

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**PAUL DILLON and MATTHEW STURGELL,
Grievants,**

v.

Docket No. 2019-0490-CONS

**DIVISION OF HIGHWAYS,
Respondent,**

and

**RONALD SPAULDING,
Intervenor.**

DECISION

Grlevants, Paul Dillon and Matthew Sturgell, filed this action against their employer, Division of Highways, challenging their non-selection for the position of Transportation Worker 3 Crew Chief for District 2 in 2018. Grlevants seek the position and an award of back pay. Ronald Spaulding was granted intervenor status as a successful applicant on October 22, 2018. A level one hearing was on October 25, 2018, and a decision denying the grievance was issued by letter dated November 19, 2018. A level two mediation session was conducted on March 25, 2019. A level three evidentiary hearing was conducted on February 8, 2021, by Zoom video conferencing before Billie Thacker Catlett, Chief Administrative Law Judge. This case was reassigned to the undersigned for administrative reasons on April 8, 2021. Girevants appeared *pro se*. Intervenor appeared *pro se*. Respondent appeared by its counsel, Jennifer J. Meeks, Legal Division. This matter became mature for consideration upon receipt of

Respondent's Fact/Law proposals on March 9, 2021. The other parties did not file proposals.

Synopsis

Respondent posted a total of three vacancies for Transportation Worker 3 Crew Chief in two separate postings. The vacancies were for Mingo County. Grievants and six other internal and four external applicants applied for the positions. Neither Grievant was recommended nor selected for any of the vacant positions. Grievants argue that the hiring process was improper, and their non-selection was arbitrary and capricious because they were the most qualified candidates. Both Grievants are experienced and capable employees with good employment records. However, they did not prove that any flaws occurred in the hiring process. Grievants did not prove that the reasons for selecting the successful applicants were not reasonably related to the position being filled.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Paul Dillon is employed in Division of Highways' District 2 as a Transportation Worker 2 and has employed since 2008. Mr. Dillon was one of twelve people interviewed in August 2018 for the position of Transportation Worker 3 Crew Chief.

2. Matthew Sturgell is employed in Division of Highways' District 2 as a Transportation Worker 3 Equipment Operator and has been employed since 2012. Mr. Sturgell was one of the twelve people interviewed for the position of Transportation Worker 3 Crew Chief.

3. Grievants were not selected for the position.

4. Intervenor, Ronald Spaulding, was employed in District 2 as a Transportation Worker 2 Equipment Operator in 2018. Mr. Spaulding was selected for one of the Crew Chief positions.

5. Jeremy Adkins and Tennis Scott Wilson were selected for the other Crew Chief positions. Both men were external candidates.

6. In August 2018, interviews were held in District 2 to fill three Crew Chief positions in Mingo County. Twelve persons were interviewed for the Crew Chief positions.

7. Crew Chief is a supervisory position, leading a crew of workers to perform maintenance and repair of highways; being accountable for time, materials and equipment; determining assignments and materials needed to complete projects; and interacting with the traveling public and citizens.

8. Human Resources Manager, Kathleen Dempsey, was part of the District 2 interview team in 2018 for the positions in question. Ms. Dempsey has participated in interviews, and in overseeing completion of documentation of the hiring process.

9. Highway Administrator 2, Ray Messer, is responsible for operation activities in Mingo County. Mr. Messer was part of the interview team in 2018 for the positions in question. Mr. Messer has conducted many interviews in his forty years of employment with the Division of Highways.

10. Highway Administrator 1, Michael Spry, participated in the interviews for the three Crew Chief positions. Mr. Spry has been employed with the Division of Highways since 1994, and has often participated in the interview process.

11. Highway Engineer, Edward Armbruster, has been employed with the Division of Highways since 1994. Mr. Armbruster has participated in numerous interviews, and was part of the interview team for the positions in question.

12. Highway Engineer, Patrick Hassett, has been employed at the Division of Highways since 1995. Mr. Hassett has been involved with the interview process many times. Mr. Hassett was part of the interview team for the hiring of the Crew Chief positions.

13. The interview team interviewed all twelve applicants, using the same list of interview questions, and the same skills assessment with each candidate. Notes were made by each interview team member regarding each applicant's answers to interview questions.

14. A summary of the interview and evaluations of each candidate is written and signed by each member of the interview team, representing a unanimous determination of whether the candidate was recommended for the job.

