

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JACK A. JARRELLS,
Grievant,**

v.

Docket No. 2019-1508-CONS

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Grievant, Jack A. Jarrells, is employed by Respondent, Division of Highways. On January 24, 2019 and April 22, 2019 Grievant filed three separate grievances protesting his non-selection for three Transportation Worker 3 Equipment Operator positions. The grievances were consolidated into the above-styled action at level one of the grievance process by order entered April 26, 2019. For relief, Grievant seeks instatement into a Transportation Worker 3 Equipment Operator position.

Following the July 29, 2019 level one hearing, a level one decision was rendered on August 16, 2019, denying the grievance. Grievant appealed to level two on August 22, 2019. Following mediation, Grievant appealed to level three of the grievance process on November 5, 2019. A level three hearing was held on March 19, 2021, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and was represented by counsel, Sarah Hodges, WV School Service Personnel Association. Respondent appeared by Kathleen Dempsey and was represented by counsel, Jesseca R. Church. This matter became mature for decision on April 16, 2021, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").

Synopsis

Grievant is employed by Respondent, Division of Highways, as a Transportation Worker 2. Grievant protests his nonselection for one of three Transportation Worker 3 Equipment Operator positions. Grievant failed to prove the selection decision was arbitrary and capricious. Although there was a procedural error in the selection process, the error was harmless. 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, Division of Highways, as a Transportation Worker 2.
2. In September 2018, as part of a mass hiring event, Respondent posted multiple positions, including the three vacancies in the Transportation Worker 3 Equipment Operator ("TW3EQOP") posting at issue here.
3. Participants in the mass hiring event could submit one application and have a single interview for all positions to which they had applied.
4. In addition to the TW3EQOP positions at issue in this grievance, Grievant also applied for a Transportation Worker 3 Crew Chief ("TW3CRCH") position. Grievant was not selected for the TW3CRCH position but did not grievance his nonselection to that position.
5. Nine internal applicants applied for the three TW3EQOP position vacancies.
6. Human Resources Manager Kathleen Dempsey and Maintenance Assistant Michael Spry conducted the interviews for all candidates.

7. The successful candidates were interviewed from the TW3EQOP questionnaire while Grievant was interviewed from the TW3CRCH questionnaire.

8. Grievant was not asked questions regarding eight, nine, and ten speed transmission experience while the successful candidates were not asked questions about mower and roller experience. Grievant was also not asked the question, "What are some things in a job that are important to you and why?"

9. Ms. Dempsey and Mr. Spry each took notes on the interview questions form and together completed an *Application Evaluation Record* for each candidate.

10. In scoring each candidate on the *Application Evaluation Record*, Ms. Dempsey and Mr. Spry considered the applications and the interviews.

11. Ms. Dempsey and Mr. Spry ultimately selected Dwayne Cox, Todd Dillon, and Joshua Farley to fill the three TW3EQOP vacancies.

12. The *Application Evaluation Record* evaluated the following qualifications as either meets, exceeds, or does not meet: Education; Relevant Experience; Possess Knowledge, Skills & Abilities; Interpersonal Skills; Flexibility/Adaptability; Presentability; and Overall Evaluation.

13. Ms. Dempsey and Mr. Spry rated Mr. Farley as "exceeds" overall and Mr. Cox and Mr. Dillon as "meets" overall with several categories of each rated as "exceeds." No successful candidate had any ratings of "does not meet."

14. Ms. Dempsey and Mr. Spry rated Grievant as "meets" overall but rated him as "does not meet" in Interpersonal Skills and Flexibility/Adaptability.

15. Ms. Dempsey and Mr. Spry rated all the successful candidates as "exceeds" in Relevant Experience and rated Grievant as only "meets."

16. Ms. Dempsey considered Grievant's interview to be poor, stating that the interview was "difficult" as she felt she had to "pull" answers out of Grievant. Grievant's response regarding working with others was that Grievant was the leader and they would do what he asked, which came across as arrogant. Ms. Dempsey and Mr. Spry had concerns with Grievant's fit in the position as it is considered a lead worker position.

17. In contrast, the successful candidates all presented themselves well in the interviews, providing more complete answers to questions, and all spoke regarding team-building or working as a team.

18. All candidates possessed significant equipment operation experience.

19. Ms. Dempsey and Mr. Spry agreed that Mr. Cox, Mr. Dillon, and Mr. Farley were the top three candidates and recommended their hire to District Manager Scott Eplin.

20. Mr. Eplin reviewed the recommendations and approved the candidates for hire.

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.*

Grievant asserts the selection decision was arbitrary and capricious as Ms.

Dempsey could not provide adequate explanation for why she selected the successful candidates and the selection decision was based too heavily on the interview performance.¹ Respondent asserts the selection decision was proper and that the candidates selected for the positions were the best fit based on properly-considered criteria.

