MICHAEL JORDAN,

Grievant,

v. **Docket No. 04-DOH-202**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Michael Jordan ("Grievant") initiated this proceeding on September 4, 2003, challenging his non-selection for a craftworker position. After denials at levels one and two, the grievance was heard at level three on March 25, 2004. The grievance was denied in a written level three decision on May 17, 2004. Grievant appealed to level four on May 24, 2004. A hearing was conducted in Elkins, West Virginia, November 17, 2004. Grievant was represented by counsel, Bernard Mauser, and Respondent was represented by counsel, Barbara Baxter. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on December 17, 2004. (See footnote 1)

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

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") for approximately 14 years. 2. Grievant's current assignment is "rod man" on the District Seven survey crew. His actual job title is Transportation Engineering Technician Associate.

3. In 2002, Grievant filed a grievance complaining about his transfer to the survey crew after having previously been assigned as a small bridge inspector. That grievance was denied at level four. *See Jordan v. Dep't of Transp*., Docket No. 03-DOH- 057 (Sept. 15, 2003).

4. On May 8, 2003, DOH posted a vacancy for a Transportation Worker 2-- Craftworker

("craftworker position") in the District Seven Sign Shop. The duties were listed as "skilled work in the signing of highways. Will install and remove signposts; erect traffic control signs and barricades on construction and maintenance projects."

5. Grievant's initial assignment in 1990 was in the District Seven Sign Shop as a craftworker for approximately eight months on a part-time basis. Grievant's assignments since that time have been on survey crews and in small bridge inspection.

6. Interviews of applicants for the craftworker position were conducted by Ismail Latif, District Traffic Engineer, Beverly Stalnaker, Administrative Manager, and Pete Mick, Sign Shop Supervisor. Grievant was one of the applicants interviewed for the position.

7. After the interviews were conducted, the top two applicants were Penny Ellyson and Randy Stark, neither of whom were current employees of DOH. Following a discussion of the applicants' interviews and their qualifications, it was determined that Ms. Ellyson should be offered the position.

8. Although she was working as a store cashier at the time she applied for the craftworker position with DOH, Ms. Ellyson had previously been employed by DOH as acraftworker from October 2001 to April 2002 and as a laborer from March 2000 to August 2000. She had experience working in the Sign Shop.

9. The interview committee determined that Grievant's and Ms. Ellyson's qualifications were essentially equal, but ultimately decided that Ms. Ellyson was a "better fit" for the position, based upon her interpersonal skills, as demonstrated during her interview.

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 bestqualified 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 [the employer]." *Trimboli*, *supra*; *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

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 transferis 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 <u>demonstrated capacity and quality and length of service.</u>

(Emphasis added).

The testimony of the members of the selection committee in this case was somewhat vague regarding their reasons for selecting Ms. Ellyson over Grievant. Mr. Mick testified that he would not have selected Ms. Ellyson or Grievant, because he preferred Mr. Stark. Mr. Latif stated that he believed Ms. Ellyson was a “better fit” for the craftworker position, and that Grievant would probably be better suited to a supervisor position. However, when questioned as to why he believed this, he could only point to “the way [Ms. Ellyson] presented herself.” Ms. Stalnaker's justification for selecting Ms. Ellyson was her response to an interview question regarding the desired qualities in a coworker, in which Ms. Ellyson discussed cooperation, communication and getting along with others. In response to the same question, Grievant had stated that a good co-worker would share job responsibilities.

Naturally, Grievant believes that his thirteen years of seniority should have caused the interview committee to select him for this position. However, the provisions cited above only require that seniority be a determinative factor when *both* applicants are state employees. In the instant case, the

evidence establishes that Grievant and Ms. Ellyson had substantially similar qualifications, but Ms. Ellyson was not a state employee. Therefore, DOH was not required to use Grievant's seniority as the pivotal selection criteria.

Clearly, reasonable minds could differ as to who the best candidate for this position was. In such cases, the undersigned is simply not permitted to substitute her judgment for that of the selection committee. The evidence shows that Grievant's and Ms. Ellyson's qualifications for this position were similar. Both had experience in the sign shop, but Ms. Ellyson's was obviously more recent. Grievant has more experience in highway work ingeneral, but did not present himself as well during the interview. The committee's determination that Ms. Ellyson would be a better fit for the assignment, based upon her perceived interpersonal skills and ability to get along well with others, cannot be found to be arbitrary and capricious.

At level four, Grievant's evidence focused upon past events regarding his assignments since his employment with DOH began. Apparently, this was an attempt to establish some general bias against him on the part of all DOH administrators. However, a review of this Grievance Board's decision in his previous grievance indicates that the same issues were litigated in that case. The preclusion doctrine of *res judicata* may be applied by an administrative law judge to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." *Vance v. Jefferson County Bd. of Educ.,* Docket No. 03-19-018 (May 27, 2003). Grievant had full opportunity to grieve his assignment to the survey crew, which has been determined to have not been the result of any improper motive on the part of DOH. Accordingly, Grievant is barred from relitigating that issue here.

The following conclusions of law support this decision.

Conclusions of Law

___1. 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 bythe grievant to be arbitrary and capricious or clearly wrong. *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

2. "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*, *supra*; *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

3. An employer is only required to consider seniority when two *employees* with equal or similar qualifications apply for a promotion. *See* W. Va. Code § 29-6-10(4) .

4. Grievant has failed to prove by a preponderance of the evidence that Respondent's selection decision for the position at issue was arbitrary and capricious, unlawful, or unreasonable under the circumstances.

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. Theappealing 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: January 26, 2005 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant did not file a post-hearing brief.