15. All candidates were rated on the same qualifications that were titled: Education; Relevant Experience; Knowledge; Skills and Abilities; Interpersonal Skills; Flexibility/Adaptability; and Presentability. Skills assessment involving certain aspects of the Crew Chief responsibilities were rated under Optional Measures.

16. The interview team noted that Mr. Spaulding "meets" qualifications for six criteria, and "exceeds" for the remaining three criteria. All interviewers noted that they were impressed with his enthusiasm for the job, and his interest in working constructively with the community.

17. The interview team noted that Mr. Adkins “meets” all but three qualification criteria, and “exceeds” for the remaining criteria. The interview team noted that Mr. Adkins possessed excellent experience relevant to the position.

18. The interview team noted that Mr. Wilson “meets” qualifications in all but three criteria, and for those three he “exceeds” qualifications. The interview team was impressed that Mr. Wilson had researched the position prior to the interview.

19. The interview team noted that Mr. Dillon “meets” qualifications in all criteria. No comments were recorded. Mr. Dillon was not recommended for the position.

20. The interview team noted that Mr. Sturgell “meets” qualifications in six criteria, “exceeds” in two, and “does not meet” in two. Mr. Sturgell was not recommended for the position.

21. Mr. Dillon did have experience in temporary upgrades as a Crew Chief. However, for much of that time Mr. Dillon was only responsible for timekeeping, and not for assigning work to employees or other supervisory duties.

22. Grievants were not more qualified for the Crew Chief positions than Mr. Spaulding, Mr. Adkins and Mr. Wilson.

Discussion

This grievance does not involve a disciplinary matter. Consequently, Grievants bear the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

Grievants argue that they were the most qualified candidates and their non-selection was arbitrary and capricious because it failed to follow proper procedures for filling vacancies. 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); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

Mr. Dillon argues that Intervenor and other successful applicants were 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). It is undisputed that many of the applicants were known to some of the interview team, including Grievants. All of the interview team opined that there was no favoritism involved in the selection process. The candidates were rated on the basis of their qualifications and the quality of the interviews. Their conclusions are supported by the fact that the decisions on which candidates to recommend for the positions were unanimous. Grievants presented no evidence that the selection process was based on any unfair criterion. When a supervisory position, such as Crew Chief, is being filled, it is appropriate for the employer to consider factors such as personality traits and abilities which are necessary to successfully motivate and supervise employees. *Pullen v. Dep’t of Transp.*, Docket No. 06-DOH-121 (Aug. 2, 2006).

Grievants also argue that Respondent failed to consider Grievants’ seniority. Grievants failed to prove Respondent was required to consider seniority. The Grievance Board has noted that “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.” *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019). Furthermore, if there is a policy requiring the consideration of seniority, Grievants must prove its existence which they did not. *Id.* Grievants did not submit to the interview team any evidence of seniority or experience, beyond what was in the application.

The successful applicants had many years of experience building and maintaining roads, supervising employees, and running equipment. While Grievants argue that only experience working as a Division of Highways’ employee should be counted, they cite no statute, rule or policy in support of the assertion. The successful applicants’ private sector experience was comparable to what an applicant would get within the Division of Highways.

The record supports a finding that the positions were properly filled. The interview team reviewed the same material for each candidate, asked each candidate the same list of questions, had each candidate follow the same instructions to fill out the skills assessments, and ranked each candidate on the same qualifications. The successful applicants were qualified, and did well on their interviews, impressing the interview team with their confidence and ability to do the job. The interview team found that the successful applicants’ responses were more specifically related to their experience and demonstrated more leadership potential. The agency relied on criteria intended to be considered for filling the positions, so its decisions were not arbitrary and capricious.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. This grievance does not involve a disciplinary matter. Consequently, Grievants bear the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

2. Grievants did not prove by a preponderance of the evidence that Respondent violated W. VA. CODE § 29-6-10 and the Division of Personnel Administrative Rule which implements that statute, (or any other law or policy), by not giving proper consideration to their seniority in the selection process. *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

3. 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).

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 v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

5. 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); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

6. Grievants did not prove by a preponderance of the evidence that any flaws in the selection process influenced the outcome of the process.

7. Grievants did not prove by a preponderance of the evidence that the selection decision concerning the vacancies in question were arbitrary and capricious.

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: April 16, 2021

Ronald L. Reece
Administrative Law Judge