THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS BURGESS,
Grievant,

v. **Docket No. 2019-0576-DOT**

DIVISION OF HIGHWAYS,
Respondent,

and

JIMMIE CARSON,
Intervenor.

DECISION

Grievant, Thomas Burgess, is employed by Respondent, Division of Highways. On November 7, 2018, Grievant filed this grievance against Respondent protesting his nonselection for a Transportation Worker 3 position. For relief, Grievant seeks instatement into the position with back pay and interest.

On November 30, 2018, Jimmie Carson, the successful candidate for the disputed position, was granted intervenor status. Following the January 15, 2019 level one conference, a level one decision was rendered on February 6, 2019, denying the grievance. Grievant appealed to level two on February 8, 2019. Following mediation, Grievant appealed to level three of the grievance process on April 22, 2019. A level three hearing was held on September 10, 2019, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by Charles Smith and was represented by counsel, Jesseca Church. This matter became mature for decision on October 10, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent in District 1 as a Transportation Worker 2, Equipment Operator. Grievant protests his nonselection for a Transportation Worker 3 position. Grievant failed to prove he was the most qualified applicant, that there was any significant flaw in the selection process, or that Intervenor was selected due to favoritism. 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 in District 1 as a Transportation Worker 2, Equipment Operator and has been so employed since February 22, 2011.

2. On July 30, 3018, Respondent posted a Transportation Worker 3 position to be stationed at the District 1 Chelyan garage.

3. There were four applicants for the position, including Grievant and Intervenor, and all were current employees of Respondent. The other applicants were Josheph Carney and Robert Little.

4. The selection panel for the position was District 1 Highway Administrator 4 Charles Smith and Highway Administrator 2 Robert Adkins, who is the direct administrator of the Chelyan garage.

5. All four candidates were interviewed by Mr. Smith and Mr. Adkins. A human resources representative sat in on the interviews to take notes.

6. Grievant and Mr. Carney were interviewed at district headquarters on September 6, 2018. Intervenor and Mr. Little were interviewed at the Chelyan garage on September 18, 2018.

7. A set of questions were prepared for the position and each candidate was asked the same questions. The human resources representative took notes on the interview questions form for each candidate.

8. In addition to the interviews, Mr. Smith and Mr. Adkins reviewed the applications submitted and considered any job performance from the candidates that either had witnessed personally.

9. Mr. Smith and Mr. Adkins also rated each candidate on the Application Evaluation Record, which evaluated the following qualifications: Education; Relevant Experience; Possess Knowledge, Skills & Abilities; Interpersonal Skills; Flexibility/Adaptability; Presentability; and Overall Evaluation.

10. Grievant, Mr. Carney, and Mr. Little were each ranked as "Meets" in all categories. No comments were made on their forms.

11. Intervenor was ranked as "Exceeds" in "Possess Knowledge, Skills & Abilities" and "Flexibility/Adaptability" and "Meets" on the remaining categories. The "Comments" section stated, "We feel he would be an asset to our garage due to his ability to run and maintain equipment."

12. Grievant did not list his DOH experience on his application, believing that was not necessary as it was an internal application despite the instruction on the form to list "all work experience." Although Grievant stated he had operated equipment since

1982, Grievant only listed five years of experience at two coal companies as a "Fueler/Greaser" and a "P.M. Tech" not as an equipment operator.

13. On an unspecified date shortly prior to the selection, Mr. Smith and Mr. Atkins had observed Grievant operating a backhoe during a rockslide emergency. Grievant backed into a debris pile which tore hoses off the backhoe.

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 argues that Respondent "failed to establish by clear and convincing evidence that Intervenor was more qualified than Grievant," that Respondent improperly failed to consider his prior experience, that Respondent failed to follow its hiring policy[1], that Intervenor was selected due to favoritism, and that Respondent failed to consider Grievant's seniority. Respondent asserts there was no flaw in the selection process and that Intervenor was the most qualified applicant for the position.

There is factual dispute regarding what happened during the interview process and whether Mr. Smith and Mr. Atkins had observed Grievant's work performance. In situations where "the existence or nonexistence of certain material facts hinges on

[1] As Grievant failed to offer Respondent's hiring policy into evidence, this argument will not be addressed.

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); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). 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).

In this case, while it does not appear Grievant is untruthful, the facts recited by Mr. Smith and Mr. Atkins are more credible. All three displayed appropriate demeanors and attitudes toward the action and there was no evidence of bias or untruthfulness. It simply comes down to the plausibility of the information. Mr. Smith and Mr. Atkins stated they rated Grievant lower in the selection process because of his failure to properly complete his application or explain his experience during the interview and because of their observation of Grievant's work.

Regarding the interview, it is clear Grievant's assertions are based on his belief that Mr. Smith and Mr. Atkins should have simply known about his DOH experience. In his testimony, Mr. Smith appeared genuinely baffled by Grievant's refusal during the

interview to explain his experience even when it was brought to his attention. During his testimony, Grievant specifically admitted that the human resources representative had asked him about his DOH employment and Grievant stated that was "odd" she would do so and appeared almost offended that his experience was questioned even though Grievant had utterly failed to properly document his experience in his application. This was the same attitude Mr. Smith and Mr. Atkins described Grievant displaying during the interview, which lends plausibility to their description. Therefore Mr. Smith and Mr. Atkins were credible in describing Grievant's interview as poor.

