

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**BOBBY J. SMITH,
Grievant,**

v.

Docket No. 2019-1777-DOT

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Bobby J. Smith, Grievant, filed a grievance against his employer the West Virginia Division of Highways (“DOH”), Respondent on June 17, 2019, protesting a prospective promotion. The grievance form provides:

This grievance is a result of a foreman position being filled by and worker (or person) that was not qualified due to lack of experience and years of services Position was given to a non-experience worker out of retaliation by acting McDowell Co. Supervisor Joseph Ray [sic]

Relief requested:

For the position to be given to me (Bobby J. Smith) because of my 11 yrs. of services with DOH 5 yrs. acting foreman experience and I was given the responsibility of running day shift along all of winter 2018 and back pay [sic]

A hearing was held at level one on July 17, 2019, and the grievance was denied at that level by written decision dated August 7, 2019. Grievant appealed to level two on August 13, 2019, and a mediation session was held on December 17, 2019. Grievant appealed to level three on December 20, 2019. A level three hearing was held on September 28, 2020, via Zoom video conferencing, before the undersigned Administrative Law Judge who appeared from in the Grievance Board’s Charleston office. Grievant appeared *pro se*.¹ Respondent appeared and was represented by Joseph Ray,

¹ “*Pro se*” is translated from Latin as “for oneself” and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black’s Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

Highway Administrator and agency legal counsel Regenia L. Mayne, Esquire. At the conclusion of the level three hearing, the parties were invited to submit written proposed Findings of Fact and Conclusions of Law. Both parties submitted post hearing documents and this matter became mature for decision on or about October 23, 2020, on receipt of the last of these fact/law proposals.

Synopsis

Grievant protests his non promotion for a Crew Chief position by Respondent, Division of Highways. Grievant had in fact been selected, for a time, for the posted position, however, before his selection was completely processed, Grievant informed his supervisor that he did not want the position. The position was subsequently awarded to an alternate candidate. Grievant alleges Respondent's actions were unlawful, unreasonable, or arbitrary and capricious.

Grievant maintains he is entitled to the promotion and requests he be granted the crew chief position. Respondent maintains its actions were reasonable and appropriate in the circumstances of this case. Grievant did not prove that the hiring decision regarding the successful applicant was arbitrary and capricious. Grievant did not establish by a preponderance of the evidence that Respondent acted unlawful, in not awarding him the Crew Chief position. This grievance is DENIED

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Bobby J. Smith, Grievant, is a Transportation Worker 2 Equipment Operator in District Ten (D-10) for the Division of Highways (DOH), Respondent. Grievant has been employed with Respondent since October 16, 2008.

2. Joseph ("Joe") Ray is a Highway Administrator 4 (Maintenance Assistant) who has worked for Respondent DOH since 1994. A position of supervisory responsibility in relation to that of Grievant's duties.

3. In February of 2019 the position of Transportation Worker 3 Crew Chief opened up in McDowell County. Interested employees could forward an application to the address listed in the posting until March 3, 2019. Grievant and several other DOH employees applied for this position.

4. Interviews were conducted in March 2019 of all the applicants. Grievant and five other internal applicants applied for the position.

5. Interviews were conducted by Kristen Shrewsbury, David Harper and Joe Ray. Kristen Shrewsbury is an Administrative Services Manager 1 at D-10. Joe Ray is a Highway Administrator 4 at D-10. At the time of the interviews David Harper was the District Manager.

6. A summary of the interview is written on an "Applicant Evaluation Record." The form is used throughout the DOH during interviews. The "Applicant Evaluation Record" indicates whether the applicant meets, does not meet, or exceeds the minimum requirements for the job posting. Additionally, there is a "comments section" for the interviewers to note pertinent information during the interview.

7. The same questions were asked of all the applicants, and after each interview, each applicant was scored, as either “Does Not Meet Requirements,” “Meets Requirements,” or “Exceeds Requirements.” Administrator Ray Testimony

8. One of the other applicants, not Grievant, scored the highest on the interview criteria, but the position was nonetheless awarded to Grievant, who was considered a very good employee.

