TIMOTHY FERRELL,

Grievant,

v. **DOCKET NO. 04-DOH-240**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Timothy Ferrell ("Grievant") initiated this proceeding on June 12, 2003, challenging his non-selection for the position of Highway Equipment Supervisor I ("HESI"). The grievance was denied at level one on June 17, 2003, and at level two on June 23, 2003. A level three hearing was conducted on January 29, 2004, and the grievance was denied in a decision dated April 29, 2004. Grievant appealed to level four on May 7, 2004. (See footnote 1) A hearing was held in the Grievance Board's office in Elkins, West Virginia, on November 17, 2004. Grievant represented himself, and Respondent was represented by counsel, Barbara Baxter. This matter became mature for consideration at the conclusion of that hearing.

The following facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") since 1986. His current position is Highway Equipment Specialist. 2. On December 3, 2002, DOH's Equipment Division posted a job vacancy for a HESI position.

3. There were twelve applicants for the position, including Grievant.

4. The classification specification for HESI states that this position supervises "employees in the technical function related to repair and maintenance of vehicles or heavy equipment used in highway construction and maintenance." This position is designated as a "working supervisor" who

oversees the functional duties of the equipment unit. Duties include supervision of mechanics and equipment operators in the repair and maintenance of vehicles and equipment, schedule and review of work assignments, supervision of a parts and supplies inventory, ensuring compliance with equipment management and preventive maintenance systems, and assistance in the development of equipment specifications and maintenance schedules.

5. The applicants for the position were interviewed by Donald Weese, HES2 in Fleet Planning, and Robert Andrews, Director of the Equipment Division.

6. All applicants were asked the same questions, including several questions related to a schematic drawing, which were designed to assess their technical knowledge of equipment with which they would be working in this position.

7. Todd Campbell was the successful applicant for the position. He had been employed by DOH as a Mechanic III since 1999, and had been an Equipment Operator II in 1998. Prior to that time, he had been employed in the private sector as a mechanic and as the owner of an automotive repair shop. He also had several years of experience as a mechanic for an oil and gas drilling company and a trucking company. Mr. Campbell had numerous certifications from 2000, 2001, and 2002, including several national mechaniccertifications, and he only lacked two tests from being a master mechanic. He also had certifications as a state inspector, in refrigerants, for air brakes, and as a welder.

8. Grievant's most recent position with DOH has been as a training instructor as the Equipment Division's Training Academy. He also worked for approximately twelve years as an inventory manager for DOH's equipment yard. Grievant had obtained some heavy equipment training in the 1980's, and also had a national certification at that time, which had never been updated.

Discussion

In a selection case such as this, Grievant's burden is to demonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Surbaugh v. Dep't of Health and Human Serv*., Docket No. 97-HHR-235 (Sept. 29, 1997). His claim must be proven by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claims are more likely valid than not. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-

486 (May 17, 1993).

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). This 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. *Skeens-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, supra*.

“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." *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. *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 her judgment for that of a board of education." *Trimboli*, *supra*; *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Grievant contends that, because of his numerous years working with DOH, he should have been selected for this position. He also contended at level three that the questions related to the schematic drawing were improper, and, at level four, argued that Mr. Campbell's certifications should not have been considered superior to his own.

Mr. Weese testified that the questions related to the schematic drawing were onlyweighed as about one tenth of the overall interview process for each applicant. He also explained that Mr. Campbell's selection was based largely upon the recency of his certifications and, most importantly, the fact the he was very close to being a nationally- accredited “master mechanic.” By comparison, Grievant's limited certifications were quite out of date, and were not considered to be as pertinent to

the position in question.

Additionally, although not cited by the parties, the undersigned Administrative Law Judge will take judicial notice of the legal guidelines which DOH must apply when comparing candidates. *See Ward v. Dep't of Transp./Div. of Highways*, Docket No. 96- DOH-184 (July 24, 1997). W. Va. Code § 29-6-10(4) states:

> For promotions within the classified service which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination, when such examination is practicable. An advancement in rank or grade or an increase in salary beyond the maximum fixed for the class shall constitute a promotion. When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit or have the benefit withdrawn, as the case may be. When an employee classified in a secretarial or clerical position has, irrespective of job classification, actual job experience related to the qualifications for a managerial or supervisory position, the division shall consider the experience as qualifying experience for the position. The division in its classification plan may, for designated classifications, permit substitution of qualifying experience for specific educational or training requirements at a rate determined by the division.

(Emphasis added.)

Additionally, as cited in the Division of Personnel's Administrative Rules at Section 2. "Preamble":

> The general purpose of the Division of Personnel is to attract to the service of this State personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, removal, discipline, classification, compensation, and welfare of its employees, and other incidents of state employment. All appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness.

Further, as cited in the Division of Personnel's Administrative Rules at Section 1.1 (a), "Method of Making Promotions":

> In filling vacancies, appointing authorities shall make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. Whenever practical and in the best interest of the service, an appointing authority may fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the classified service based on demonstrated capacity and quality and length of service.

(Emphasis added).

Especially when a position involves knowledge and abilities of a technical nature, it is of the utmost importance that an employer's substantial discretion in these matters must not be disturbed, absent evidence that its decision was unreasonable. The evidence indicates that all applicants were asked the same questions during the interviews and that all information solicited was relevant to the duties of the position. With respect to Mr. Campbell's certifications and training, it was well within DOH's discretion to determine that these factors made his qualifications superior to those of all other applicants for this particular job.

When a grievant and a successful applicant meet the minimum qualifications for the job, but one applicant is more qualified than the grievant, the qualifications are not substantially equal, and seniority need not be considered. *Mowery v. W. Va. Dep't ofNatural Res*., Docket No. 96-DNR-218 (May 30, 1997). "The employer retains the discretion to discern whether one candidate has superior qualifications than another, without regard to seniority as a factor." *Lewis v. W. Va. Dep't of Admin*., Docket No. 96- DOA-027 (June 7, 1996). *See Board v. Dep't of Health & Human Res*., Docket No. 99- HHR-329 (Feb. 2, 1999). In the instant case, Grievant has failed to prove that DOH's determination that Mr. Campbell was more qualified for this position was arbitrary and capricious or unreasonable under the circumstances presented.

Consistent with the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. In a selection case, Grievant's burden is to demonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Surbaugh v. Dep't of Health and Human Serv*., Docket No. 97-HHR-235 (Sept. 29, 1997).

2. “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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

3. When a grievant and a successful applicant meet the minimum qualifications for the job, but one applicant is more qualified than the grievant, the qualifications are not substantially equal, and

seniority need not be considered. *Mowery v. W. Va. Dep't of Natural Res*., Docket No. 96-DNR-218 (May 30, 1997). 4. Grievant has failed to prove by a preponderance of the evidence that Respondent's determination that Todd Campbell was the most qualified applicant for the position in question was arbitrary and capricious, clearly wrong, or unreasonable.

Accordingly, this grievance is **DENIED**.

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.

Date: December 20, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Apparently, the Grievance Board did not receive this grievance form, and Grievant re-submitted his grievance on June 22, 2004, after which time it was forwarded to the undersigned for scheduling of a hearing.