Academy, and the decisions he made were arbitrary and capricious. Therefore, this grievance is granted.

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 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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. West Virginia DOH Administrative Operating Procedure, Section IV, Chapter 9, "Equipment Operators Training Academy," as controlling. Section III B "Applying for Basic and Pre-Certification Equipment Operator Courses," states, in part, as follows:

1. When there is a need for additional employees to operate equipment requiring certification and consistent with the classifications of Transportation Worker II or III, the organization supervisor will:
 - a. post a notice to that effect on the organization's bulletin board for ten working days; and
 - b. ensure that employees are informed of the opportunity for training and that they are given the opportunity to tell him or her of their interest.
2. Qualified and interested employees will advise the organization supervisor of their interest within ten working days of the posting.

3. After ten working days from posting the notice, the organization supervisor will:
 - a. consider all interested employees based on their work experience, general abilities, valid CDL and work history including the amount of time employed with the agency;
 - b. make a list of his or her choices based upon the preceding criteria; and
 - c. send the list of choices, along with the names of all other interested employees, to the District Engineer or Division Director.
4. The District Engineer or Division Director will review the supervisor's choices and the names of other interested employees and will:
 - a. decide which of the employees are to be trained; and
 - b. provide an approved list to the organization supervisor and the Training Coordinator. No employees will be notified that they have been selected for training until approved by the District Engineer or Division Director. . . .

3. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994).

4. 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). "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).

5. Grievants proved by a preponderance of the evidence that Respondent failed to follow its policy regarding the selection of employees to be sent to the Equipment Operators Training Academy, and that Respondent's selection decisions were arbitrary and capricious.

Accordingly, the grievance is **GRANTED**. Respondent is hereby **ORDERED** to provide training through the Equipment Operators Training Academy in Buckhannon, West Virginia, to both Grievant Preast and Grievant Burkholder as soon as possible, but no later than four months from the entry of this order, on one of the following pieces of equipment: Backhoe, Rubber-Tired Excavator, or Motor Grader. It is noted that Grievants are not required to attend the same training. The two trainings being ordered herein can be on different pieces of equipment.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: July 7, 2017.

Carrie H. LeFevre
Administrative Law Judge