RONNIE ADKINS,

Grievant,

v.

DOCKET NO. 02-DOH-291

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Ronnie Adkins, filed this grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("DOH") on March 19, 2002:

> I signed for a crew leader position that was posted. I feel that I should have received this position with the number of years of service and experience with this position.
>
> Relief sought: I would like to be rewarded the position of crew leader that I feel was due me with 21 years of experience.

The grievance was denied at level one by Grievant's supervisor, Curley Belcher, and at level two by James Roberts. A level three hearing was held on July 16, 2002, and the grievance was denied by Hearing Examiner Brenda Craig Ellis, Esq., by decision dated September 6, 2002. Grievant appealed to level four on September 11, 2002, and a level four hearing was held in the Grievance Board's Charleston, West Virginia, office on November 12, 2002. This case became mature on December 12, 2002, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant wasrepresented by Kevin D. Church, AFSCME, and DOH was represented by Barbara L. Baxter, Esq.

SUMMARY OF EVIDENCE

Level Three Joint Exhibits

Ex. 1 -

Ronnie Adkins' application for TCCMain, interview questions, interview checklist and evaluation records, and employment history.

Ex. 2 -

Ronnie Adkins' Employee Performance Appraisal for 2001.

Ex. 3 -

Ronnie Adkins' Employee Performance Appraisal for 1999.

Ex. 4 -

Ronnie Adkins' Employee Performance Appraisal for 2000.

Ex. 5 -

Herman Johnson's application for TCCMain, interview questions, interview checklist and evaluation records, and employment history.

Ex. 6 -

Herman Johnson's Employee Performance Appraisal for 1999.

Ex. 7 -

Herman Johnson's Employee Performance Appraisal for 2000.

Ex. 8 -

Herman Johnson's Employee Performance Appraisal for 2001.

Ex. 9 -

Weekly Vacancy Report for the TCCMain position in Logan County.

Level Four Exhibits

None.

Testimony

Grievant testified in his own behalf, and presented the testimony of Carl Belcher and James Roberts. DOH presented the testimony of James Roberts, and Carl Belcher.

Based upon a review of the testimony and exhibits in their entirety, I find the following facts have been established by a preponderance of the evidence.

FINDINGS OF FACT

1. DOH posted a position vacancy for a Transportation Crew Chief Maintenance position ("TCCMain") for Logan County in District Two.

2. Grievant is a Transportation Worker III, Equipment Operator, and has been employed by DOH for 22 years. 3. Herman Johnson was a Transportation Worker II, Equipment Operator, and has been employed by DOH for 7 years.

4. Grievant and Mr. Johnson applied for the TCCMain position in Logan County.

5. Carl ("Curley") Belcher, Logan County Administrator, and James Roberts, Administrative Services Manager, conducted interviews on December 18, 2001.

6. Mr. Johnson had been placed in the acting position of TCCMain for several months prior to the selection for the permanent position.

7. Grievant had served in the TCCMain position off and on over the years as needed.

8.

The TCCMain position had been vacant for approximately one year.

9. Grievant was on Workers' Compensation leave during the time period when Mr. Belcher was seeking a temporary replacement from January to approximately October, 2001.

10. The same questions were asked of each of the applicants during the interview.

11. The interviewers reviewed the application of each of the applicants. Evaluations were not reviewed. The applicants' use of leave time was not reviewed.

12. The deciding factor for both of the interviewers in their decision to recommend Mr. Johnson was that he was in the position in an acting capacity, and his performance in that role was good.

DISCUSSION

In non-disciplinary matters the grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways,Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant alleges he should have been selected for the TCCMain position because, all other things being equal, he had greater seniority than the successful applicant, and also because DOH failed to consider performance evaluations and other recorded measures of performance in making the selection. Grievant also alleges the successful applicant received the position in question as a result of favoritism.

In adjudicating selection challenges for classified civil service positions, this Grievance Board has stated: "An agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary and capricious or clearly wrong." Lilly v. W. Va. Dept. of Tax & Revenue, Docket No. 95-T&R-576 (Apr. 4, 1996). See Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). Further, the grievance procedure is not intended to serve as a "super interview" for unsuccessful job applicants, providing instead for a review of the legal sufficiency of the selection process. Ward v. Dept. of Transp., Docket No. 96-DOH-184 (July 24, 1997); Thibault, supra. See also Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 16, 1989).

Unless proven arbitrary or capricious or clearly wrong, an agency decision made by appropriate personnel as to which candidate is most qualified for selection or promotion will be upheld. Shull v. Dept. of Health & Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998); Ashley v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995). Generally, an agency's action is arbitrary and capricious if the agency did not rely on the factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to adifference of view. Shull, supra; Sheppard v. W. Va. Dept. of Health & Human Resources, Docket Nos. 97-HHR-186/187 (Dec. 29, 1997).

DOH is required to abide by the provisions of the Administrative Rules promulgated by the state Division of Personnel in making promotions and other incidents of covered employment. The Division of Personnel's Administrative Rule Section 15 outlines in pertinent part that:

> The appointing authority *shall* consider performance evaluations as well as other

> recorded indicators of performance in determining salary advancements and in making promotions, demotions, and dismissals (emphasis added).

