

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JEREMY M. HOPSON,
Grievant,**

v.

Docket No. 2017-1709-DEP

**DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.**

DECISION

Grievant, Jeremy M. Hopson, is employed by Respondent, Department of Environmental Protection. On February 22, 2017, Grievant filed this grievance against Respondent protesting his non-selection for the position of Environmental Inspector. For relief, Grievant seeks instatement into the position.

Following the February 25, 2018¹ level one conference, a level one decision was rendered on April 24, 2018, denying the grievance. Grievant appealed to level two on April 26, 2018. Following mediation, Grievant appealed to level three of the grievance process on August 10, 2018. A level three hearing was held on March 27, 2019, 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, Anthony D. Eates II, Deputy Attorney General. This matter became mature for decision on May 8, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

¹ The level one decision states the conference occurred on February 15, 2018, which is an obvious typographical error as the grievance was not filed until February 22, 2018.

Synopsis

Grievant is employed by Respondent as an Environmental Inspector in the Division of Mining and Reclamation. Grievant applied for and was not selected for an Environmental Inspector position in Hazardous Waste Unit of the Office of Environmental Enforcement within the Division of Water and Waste Management. Grievant failed to prove any legal insufficiency in the selection process or that the selection decision was 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 an Environmental Inspector in the Division of Mining and Reclamation.
2. On September 26, 2016, Respondent posted an Environmental Inspector position in Hazardous Waste Unit of the Office of Environmental Enforcement within the Division of Water and Waste Management. The position is responsible for performing hazardous waste regulatory functions by inspecting facilities, investigating complaints, and responding to emergency situations.
3. Respondent appointed Joseph Sizemore and John Killian as the selection committee. Mr. Killian is the direct supervisor of the position and Mr. Sizemore is Mr. Killian's supervisor.
4. In December 2016, the committee interviewed six candidates, including Grievant, for the position.

5. The committee asked each candidate the same questions and both recorded separate notes from the interviews. Both also separately ranked each candidate with a score between one and ten on five criteria: education, enthusiasm, experience, verbal communication skills, and written communication skills. In addition, each candidate was required to provide two short essays regarding why the candidate wanted the position and the candidates' impressions of the duties and responsibilities of the position.

6. Casey Stutler, an external candidate, was the highest-scored candidate and the selection committee's preferred candidate.

7. However, following the selection process, the committee discovered that there was a preference register in effect for external candidates. When state employees are laid off, they are placed on a preference register and state agencies are required to hire eligible persons on the preference register if selecting an outside candidate to fill a position, regardless of that person's score in the selection process. An agency is not required to hire a person on the preference register if selecting an internal candidate.

8. In this case, a previous employee of the Division of Forestry, Matthew Bailey, who was the lowest-scored candidate for the position, was on the preference register.

9. Thus, as the committee could not extend an offer of employment to Mr. Stutler, the highest-rated candidate, the committee decided to select the highest-rated internal candidate, Matthew Smith.

10. The application of the preference register caused some confusion within the agency and during the confusion Grievant understood that the former Division of Forestry employee had been hired, which lead Grievant to file the instant grievance.

11. Grievant was informed during the level one conference that the Division of Forestry employee had not been hired.

12. Grievant received a score of 31 points from Mr. Sizemore and 30 points from Mr. Killian for a total of 61 points. Mr. Smith received a score of 33 points from Mr. Sizemore and 37 points from Mr. Killian for a total of 70 points. Grievant was rated lower than Mr. Smith in all categories other than experience.

13. Mr. Smith holds a Bachelor of Science in Chemistry and a doctorate in Physical Chemistry while Grievant holds a Regents Bachelor of Arts and a masters in Geography.

14. The selection committee rated Mr. Smith much higher than Grievant on education both because he had a higher degree level and because it was in a subject that was directly related to the field.

15. As Grievant was already employed as an Environmental Inspector in another division he was rated much higher than Mr. Smith on experience. Mr. Smith did have directly relevant current experience related to hazardous waste, although not the specific regulations enforced by the position, which prompted Mr. Sizemore to give Mr. Smith an average score for experience. Mr. Killian was not questioned why he rated Mr. Smith only a three in experience when Mr. Smith had hazardous waste experience.

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.*

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 Rehabilitation 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).

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)). "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 argues the selection decision was flawed in that Respondent did not select the best scored candidate, the selection procedure was arbitrary and capricious, and because "Respondent presented no evidence or explanation of how it arrived at the selection herein grieved." Respondent asserts Grievant failed to prove the selection process was flawed in any way or that the selection of Mr. Smith was arbitrary and capricious.