9. The paperwork for Grievant’s promotion to the position of Crew Chief commenced. Appropriate and necessary administrative documents were sent to Charleston to be processed. L3 Testimony

10. On April 1, 2019, Grievant was leading a crew and started on WV 161, where several things did not go as planned. Grievant’s Testimony

11. Administrator Joe Ray, as part of his supervising duties, stopped by the jobsite to discuss the progress of the job with Grievant. Grievant declined to talk with Highway Administrator Ray at that time,² he told Grievant that Grievant *would* talk to him later. L3 Testimony

12. Grievant left Burke Mountain to work on several sites. Administrator Ray caught up with him at one of those sites. Grievant told him that he did not want the Crew Chief position; Joe Ray agreed that Grievant was not the appropriate candidate for the job if he felt that way. Administrator Ray L3 Testimony

² At the level three (L3) hearing Highway Administrator Ray was inclined to infer this was insubordinate conduct. At the time of the event Administrator Ray did not “write up” or discipline Grievant for this behavior. The undersigned is not persuaded to determine that Grievant’s conduct was intentionally dismissive to Administrator Ray’s authority or a violation of a directive given by a supervisor.

13. Later, on the Daily Work Report, DOT-12, Grievant confirmed in writing that he had told Administrator Ray he “didn’t want the job.” Ray and Grievant L3 Testimony

14. At the L3 hearing, Grievant seemed to want to change the tone or the words of the conversation, but he acknowledged that he had written what he did on the DOT-

12. Grievant also acknowledged that he had not approached Mr. Ray later to explain or retract his statement or say that he did want the permanent Crew Chief position.

Grievant L3 Testimony

15. Highway Administrator Ray contacted Kristen Shrewsbury, the Administrative Services Manager (ASM) for D-10, and told her to halt the processing of Grievant’s selection for the Crew Chief position. Ultimately an alternative candidate was promoted to the position instead of Grievant. Ray L3 Testimony

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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

The instant grievance matter is not the typical non-selection grievance. Grievant for a time had been selected for the posted Crew Chief position. However, before his promotion was completely processed, Grievant informed Respondent that he did not want the position. See grievance file, e.g., level one and level two testimony of record. The position was subsequently awarded to an alternate candidate.³ Grievant now maintains he is entitled to the promotion and Respondent has acted unlawful, in not awarding him the Crew Chief position.

The Grievance Board recognizes that 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). Therefore, in a selection case, such as this, Grievant “must prove by a preponderance of the evidence that the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision.” *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005). 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. Services*, Docket No. 93-RS-489 (July 29, 1994).

Respondent does not dispute that Grievant is a very good employee and acknowledges that Grievant, for a time, was actually selected for the vacancy. However,

³ The successful candidate meets the identified requirements for the position. While Grievant is of the utmost belief he is more qualified than the individual who ultimately received the promotion, Respondent highlights that the successful candidate had a higher score in the interview process.

ultimately decided to award the position to an alternate choice. Respondent maintains its actions were within its discretion and not unreasonable in the circumstance of this matter.

On April 1, 2019 Grievant was the acting Crew Chief for a patching job on Elkhorn Mountain. Joe Ray is a Highway Administrator who has worked for Respondent for over twenty-five years. Administrator Ray in accordance with one of his numerous duties stopped by the job site to discuss the patching progress and Grievant refused to talk to Mr. Ray due to his frustration with events which had occurred throughout the day with the crew. Administrator Ray said he would come back at a later time, and again Grievant refused to talk to Mr. Ray. Respondent's Exhibits included a Daily Work Report (DOT-12) dated April 1, 2019. It is memorialized on the back of the DOT-12, that Grievant indicated he "didn't want this job." Mr. Ray took Grievant's statement as an indication that Grievant no longer wished to be promoted to the pending permanent crew chief position. Administrator Ray's comprehension was rational and not unreasonable. Grievant acknowledges and admits he told Highway Administrator Ray that he did not want to perform the duties of the Crew Chief position.⁴ Ray contacted Kristen Shrewsbury, the Administrative Services Manager for D-10, and told her to halt the processing of Grievant's selection for the Crew Chief position.

