

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANNY WOLFORD,

Grievant,

v.

Docket No. 2020-0276-CONS

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Danny Wolford, filed three separate grievances at level one of the grievance process against his employer, Respondent, Division of Highways. The first of these grievances was dated August 21, 2019, and stated as follows: “[n]onselection for crew leader.” As relief sought, Grievant asked, “[t]o be made whole in every way including selection with back pay and interest.” Grievant's second statement of grievance was dated August 26, 2019, and stated as follows: “[i]n retaliation for grieving his nonselection as crew leader, Grievant was passed over for designated upgrade to crew leader for the week of August 26-30. As relief sought, Grievant asked “[t]o be made whole in every way including selection with back pay and interest. The third statement of grievance was dated September 3, 2019, and stated as follows: “[n]onselection for crew leader.” As relief sought, Grievant asked “[t]o be made whole in every way including selection with back pay and interest.” These grievances were consolidated at level one by Order issued September 10, 2019.

A level one conference was conducted on October 17, 2019. The grievance was denied by decision issued on January 13, 2020. Grievant's appeal to level two was dated

January 17, 2020. A level two mediation was conducted on June 8, 2020.¹ Grievant appealed to level three on June 18, 2020. A level three hearing was held on August 2, 2021, via Zoom video conferencing, before the undersigned ALJ who appeared from the Grievance Board's Charleston, West Virginia, office.² Grievant appeared in person, *pro se*, and Respondent appeared, by counsel, Rebecca D. McDonald, Esquire, and by its representative, Arlie Matney, Acting District Manager for District 1. The parties appeared from separate locations. This grievance became mature for decision on September 15, 2021, upon receipt of the last of the parties' post-hearing proposals.

Synopsis

Grievant is employed by Respondent as Transportation Worker 3 Equipment Operator. Grievant applied for two Transportation Worker 3 Crew Chief positions, but Grievant was not selected for either position. Grievant argues that he is more qualified than at least one of the people selected to fill the two positions, and that he should have been selected instead. Respondent denies Grievant's claims and asserts it properly filled the Crew Chief positions. Grievant failed to prove his claims by a preponderance of the evidence. Accordingly, the grievance is DENIED.

¹On February 5, 2020, this matter was scheduled for a mediation to be held on May 1, 2020. However, the mediation was continued because of the world-wide COVID-19 pandemic, which halted the in-person operations of state government, including the Grievance Board, in March 2020. This matter was rescheduled to be conducted telephonically on June 8, 2020.

²The level three hearing was originally scheduled to be held on December 10, 2020. Respondent moved to continue that hearing, and for good cause shown, the motion was granted by Order entered December 14, 2020. This grievance was next scheduled to be heard at level three on March 18, 2021. On March 16, 2021, Respondent, by counsel, moved for a continuance of the March 18, 2021, hearing. For good cause shown, this ALJ granted the motion by Order entered March 18, 2021. The level three hearing was then scheduled to be conducted on August 2, 2021.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:³

Findings of Fact

1. Grievant is employed by Respondent as a Transportation Worker 3 Equipment Operator. Grievant has been employed by Respondent since 2008. Grievant has been employed at DOH for approximately thirteen years.

2. Respondent posted two Transportation Worker 3 Crew Chief positions in Mercer County on or about May 13, 2019.

3. Kristen Shrewsbury is an Administrative Services Manager 1 in District 10. She is responsible for all personnel transactions in the district.

4. At the times relevant herein, Joe Ray and Arlie Matney were Highway Administrator 4 Maintenance Assistants employed at DOH. Arlie Matney was assigned to Mercer County in District 10. It is unclear from the record as to where Mr. Ray was assigned.

5. Grievant and three other internal applicants applied for the two Transportation Worker 3 Crew Chief openings in Mercer County.

6. The four applicants were interviewed by a panel comprised of Kristen Shrewsbury, Arlie Matney, and Joe Ray on June 19, 2019.

