

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

NICK WEAVER,
Grievant,

v.

Docket No. 2017-2014-DOT

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Nick Weaver, is employed by Respondent, Division of Highways. On March 30, 2017, Grievant filed this grievance against Respondent stating, "Nonselection for DT1700138, DT1700116, and DT 1700112." For relief, Grievant seeks "To be made whole in every way including selection for one of the above with back pay and interest."

Following the March 30, 2017 level one conference, a level one decision was rendered on May 12, 2017, denying the grievance. Grievant appealed to level two on May 16, 2017. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on August 28, 2017. A level three hearing was held on December 19, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Xueyan Z. Palmer, Assistant Attorney General. This matter became mature for decision on January 22, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Transportation Worker 3, Equipment Operator, and grieves his nonselection for a position as Transportation Worker 3, Crew Chief. Grievant asserts that the selection decision was flawed because the selection

panel failed to properly consider Grievant's previous supervisory experience, because the selection panel was the same that had already been found to have made an arbitrary and capricious selection decision, and because a member of the selection committee pressured one of the applicants to withdraw her application and attempted to conceal this fact. Grievant failed to prove that Respondent failed to consider his previous supervisory experience or that his supervisory experience exceeded that of the successful candidates. The previous grievance decision overturning the first selection decision was not based on any factor that would require a different selection panel be chosen. The selection panel member's attempt to conceal his conversation that lead to the withdrawal of a candidate's application does impact his credibility, but does not constitute a flaw in the process itself, as the withdrawal of the application of another candidate would not impact the sufficiency or legality of the selection process as it relates to Grievant. Grievant failed to prove that the selection decision was unlawful, unreasonable, or 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. Grievant is employed by Respondent as a Transportation Worker 3, Equipment Operator, and has been employed with Respondent full-time since September 3, 2004.

2. On January 26, 2015, Respondent posted a Transportation Crew Supervisor 1 position, for which Grievant applied and was not selected. Gary Miller was the successful applicant. Grievant filed a grievance protesting his nonselection in Docket

Number 2015-1223-DOT. By *Decision* entered March 9, 2016, the Grievance Board granted the grievance, in part, and denied the grievance, in part, finding that the selection decision was arbitrary and capricious because the selection committee had not completed the documents required by Respondent's policy, but that Grievant failed to prove he was the most qualified candidate. The *Decision* ordered Respondent to repost the position within thirty days of receipt of the decision.

3. Respondent did not appeal the final decision of the Grievance Board and failed to repost the position within thirty days as ordered. Grievant did not seek to enforce the final decision in circuit court as permitted by West Virginia Code § 6C-2-5(a).

4. Respondent's policy, *West Virginia Division of Highways Administrative Operating Procedures Section II, Chapter 14, Posting and Filling of Job Vacancies*, provides that advancement be made based upon "knowledge, skills and efficiency" and requires that interviewers complete an interview record on a designated form.

5. On December 27, 2016, Respondent posted two vacancies for Transportation Worker 3, Crew Chief. Grievant and six other internal applicants, Gary Miller, Michael Sheppard, Howard Julow, Wilber Harless, Chad Nelson, and Twila Milam, applied for the positions.

6. On January 10, 2017, Highway Administrator 4 Chuck Smith and Highway Administrator 2 Keither Baisden conducted interviews of all seven applicants. Each applicant was interviewed once for both positions. Shari Parsons, a human resources employee, sat in on the interviews to take notes on the *West Virginia Department of Transportation Interview Questions* form but did not participate in the selection decision. The same questions were asked of all applicants in the interviews.

7. On January 11, 2017, Mr. Baisden discussed with Ms. Milam his expectations for the position, which she believed to be unfair. On January 12, 2017, Ms. Milam informed Mr. Baisden that she was withdrawing her application. Several days later, Mr. Baisden asked Ms. Milam to place her withdrawal in writing, which she did.

8. An *Application Evaluation Record* was completed for each applicant, except Ms. Milam. Ms. Parsons completed each *Application Evaluation Record* at the direction of Mr. Baisden and Mr. Smith and the “Comments” section is a transcription of what Mr. Baisden and Mr. Smith said about each applicant. The evaluations were not completed on the date of interviews but were completed at some later unspecified date, after Ms. Milam had withdrawn her applications.

9. The *Application Evaluation Record* rated each candidate in seven categories: Education; Relevant Experience; Possess Knowledge, Skills & Abilities; Interpersonal Skills; Flexibility/Adaptability; Presentability; and Overall Evaluation.

