

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

HEATHER L. COX,

Grievant,

v.

Docket No. 2017-2285-DOT

DIVISION OF HIGHWAYS

Respondent.

DECISION

Grievant, Heather Cox, is employed by Respondent, Division of Highways. On May 31, 2017, Grievant filed this grievance against Respondent stating:

I have been treated unfair and unjust. I applied for the Supervisor 1 position posting #DT1700824. The position that i (sic) have been doing since Nov 31st 2016 along with my job. The job of Supervisor 1 was given to someone outside the DOH that has less or no experience.

For relief, Grievant seeks, "To be given the job of Supervisor 1 with back pay and any other way to be made whole without retaliation. To be reimbursed for all attorney fees and any other fees that I might acquire in settling this problem."

A level one hearing was held on July 11, 2017, and a decision was issued on July 27, 2017, denying the grievance. Grievant appealed to level two on August 25, 2017, and a mediation session was held on December 8, 2017. Grievant appealed to level three of the grievance process on December 29, 2017. Grievant was represented by Karl Kolenich, Esq. Respondent was represented by Keith Cox, Esq. The parties agreed to a level three decision on the level one record, without submitting proposed findings of fact and conclusions of law. This matter became mature for decision on May 23, 2019.

Synopsis

Grievant is employed by Respondent as a Storekeeper 2. Respondent posted a vacancy for Supervisor I. Respondent chose an external applicant over Grievant. Grievant disputes her non-selection. Grievant did not prove by a preponderance of the evidence that the selection process was legally flawed, that she was the most qualified candidate, or that the selection of another applicant was arbitrary and capricious. Accordingly, this grievance is DENIED.

The following findings of fact are based upon the record developed at level one. The underlying facts of this grievance are not in dispute.

Findings of Fact

1. Grievant has been employed by Respondent, the Department of Highways (DOH), since August 22, 2012, and is currently classified as a Storekeeper 2 in District Eight.
2. On February 6, 2017, Respondent posted a vacancy for Supervisor 1.
3. There were seven applicants for the position.
4. Grievant was the only internal applicant for the position.
5. On March 9, 2017, applicants were interviewed by an interview panel.
6. All candidates were asked the same written questions and their answers were noted by each interviewer.
7. An Applicant Evaluation Record form (AER) is used by the DOH interview panel to rate each applicant.
8. The panel uses the AER to rate whether the applicant “meets”, “does not meet”, or “exceeds” qualifications for the job posting. These qualifications include

education; relevant experience; possess knowledge, skills & abilities; interpersonal skills; flexibility/adaptability; presentability; and overall evaluation.

9. Grievant received “meets” for each of her AER qualifications and “overall evaluation”, while she received “exceeds” on “flexibility/adaptability”.

10. Applicant Donald Staten received “exceeds” for “education”, “relevant experience”, “flexibility/adaptability”, and “overall evaluation”, while he received “meets” for “possess knowledge, skills & abilities”, “interpersonal skills”, and “presentability”.

11. Additionally, there is a comments section for the interviewers to note any pertinent information during the interview.

12. In the comments section of Grievant’s AER, the panel noted that Grievant “meets the qualifications for the position but has minimal supervisory work experience (+/-2yrs.). She is currently a Storekeeper 2 with DOH and has a general understanding of purchasing policies and procedures.”

13. In the comments section of Mr. Staten’s AER, the panel notes that “Mr. Staten is highly qualified for the Supervisor 1 position due to the fact that he has an Associate Degree in management and has 15 yrs. of inventory control related work experience. He currently has a position with a state agency in which he purchases inventory by ‘P-Card’ policies & procedures and is involved with purchase order contracts for inventory and equipment related materials. He has served in US military & references have stated his work is highly organized and he is a very dependable employee”.

14. Donald Staten was selected and subsequently approved for the Supervisor 1 position by the Human Resources Division and the West Virginia Division of Personnel, with an effective date of July 22, 2017.