7. During the interviews, the panel asked each of the four applicants the same set of questions and used Respondent's "Applicant Evaluation Record" (AER) form to evaluate each applicant during the interviews.

³ The record includes the level one decision issued by Level One Grievance Evaluator, Sandra Castillo.

8. The AER is a form designed to serve as a summary of a candidate's interview. Qualification categories for the position, such as education, relevant experience, possess knowledge, interpersonal skills, flexibility/adaptability, and presentability, are listed on the AER and the interviewers are provided boxes to check to indicate thereon whether the candidates "do not meet," "meet," or "exceed" each qualification. Additionally, the AER has a section for "comments," "recommended for position" which a place to mark "yes" or "no," and lines for the three interviewers' signatures.⁴

9. Each applicant was required to submit a completed standard application for the position, copies of which were provided to the interview panel. Some applicants appear to have submitted recommendation letters as well.

10. The panel did not rank or otherwise score the applicants following their interviews. The panel used the "meets," "exceeds," and "does not meet" categories for evaluating applicant qualifications. It appears from a review of the AERs that all applicants met or exceeded the qualifications listed on the form. P.D. was noted to have exceeded in the categories of "Possess Knowledge, Skills, & Abilities" and "Interpersonal Skills." E.H. was noted to have exceeded in the categories of "Relevant Experience," "Possess Knowledge, Skills, & Abilities," and "Interpersonal Skills." Grievant and the other applicant were not noted as "exceeds" in any of the qualification categories.

11. Mr. Matney and Mr. Ray were familiar with the work of the four applicants as they were already employed by DOH in District 10.

⁴ See, Joint Exhibit 1, Applicant Evaluation Record forms for each candidate.

12. The panel further completed a form titled, "Internal Application and Interview Log" on June 19, 2019, on which it listed the four applicants who applied for the two positions, along with some demographic information. The purpose of this document is unknown. It is noted that Ms. Shrewsbury signed it, as did another person whose name cannot be deciphered.

13. After evaluating each applicant and considering their interview performances, the panel unanimously selected P.D. and E.H. for the two positions.⁵

14. While it does not appear that any specific amount of weight was assigned to the applicant interviews, interview performance was a significant factor in the panel's decision-making process.

15. Grievant testified at the level three hearing in his case-in-chief, and called Eugene Allen Thompson as a witness. Grievant was also given the opportunity to question Mr. Matney and Mr. Ray whom Respondent called to testify.

16. Neither party called P.D. or E.H. as witnesses at the level three hearing. Further, neither party called Kristian Shrewsbury or the fourth applicant, whose identity is unknown, to testify.⁶

17. Other than the application packet for the fourth applicant for the position, no other evidence about the fourth applicant, including his or her identity, was presented as evidence at the level three hearing.

⁵ Neither P.D. nor E.H. intervened in this grievance. Given that they are not parties to this action, this ALJ will refer to them by their initials.

⁶ The personal identifying information for all applicants other than Grievant was properly redacted on all exhibits Respondent presented at level three.

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.*

Even though E.H. and P.D. were selected for the two positions, during the level three hearing and in his post-hearing submission, Grievant focused his attention on E.H., rather than P.D. Grievant repeatedly asserted that he is more qualified than E.H., that he had more training and experience than E.H., that he had already been doing the job at issue as a foreman, and that E.H. did not know how to do time sheets. Grievant also asserted that he had more certifications than E.H., and that he recently taught a mowing class that E.H. attended. Grievant also complained that E.H. does not do the job safely, and presented photographs that show E.H. in the back of a DOH truck. When presented with the photograph, Mr. Matney identified E.H. as the person in the truck and testified that what E.H. was doing in that photograph was unsafe. Grievant further alleged that E.H. should not have been selected for the position because he damaged a wash bay that cost DOH thousands of dollars to repair.