Mr. Belcher testified that he had worked with both applicants for a long period of time, and was aware of their performance. In fact, Mr. Belcher completed both applicants' performance evaluations for the past three years. Mr. Roberts testified that he relied on Mr. Belcher's knowledge of the applicants, and simply went with his recommendation. Thus, Grievant's allegation that the interviewers did not consider performance evaluations is not true, as Mr. Belcher had first-hand knowledge of the evaluations and the applicants' performance.

However, Mr. Belcher also testified that the sole reason he recommended Mr. Johnson for the TCCMain position was because he had been serving in that capacity as acting supervisor, and at the time he offered his employees the opportunity to serve as acting supervisor, Grievant was on Workers' Compensation. He acknowledged that he rated Grievant higher than Mr. Johnson on performance evaluations. He also acknowledged that, had Grievant been working at the time he offered his employees theopportunity to serve as acting TCCMain, he would have given the job to Grievant, and that Grievant would have, more likely than not, been hired for the permanent job.

Favoritism is defined by W. Va. Code § 29-6A-2(h) as, “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” In order to establish a prima facie case of favoritism, Grievant must establish the following:

(a)

> that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

> that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c)

> that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Frantz v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999); Blake v. W. Va. Dep't of Transp., Docket No. 97-DOH-416 (May 1, 1998). See McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). If Grievant establishes a prima facie case of favoritism, DOH may rebut this showing by articulating a legitimate reason for its action. However, Grievant can still prevail if he can demonstrate that the reason proffered by respondent was mere pretext. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Grievant contends Mr. Johnson received the TCCMain position because he was in an acting role at the time of the hiring, an opportunity not presented to Grievant. However, at the time Mr. Belcher offered his employees the opportunity to take the acting role,Grievant was on Workers' Compensation. The only employee to accept the offer at the time was Mr. Johnson. When Grievant returned to work, Mr. Belcher had no obligation to offer Grievant the opportunity to act as TCCMain before making a decision on the permanent position, and his failure to do so does not result in favoritism being shown to Mr. Johnson.

Nevertheless, the undersigned concludes that the evidence overwhelmingly demonstrates that had Grievant not been on Workers' Compensation at the time the acting position was offered, he would have been given it, and consequently, based on Mr. Belcher's testimony, would have been hired for the permanent position. This evidence points to an arbitrary decision on the part of the interviewers, although there is no evidence of any ill-will towards Grievant. Based on Mr. Belcher's testimony, it appears that whoever might have accepted the opportunity to work as acting supervisor would have been given the permanent job. This flies in the face of the Administrative Rules, though, and negates any consideration of performance evaluations, merit, seniority, or any other recorded measures of performance. While seniority is not normally a determining factor in awarding state jobs, in a case where everything else is equal, it can be used in making an employment decision. In this case, not only was Grievant more senior than Mr. Johnson, he had better performance evaluations, and was regarded as a good employee by Mr. Belcher. Based on the evidence and testimony, it appears the decision to hire Mr. Johnson, while well-meaning, was arbitrary, and Grievant has proven that he would have received the job but for his being on Workers' Compensation at the time the acting position was filled, he would have received the permanent TCCMain position.

CONCLUSIONS OF LAW

1. In non-disciplinary matters the grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. In adjudicating selection challenges for classified civil service positions, this Grievance Board has stated: "An agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary and capricious or clearly wrong." Lilly v. W. Va. Dept. of Tax & Revenue, Docket No. 95-T&R-576 (Apr. 4, 1996). See Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

3. The grievance procedure is not intended to serve as a "super interview" for unsuccessful job applicants, providing instead for a review of the legal sufficiency of the selection process. Ward v. Dept. of Transp., Docket No. 96-DOH-184 (July 24, 1997); Thibault, supra. See also Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 16, 1989).

4. Unless proven arbitrary or capricious or clearly wrong, an agency decision made by appropriate personnel as to which candidate is most qualified for selection or promotion will be upheld. Shull v. Dept. of Health & Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998); Ashley v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995).

5. Generally, an agency's action is arbitrary and capricious if the agency did not rely on the factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Shull, supra; Sheppard v. W. Va. Dept. of Health & Human Resources, Docket Nos. 97-HHR-186/187 (Dec. 29, 1997).

6. DOH is required to abide by the provisions of the Administrative rules promulgated by the state Division of Personnel in making promotions and other incidents of covered employment. The Division of Personnel's Administrative Rule Section 15 outlines in pertinent part that:

> The appointing authority *shall* consider performance evaluations as well as other recorded indicators of performance in determining salary advancements and in making promotions, demotions, and dismissals (emphasis added).

7. Favoritism is defined by W. Va. Code § 29-6A-2(h) as, “unfair treatment of an employee as

demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of favoritism, Grievant must establish the following:

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8. Grievant has failed to establish that DOH did not abide by the Division of Personnel's Administrative Rule, or that it engaged in favoritism.

9. Grievant has proven by a preponderance of the evidence that DOH's decision to hire Mr. Johnson for the permanent TCCMain position was arbitrary and capricious, and that he should have been offered the position.

Accordingly, this grievance is **GRANTED**, and DOH is hereby **ORDERED** to instate Grievant into the subject TCCMain position, and compensate him in the form of all backpay, benefits, and interest, to which he is entitled, from the date the position was filled up to the date he is effectively instated

into the position.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: February 10, 2003