15. Stephen Carr was one of the members of the interview panel.

16. On December 5, 2016, Mr. Carr had requested by email an upgrade for Grievant after she assumed duties for a recently retired Storekeeper 3.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant contends that she is more qualified than Mr. Staten, the candidate awarded the Supervisor I position, and that she should have been selected. She asserts that she had been performing the duties associated with the posted position for at least seven months and has had no complaints. Grievant submitted into the record an email from Mr. Carr requesting that Grievant be upgraded while doing the responsibilities of a Storekeeper 3. Grievant contends this establishes that she is qualified for the Supervisor position. Grievant further argues that the interviewers should have consulted with the comptroller when making the selection decision.

Respondent counters that it determined that Mr. Staten was best suited for the position due to his extensive experience. Respondent determined that even though Mr. Staten's experience was outside of DOH, he was employed by another state agency and was familiar with the P-Card and its associated responsibilities. Respondent maintains

that Mr. Staten's application and interview outweighed that of the Grievant. Further, Respondent asserts that it followed its standard procedures in posting and filling the vacancy and that Grievant was not selected because she was not the best candidate for the position. Respondent contends that the applicants were asked the same written questions and were evaluated using the same criteria and that Grievant did not prove there was anything arbitrary or capricious about the hiring process.

In a selection case, a grievant must prove, by a preponderance of the evidence, that he was the most qualified applicant for the position in question. See *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter, supra*. 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 Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994). The fact that Mr. Carr had in the past supported Grievant's promotion is not evidence that Grievant was in this instance the most qualified applicant. Grievant did not present any authority for the proposition that the interviewers should have consulted with the comptroller when making the selection decision.

The Grievance Board has consistently held, when 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).

Grievant contends that she had ample experience at DOH and that Mr. Staten was an external candidate with less experience. Seniority is merely a factor to be considered, it is not required by the statute to be the determinative factor. An employer certainly retains the discretion to select a less-senior applicant with greater qualifications. *Lewis v. W. Va. Dep't of Admin.*, Docket No. 96-DOA-027 (June 7, 1996); *See Blake v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 97-DOH-416 (May 1, 1998); *McCloy v. Div. of Rehabilitation Ser.*, Docket No. 2014-1499-DEA (Oct. 22, 2015). That is particularly true when filling a management position where 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.*, *supra*. In spite of Grievant's contention, it appears that Mr. Staten has more relevant experience than Grievant. While Grievant's "relevant experience" was rated "meets", Mr. Staten's was rated "exceeds". Mr. Staten has 15 years of inventory control experience which the panel determined put him ahead of Grievant in the "relevant experience" category.

The interviewing panel had valid and reasonable explanations for their selection of Mr. Staten. They were in complete agreement that Mr. Staten was the most qualified applicant due to his education and work experience. The interviewers noted that Mr. Staten "exceeds" many of the qualifications Respondent considered, while Grievant only received "exceeds" in one "qualification" category. Furthermore, Mr. Carr testified at level one that Grievant did not submit any supporting documentation with her application and that Mr. Staten's application was very thorough in including supporting documentation. Grievant argues that she was not aware that she needed supporting documentation since

most of her experience had been obtained at DOH and would be accessible from her administrative or personnel file.

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, supra*. The "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. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

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 & 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (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 employer]." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). Respondent used standardized procedures to evaluate the applicants and the same AER form that DOH uses for all its interviews. All candidates were asked the same written questions and were rated on the same qualifications, including education, relevant experience, knowledge, skills and abilities, interpersonal skills, flexibility/adaptability, and presentability.

Ultimately, the selection process was uniform and based upon specific criteria. All applicants were treated equally. Grievant did not prove that there was a flaw in the process or that she was the most qualified candidate. Further, Grievant did not prove that Respondent's selection decision was arbitrary and capricious. Accordingly, the grievance is DENIED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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, a grievant must prove, by a preponderance of the evidence, that he is the most qualified applicant for the position in question. *Unrue v. W.Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996).

3. 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 Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 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, supra*.

5. The Grievance Board has held many times, when 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).

6. 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).

7. Grievant did not prove by a preponderance of the evidence that the selection of Donald Staten as the most qualified candidate was arbitrary or capricious.

8. Grievant did not prove by a preponderance of the evidence that she was the most qualified candidate for the position.

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: June 26, 2019

Joshua S. Fraenkel
Administrative Law Judge