Respondent agreed that Grievant is a good worker and that he had been regularly upgraded to take crews out for the past several years when a crew chief was absent. However, Respondent asserted that the panel properly selected E.H. and P.D. for the two

vacant crew chief positions because they were the best candidates for those supervisory jobs. Mr. Matney and Mr. Ray testified that E.H. was selected for the crew chief position, in part, because he had a "great" interview. Mr. Ray also testified that E.H. had a great attitude toward management, showed enthusiasm, and that Mr. Ray had supervised E.H. in the past and remembered his work. Mr. Ray cited issues with Grievant's leadership ability and decision-making skills as reasons why he thought E.H. was a better choice for a management position. Mr. Matney also testified that Grievant needed "guidance" when he was filling in for an absent crew chief, and that he needed assistance with decision making. He further explained that they had to tell Grievant where to go next, instead of Grievant making those decisions and leading the crew on his own. In reviewing the applicant AERs, it is noted that the panel rated E.H. as "exceeds" in relevant experience, possesses knowledge, skills, and abilities, and interpersonal skills. The panel rated Grievant as "meets" in all the qualification factors. The panel also rated P.D. as "exceeds" in possesses knowledge, skills, and abilities and interpersonal skills.⁷

The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. See *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. See *Mihaliak v. Div. of Rehabilitation 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

⁷See, Joint Exhibit 1, Applicant Evaluation Records for the four applicants.

capricious or clearly wrong. See *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994). “Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that he should have been selected for the position, the position should be reposted and a new selection process undertaken.” *Forsythe v. Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009) (citing *Neely v. Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009)).

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. See *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 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 & Human Serv.*, 789 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 & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *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.” *Id.* (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 her judgment for that of [the employer]." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

From the evidence presented, it appears that Respondent views Grievant as a good employee and worker, but determined that his leadership and supervisory skills were not as strong as those of E.H. and P.D. Respondent was filling a permanent, full-time supervisory position. It was reasonable for Respondent to consider the applicants' leadership and supervisory skills, and for such to be a determining factor in its selection decision. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety." *Ball v. Dep't of Transp.*, Docket No. 96-DOH-141 (July 31, 1997); *Mickles v. Dep't of Env'tl. Prot.*, Docket No. 06-DEP-320 (Mar. 30, 2007), *aff'd*, Fayette Cnty. Cir. Ct. Docket No. 07-AA-1 (Feb. 13, 2008). "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 06-RJA-147 (Sept. 29, 2006); *Miller v. Kanawha County Bd. of Educ.*, Docket No. 05-20-252 (Sept. 28, 2005).

Accordingly, this ALJ cannot conclude that Respondent's decision to select E.H. and P.D. was arbitrary and capricious, unreasonable, or otherwise improper. Grievant has failed to prove by a preponderance of the evidence that he was the most qualified applicant for the positions, or that the selection process was flawed. Further, Respondent's decision to prioritize supervision and leadership skills in filling these

positions is a management decision that was not unreasonable, and it violated no laws, rules, regulations, or any known policies. Accordingly, Grievant has failed to prove his claims by a preponderance of the evidence. Therefore, this 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 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. The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *See 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. *See Mihaliak v. Div. of Rehabilitation 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. *See Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994).

4. 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. See *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)).

5. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *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.” *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

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

7. “A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety.” *Ball v. Dep’t of Transp.*, Docket No. 96-DOH-141 (July 31, 1997); *Mickles v. Dep’t of Env’tl. Prot.*, Docket No. 06-DEP-320 (Mar. 30, 2007), *aff’d*, Fayette Cnty. Cir. Ct. Docket No. 07-AA-1 (Feb. 13, 2008). “Management decisions are to be judged by the arbitrary and capricious standard.” *Adams v. Reg’l Jail & Corr. Facility*

Auth., Docket No. 06-RJA-147 (Sept. 29, 2006); *Miller v. Kanawha County Bd. of Educ.*, Docket No. 05-20-252 (Sept. 28, 2005).

8. Grievant failed to prove his claims by a preponderance of the evidence.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: October 28, 2021.



Carrie H. LeFevre
Administrative Law Judge