10. Grievant, Mr. Miller¹ and Mr. Sheppard were each rated “Meets” for Education and were each rated “Exceeds” for Relevant Experience and Possess Knowledge, Skills & Abilities. Grievant was rated as “Meets” for the remaining categories and Mr. Miller was rated “Exceeds” for the remaining categories. Mr. Sheppard was rated as “Meets” for Interpersonal Skills and Presentability and as “Exceeds” for Flexibility/Adaptability and Overall Evaluation.

11. Gary Miller and Michael Sheppard were selected for the two open positions.

¹ Mr. Miller’s *Application Evaluation Record* contains a clerical error in which his last name is listed as “Mullins” on the form, but is correctly identified as Mr. Miller in the “Comments” section.

12. The successful candidates had more years of highway maintenance experience than Grievant. Mr. Miller had twenty-four years of experience, Mr. Sheppard had seventeen years of experience, and Grievant had fourteen years of experience.

13. Neither Grievant, Mr. Miller, nor Mr. Sheppard had previously served in a permanent supervisory position. Grievant had filled in for his supervisors in a previous job and during his tenure with Respondent. He had received an official temporary upgrade to crew leader for two to three months. Mr. Miller had also received a temporary upgrade to crew leader in the past and had filled in for supervisors. Mr. Sheppard was a squad leader in the military.

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 (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).

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).

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). "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 Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Grievant asserts that the selection decision was flawed because the selection panel failed to properly consider Grievant's previous supervisory experience, because the selection panel was the same that had already been found to have made an arbitrary and capricious selection decision, and because Mr. Baisden pressured Ms. Milam to withdraw her application and attempted to conceal this fact. Respondent denies that the selection

decision was arbitrary and capricious and asserts Grievant failed to prove he was the most qualified candidate.

Grievant asserts that Respondent made the decision to “minimize or entirely ignore Grievant’s supervisory background prior to his employment with Respondent.” Although Grievant stated that he supervised employees on his application, a review of the resume attached to Grievant’s application shows that he was not a permanent supervisor, but that he had gained some supervisory experience by filling-in as crew leader for Respondent. Grievant also stated that, as a Mobile Equipment Operator/Outside Utility Man for ALO/GEB Contractor, “Quite often contractors were brought in to do many types of scheduled maintenance I often supervised 8 to 10 workers at a time for several days.” Grievant testified at level three that he had received a temporary upgrade to foreman for two to three months and that he had filled in as foreman on “several occasions” that “might be for a week or a day or sometimes a month or two.” Mr. Miller and Mr. Sheppard had similar experience in that Mr. Miller had filled in as crew leader and Mr. Sheppard had served as a squad leader in the Army. Further, all three were rated “Exceeds” for experience. Therefore, Grievant failed to prove that Respondent failed to consider his previous supervisory experience or that his supervisory experience exceeded that of the successful candidates.

Grievant asserts it was improper that the same selection panel that had already been found to have made an arbitrary and capricious selection decision was used for this selection decision. The previous *Decision* did not make any finding that the selection decision was improper due to bias or discrimination by the selection panel. The previous *Decision* determined that the selection panel had failed to complete the *Application*

Evaluation Record for any candidate, that the methodology to select the successful candidate was unclear, and that it was “not recognized that the interview committee members independently evaluated the candidates to determine who was ‘best qualified.’” The selection panel was comprised of Mr. Baisden, the supervisor of the position at issue, and Mr. Smith, Mr. Baisden’s supervisor, who would be the logical choice to make the selection for the position. Although the selection panel made mistakes in the first selection process, Grievant provided no evidence why they should be disqualified from making the second decision, apart from his simple allegation that Mr. Baisden was friends with Mr. Miller. Grievant provided no evidence to support this allegation, and even admitted in testimony that his opinion was based on “hearsay.” Grievant also cited no law or policy that would compel the exclusion of Mr. Baisden and Mr. Smith from the selection decision.

Grievant last asserts the decision was flawed because Mr. Baisden pressured Ms. Milam to withdraw her application and then attempted to conceal that pressure. Grievant states, “This alone amounts to a fatal flaw in the selection process herein grieved.” Grievant provided no further explanation of this assertion. Even if Mr. Baisden did pressure Ms. Milam to withdraw her application, there is no evidence pressuring Ms. Milam to withdraw impacted the sufficiency or legality of the selection process as it relates to Grievant. Unlike the first selection process, Respondent complied with its policy in this decision by completing the documentation required in its policy and rating the candidates based on the required criteria.