Mr. Smith and Mr. Atkins testified in detail and credibly that they had observed Grievant's work during an emergency call-out in which Grievant damaged equipment. Although Grievant asserts neither had ever seen his work, he admits he backed into something with the equipment during that particular emergency and that hoses were damaged, although he disputes he was at fault for the damage that resulted. Given that Grievant was busy operating equipment during an rockslide emergency the most likely explanation for why Grievant asserts he was not observed is that Grievant was simply too busy to see Mr. Smith and Mr. Atkins on site. Mr. Smith and Mr. Atkins are credible in their assertion that they observed Grievant damaging equipment.

Grievant first argues that Respondent "failed to establish by clear and convincing evidence that Intervenor was more qualified than Grievant" citing *Leeson and Williams v. Dept. of Transp.*, Docket No. 06-DOH-033D (Aug. 29, 2006). This is not the correct burden or standard of proof. *Leeson* was a default judgment case and was further based on repealed statutory language that predates the current iteration of the Grievance Board. As this is a non-disciplinary action, Grievant bears the burden of

proof and the proper standard is as follows. In a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv.,* Docket No. 93-RS-489 (July 29, 1994). The Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *Mihaliak v. Div. of Rehab. Serv*., Docket No. 98-RS-126 (Aug. 3, 1998). An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. *Thibault v. Div. of Rehab. Serv.,* Docket No. 93-RS-489 (July 29, 1994).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Grievant argues Respondent improperly failed to consider all his experience and that he is the most qualified applicant if all his experience is considered. Although Grievant asserts he has thirty-six years of relevant experience, he failed to include his experience on his application and failed to elaborate on his experience during the interview. Grievant did not list any DOH experience on his application and, although Grievant claimed he had been operating equipment since 1982, Grievant only listed five years of experience at two coal companies as a "Fueler/Greaser" and a "P.M. Tech" not as an equipment operator. Although Grievant credibly stated that he believed he was not required to list his DOH experience on the application, this belief was mistaken and unreasonable given the clear instruction on the form to list all experience. In contrast, Intervenor had twelve years of experience as an equipment operator that he

documented clearly on his application. While it appears true that Grievant could have been rated higher on "Flexibility/Adaptability" for his willingness to respond to call-outs for emergencies, Intervenor would still have been rated higher in one more category.

Further, Mr. Smith and Mr. Atkins' concern with Grievant's operation of equipment that they had directly observed was a reasonable consideration of Grievant's qualifications. While Grievant denies that it was his fault that the hoses ripped off, stating they were installed improperly by the mechanics, he admits that the backed the equipment into something. Grievant argues that this observation should not have been considered in the selection process because it had not been documented or brought to Grievant's attention. However, the cases Grievant cites for this assertion do not apply because they involve school employees and were based on specific state board of education policy. *See Wall v. Putnam County Bd of Educ.*, Docket No. 89-40-561 (Nov. 22, 1989); *Deadrick v. Marion County Bd of Educ.*, Docket No. 90-24-071 (Jan. 30, 1991).

Grievant argues Intervenor was selected due to favoritism. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). Grievant argues Intervenor benefited from favoritism as he was interviewed at a different time and at the Chelyan garage rather than at headquarters. Respondent reasonably explained that not only Intervenor but another candidate were interviewed on another date and at the garage because they were unavailable on the first day of interviews. Grievant failed to prove that allowing

Intervenor to interview on another day and at another location was advantageous or resulted in preferential treatment.

Grievant argues Respondent failed to consider Grievant's seniority. Grievant failed to prove Respondent was required to consider seniority. In support of its argument, Grievant cites law applicable to the statute governing the Division of Personnel and a Grievance Board decision interpreting the same. As of 2017, the Division of Highways was removed from the oversight of the Division of Personnel. Respondent's hiring procedures are now governed by West Virginia Code § 17-2A-24 and Respondent's Legislative Rule, West Virginia Code of State Regulations § 157-12-1, et seq. Neither the statute nor the rule require the consideration of seniority. If there is a policy requiring the consideration of seniority, Grievant failed to provide it.

Although Grievant asserts it was improper for Respondent consider his demeanor and performance in the interview so heavily, the case Grievant cites for this proposition, *Hale v. Div. of Highways*, Docket No. 2010-1327-DOT (June 3, 2011) was reversed on appeal. In this case, it was reasonable for the selection committee to consider Grievant's demeanor and performance in the interview in making its decision. Grievant had provided a deficient application, which did not support the years of experience he asserted he had and Grievant refused to elaborate on his experience. It was reasonable to consider this behavior as a factor in the decision and Grievant's failure to properly demonstrate his experience directly correlates with the score he received for "Knowledge, Skills, & Abilities."

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)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be

considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), aff'd Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

4. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

5. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

6. Grievant failed to prove he was the most qualified applicant, that there was any significant flaw in the selection process, or that Intervenor was selected due to favoritism.

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 (2018).

DATE: November 22, 2019

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Billie Thacker Catlett
Chief Administrative Law Judge