Grievant questions Ms. Dempsey's testimony regarding the interview process. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Ms. Dempsey's demeanor was professional and appropriate. Her answers to

¹In its PFFCL, Grievant also argued Respondent failed to follow its own policy but as the policy was not entered into evidence, that allegation will not be further addressed.

questions were forthcoming and she appeared to have a good recollection of events. Although not addressed in his PFFCL, in his testimony, Grievant asserts some bias against him by Ms. Dempsey due to his prior testimony against Ms. Dempsey in a grievance filed by another employee. As support, Grievant cited an instance in which he refused to sign a policy acknowledgment form regarding workplace security and Ms. Dempsey requested Grievant provide a written statement regarding why he refused to sign. Grievant suffered no disciplinary action for his refusal to sign the policy or for his refusal to provide a written explanation of his refusal to sign. Grievant provided very little detail regarding his allegation of bias. He did not provide the date upon which he testified, the specifics of his testimony, or what issue had been grieved. He made no allegation of bias against Mr. Spry, who also determined Grievant was not the best candidate and signed the *Application Evaluation Record*. Grievant's allegation of bias is unsupported. Ms. Dempsey is credible.

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).

“[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*). “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 Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Grievant asserts Ms. Dempsey was unable to explain her selection decision satisfactorily. "There 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). Contrary to Grievant's assertion, Ms. Dempsey did clearly explain why she believed the successful candidates were a better fit for the position than Grievant. She recognized Grievant's experience but explained that all the candidates possessed significant relevant experience. She explained that the TW3EQOP is considered a lead worker position, and that she preferred the successful candidates' emphasis on working as a team. She contrasted Grievant's answer that he was the boss and they would work for him as arrogant and inappropriate. Ms. Dempsey also explained her concern with Grievant's demeanor during the interview describing the difficulty of getting answers from him. Grievant's perceived attitude towards the selection process is a relevant consideration.

Although Grievant disputes the experience attributed to the successful candidates, Respondent's determination of experience is supported by the interview notes and applications. Grievant and the successful candidates all had significant experience on multiple pieces of equipment but, overall, it appears the successful candidates had more experience than Grievant. It appears Grievant asserts he has more experience, at least partly, because he is not counting the experience the successful candidates had from working outside of the agency. There is nothing improper in Respondent considering outside experience in its selection decision.

Grievant did demonstrate there was a procedural flaw in the selection process in the questions asked of the candidates. Because Respondent conducted one interview for consideration for multiple positions, the candidates were not all asked the same questions in the interview. While adding additional questions regarding the TW3CRCH position to the TW3EQOP questionnaire would have been of little concern in this selection decision, there were questions the successful candidates were asked that Grievant was not asked. The successful candidates were interviewed from the TW3EQOP questionnaire while Grievant was interviewed from the TW3CRCH questionnaire. Grievant was not asked questions regarding eight, nine, and ten speed transmission experience while the successful candidates were not asked questions about mower and roller experience. Grievant was also not asked the question, "What are some things in a job that are important to you and why?"

Failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995). In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as "harmless error." *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS- 023/040 (Mar. 25, 1999). See generally *Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd. of*

Educ., Docket No. 2008-0197-PLEED (Jan. 31, 2008); *Delauder v. Dep't of Health & Human Ser.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

The procedural error in this case is harmless. Grievant did not argue that he had eight, nine, and ten speed transmission experience that was not considered that would have changed the outcome. Grievant and the successful candidates all had many years of experience on multiple pieces of equipment and Mr. Cox and Mr. Dillon both had more years of highways experience overall. Although Mr. Farley had only been employed with DOH for four years, he had significant equipment experience from prior employment and significantly more total experience on the relevant equipment than Grievant. Respondent's determination that the successful candidates had more relevant experience was not unreasonable and was not impacted by the failure to ask Grievant the eight, nine, and ten speed transmission experience question. As to the other question, Grievant was instead asked, "What have you done in past situations to contribute toward a teamwork environment?" As Ms. Dempsey and Mr. Spry found an emphasis on teamwork an important consideration for the position, the question Grievant was asked actually afforded him a better opportunity to provide this information than the successful candidates.

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 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).

3. 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).

4. “[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*). “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 Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

5. “There 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).

6. Failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dep’t of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17,

1995). In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as “harmless error.” *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS- 023/040 (Mar. 25, 1999). See generally *Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd. of Educ.*, Docket No. 2008-0197-PLEED (Jan. 31, 2008); *Delauder v. Dep’t of Health & Human Ser.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

7. Grievant failed to prove the selection decision was arbitrary and capricious. Although there was a procedural error in the selection process, the error was harmless.

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: May 28, 2021

Billie Thacker Catlett
Chief Administrative Law Judge