Grievant argues that Mr. Baisden’s attempt to conceal his conversation with Ms. Milam that lead to her withdrawing her application calls into question his credibility.

Accordingly, the undersigned must make credibility determinations. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 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 ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Mr. Baisden's demeanor during the hearing was appropriate. He appeared to take the proceeding seriously. However, Mr. Baisden admitted that his memory is poor. He was uncertain in his answers to some questions. Most importantly, Mr. Baisden changed his answers regarding Ms. Milam's decision to withdraw her application. When called to testify by Grievant, Mr. Baisden testified he did not know that Ms. Milam was withdrawing her application until Ms. Milam told him she had sent the letter to Ms. Parsons and he stated that the conversation he had with her about expectations of the job was the same conversation he had with all the applicants before the interview. Ms. Milam then testified that Mr. Baisden had this conversation with her the day after the interview, she told him she was withdrawing her application the next day, and Mr. Baisden asked her to write the letter withdrawing several days after that. After hearing Ms. Milam's testimony, when Mr. Baisden was called by Respondent he then admitted that the letter was written at his request after Ms. Milam told him she did not want the position and he called Ms. Parsons

to ask what to do. This does appear to be an attempt to conceal what happened with Ms. Milam. Further, Mr. Baisden's testimony that the *Applicant Interview Checklist* was completed during the interview is directly contradicted by the document. Mr. Baisden was hesitant in his answers about when the decision was made and the interview documentation was completed, but he did testify that the interview checklist was completed during the interview. This document is also obviously supposed to be completed during the interview because it contains instructions for conducting the interview. Ms. Milam's interview checklist is blank, even though she did interview for the position, so it is clear the checklist was not completed during the interview.

Mr. Miller's demeanor was appropriate. He was serious, calm, and he maintained good eye contact. There was nothing to indicate his testimony was untruthful, and there was no argument made that Mr. Miller had any bias against Grievant or inappropriate interest in the decision. Mr. Miller was credible.

Mr. Miller testified that the decision was based on leadership skills; that the positions require people who are level-headed and calm and who will keep the county supervisor informed of activities. Mr. Smith acknowledged Grievant's job knowledge, but stated that the position needed "people skills." Although Mr. Baisden was not credible in some areas of his testimony, he and Mr. Smith testified similarly regarding the need to keep Mr. Baisden, as county supervisor, informed. Mr. Baisden testified he had a concern about Grievant in that respect as Grievant had previously moved a fifteen-thousand-dollar piece of equipment without discussing it with Mr. Baisden, which Grievant admitted, although Grievant asserted it should not have been a concern because the equipment was not functional. Mr. Baisden testified about the greater experience of Mr. Miller and

Mr. Sheppard, and about the supervisory experience they had gained, which was supported by their applications and the notes to the interview questions.

“[W]hen 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); *See Ball v. Dep’t of Transp.*, Docket No. 04-DOH-423 (May 9, 2005); *Freeland v. Dep’t of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008).” *Neely v. Dep’t of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009). It appears this decision was made, at least partially, on those factors, which is permitted.

Grievant failed to prove that the selection decision was unlawful, unreasonable, or otherwise arbitrary and capricious. The selection process appears to comply with Respondent’s policy. Although it does appear that the interview checklist was meant to be completed during the interview itself, which was not done, that failure would not materially affect the selection decision, as it is simply a guide used to conduct the interview and Grievant did not allege any flaw during the interview itself. The factors considered in the selection decision were factors that were intended to be considered per the policy. The evidence supports that both successful candidates had more experience than Grievant, and Grievant’s claim of superior supervisory experience was not supported by the evidence. Respondent’s explanation of the selection decision was not contrary to the evidence, nor was it implausible that the successful candidates had greater leadership skills.

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 (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. 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. 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). “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 Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. “[W]hen 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); *See Ball v. Dep’t of Transp.*, Docket No. 04-DOH-423 (May 9, 2005); *Freeland v. Dep’t of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008).” *Neely v. Dep’t of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009).

5. Grievant failed to prove that the selection decision was unlawful, unreasonable, or otherwise arbitrary and capricious.

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

DATE: March 2, 2018

Billie Thacker Catlett
Chief Administrative Law Judge