The selection process in this case was somewhat unusual due to the application of a former state employee who was placed on a preference register. The preferred and clearly most qualified candidate was an external candidate, which, due to the existence of a preference register candidate, could not be hired. "When filling vacancies at agencies, appointing authorities shall, for a period of twelve (12) months after a permanent classified employee in another agency has been placed on a preference register due to layoff, give preference to such employee based on tenure and fitness over all but existing classified employees of the agency." W. VA. CODE ST. R. § 143-1-12.4.j (2016). As the preference register candidate was the lowest scored of all the candidates, the selection committee decided they would hire only internally, so that the position could be awarded to the next-best qualified candidate. There was nothing improper or unreasonable in this decision.

Grievant argued the selection procedure was arbitrary and capricious in that there was no correspondence between the interview questions and the factors to be scored and the factor of “enthusiasm” was subjective. A selection committee is only required to use a particular scoring methodology if there is a policy or procedure in place. If Respondent has a hiring policy, it was not provided as evidence. The committee used a rational procedure in that the questions were determined prior to the interviews, the candidates were all asked the same questions, the committee used the same mathematical scoring procedure evaluating criteria relevant to the position, and the committee documented its process. It is not improper for a selection committee to include relevant subjective factors in the hiring process. Therefore, there was no evidence the procedure itself was flawed.

Grievant asserts “Respondent presented no evidence or explanation of how it arrived at the selection herein grieved.” The Grievance Board has found “[t]here is no doubt that it is permissible to base a selection decision on a determination that a particular applicant would be the 'best fit' for the position in question. However, the individuals making such a determination should be able to explain how they came to the conclusion that the successful applicant was, indeed, the best fit.” *Spears v. Dep't of Health & Human Res.*, Docket No. 04-HHR-284 (July 27, 2005). However, this concept does not act to shift the burden of proof as Grievant appears to suggest. Respondent is not required to prove its decision was sound; Grievant must prove the decision was flawed. A Respondent’s inability to explain its selection decision is simply proof that the selection decision was flawed.

In this case, Mr. Sizemore did clearly explain why Mr. Smith was chosen over

Grievant. Mr. Sizemore gave clear reasons why he rated Mr. Smith one point higher for oral communication than Grievant. He articulated that education was a deciding factor in his decision. These are reasonable considerations in a selection decision. While Mr. Killian was less clear in his answers, he explained his memory was impeded in that selection decision had occurred more than two years prior to the grievance hearing, and he did provide reasons for his decision in that Mr. Smith was better qualified due to his education, had more enthusiasm for the job, and had better communication skills.

It is true that Mr. Killian's scoring differed fairly significantly from Mr. Sizemore. However, it differed for both Mr. Smith and Grievant, so this is not evidence of bias. While he rated Mr. Smith much higher in several factors than Mr. Sizemore, he also rated Mr. Smith much lower in experience than Mr. Sizemore. Although Grievant appeared to contend during the hearing that the committee did not adequately consider his prior hazardous waste experience, Grievant did not prove his score on experience should have been higher. Grievant was rated a 9 and 8 on experience and was rated six points and three points higher than Mr. Smith on experience. Grievant admits that his hazardous waste experience did not include the specific hazardous waste regulations the position enforces. Therefore, a perfect score on experience would not be reasonable.

Both Grievant and Mr. Smith were well-qualified applicants. Mr. Smith had better education and Grievant had better experience. Although there was a significant difference in the scoring of Mr. Smith by Mr. Killian and Mr. Sizemore, there is no indication this was due to any bias or flaw in the selection process. Further, even if it could be said that Mr. Killian's scores for Mr. Smith were slightly inflated on a few

categories, the difference in score was great enough that Mr. Smith would still have prevailed.

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 Rehabilitation 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. 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)). "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. "When filling vacancies at agencies, appointing authorities shall, for a period of twelve (12) months after a permanent classified employee in another agency has been placed on a preference register due to layoff, give preference to such employee based on tenure and fitness over all but existing classified employees of the agency." W. VA. CODE ST. R. § 143-1-12.4.j (2016).

5. Grievant failed to prove any legal insufficiency in the selection process or that the selection decision was 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 (2018).

DATE: July 19, 2019

Billie Thacker Catlett
Chief Administrative Law Judge