Grievant and several other DOH employees had applied for the Crew Chief position. Before Grievant's promotion was completely processed, Grievant told his

⁴ There are minor deviations in the reported wording of Grievant's statement but it is factually accurate that Grievant verbally indicated he "didn't want this job." Also see Grievant's handwritten confirmation, he out of anger indicated to Administrator Ray, he didn't want the Crew Chief position. See Daily Work Report (DOT-12) dated April 2019.

supervisor that he did not want the position. The position was then awarded to the candidate who had the higher scores in the interview process. Respondent highlights that the individual who ultimately received the promotion meets the requirements for the position and had a higher interview score than Grievant.

Grievant is not happy and frustrated with Respondent. Grievant testified on his own behalf at level one and level two of the grievance process. Grievant tends to verbalize numerous allegations of wrong doing by Respondent and its various agents contending the overall selection process is corrupt, bias, rigged and retaliatory. Grievant is upset and disappointed with Respondent and its failure to promote him to a permanent crew chief position. Grievant is of the opinion that his years of service is not being properly acknowledged by Respondent. The selection process is not perfect, and there is no doubt that within the history of Respondent errors have been made. Nevertheless, in the circumstances of this grievance Grievant is responsible for his own conduct, not empowered to trade upon any and every short coming of the established system to justify his desired relief. Grievant has the burden of proving his grievance by a preponderance of the evidence, he needs to establish wrong doing by Respondent in the fact pattern of this matter. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)). Whether Grievant is entitled of the instant promotion in the circumstances of this grievance is of issue, not whether Respondent or one of its agents are predisposed to alleged systematic bias.

Time on the job, (i.e. seniority) is not the sole factor for a promotion to crew chief. Seniority is recognized as a consideration, but not the primary factor for the selection process. The undersigned is hard pressed to find anything unlawful, unreasonable, or arbitrary and capricious in DOH's decision to award the supervisory position to an alternative candidate after Grievant's communication that he "didn't want the job."

Respondent's decision must be analyzed according to the arbitrary and capricious standard. 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 is 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). 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 authoritarian agency. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). It is not established that Respondent acted arbitrary and capricious in not completing Grievant's prospective promotion.

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). Respondent had a rational basis for selecting an alternative candidate for the position in discussion.

While Grievant's words may have been spoken in anger, as he alleges, he did not later, in a cooler state of mind, try to retract them or express a desire to retain the permanent position of crew leader (prior to the appointment of an alternative candidate days later). Grievant was having a bad day. This is not an unfamiliar concept to any individual who has held a job for any extended length of time. Nevertheless, a worker is still responsible for his actions and conduct during these times. Grievant may have the temperament to be an exceptional crew leader, however in the fact pattern of the instant matter, Grievant choose to express his frustration with workplace stress at the wrong time and at the wrong individual. This is regrettable.

Respondent could have overlooked Grievant's conduct or chose to proceed with Grievant's promotion. Respondent had discretion, but for one reason or another determined Grievant was not, at this time, properly suited for the promotion. Respondent's determination is not clearly wrong. Grievant has been unable to prudently establish unlawful, unreasonable, or arbitrary and capricious conduct of DOH's decision. Respondent acted upon Grievant's stated decision to not take the position. Grievant is not the first, nor will he be the last worker, to regret his take this job and shove it comment. It is not established by a preponderance of the evidence that Respondent abused its discretion. The decision to not finalize Grievant's promotion was not arbitrary and

capricious nor is it found to be legally insufficient or unreasonable. Respondent provided a sensible and rational explanation for not promoting Grievant to the Crew Leader position discussed in this grievance. The decision to offer the position to an alternative employee does not appear to be arbitrary and capricious conduct.

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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides equally, a party has not met its burden of proof. *Id.*

2. The Grievance Board recognizes that 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. Services*, Docket No. 93-RS-489 (July 29, 1994).

3. 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 is 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). 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)). See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

4. 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).

5. "[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*).

6. Grievant has not established by a preponderance of the evidence that Respondent's selection decision(s) in this case were unlawful.

7. Grievant has not proven that Respondent's selection decision in this case was arbitrary and capricious, or clearly wrong.

Accordingly, this 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* 156 C.S.R. 1 § 6.20 (2018).

Date: December 7, 2020

Landon R. Brown
Administrative Law Judge