MEREDITH RUSH,

Grievant,

v. **Docket No. 05-TD-095**

DEPARTMENT OF REVENUE/
STATE TAX DEPARTMENT,

Respondent,

and

KEVIN CARPENTER,

Intervenor.

DECISION

The grievant, Meredith Rush, ("Rush"), challenges her non-selection for the position of Tax Unit Supervisor I in the Accounts Monitoring Unit of the Internal Auditing Division of her employer, the State Tax Department ("Tax"). The position was awarded to the intervenor, Kevin Carpenter ("Carpenter").

Rush filed a fairly lengthy statement of grievance, which concludes with her assertion that "my fifteen years with the Department in the Accounts Monitoring Unit as well as my extensive knowledge of the Personal and Business Tax billing systems makes me more qualified than Mr. Carpenters [sic] Business Degree, for the Tax Unit Supervisor I position." For relief, she asks "to be rightfully and immediately placed in the position of Supervisor 1 of the Accounts Monitoring Unit to include the salary increase with such increase retroactive from the effective date of the appointment of Mr. Kevin Carpenter." Rush appealed to Level III after her grievance was denied at both lower levels. A Level III hearing was held on February 3, 2005, at which time Carpenter was permitted to intervene

in the grievance. (See footnote 1) Thereafter, a Level III decision denying the grievance was issued on March 18, 2005.

Rush's appeal to Level IV was received by the West Virginia Education and State Employees Grievance Board ("the Grievance Board") on March 23, 2005. The Level IV hearing was held at the Charleston office of the Grievance Board on May 23, 2005. During the Level IV hearing, Rush was represented by Faith Levine, Tax was represented by Assistant Attorney General Ronald R. Brown, and Carpenter appeared on his own behalf.

This grievance matured for decision on June 24, 2005, by which date both Rush and Tax had submitted proposed findings of fact and conclusions of law. No post-hearing submissions were received from Carpenter.

In reviewing the evidence adduced in a non-selection case, it is important to remember that the Grievance Board is not charged with selecting a candidate to fill the position in question. "In matters of non-selection for state employees, the grievance process is not that of a 'super interview,' but rather, serves as a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv*., Docket No. 93-RS- 489 (July 29, 1994)." *Workman v. Div. of Corr*., Docket No. 04-CORR-384 (Feb. 28, 2005). With this limited role in mind, and after careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Rush is employed by Tax as a Tax Audit Clerk Senior in the Accounts Monitoring Unit ("AMU"). She has been a Tax employee for more than sixteen years, which includes at least two years of experience as a Lead Worker. (See footnote 2)

2 2. Rush had been groomed by her supervisor, Barbara Oates ("Oates"), to step into the role of the AMU Supervisor (See footnote 3) when Oates retired from that position.

3 3. Carpenter has been employed by Tax for over twelve years as a Taxpayer Services Representative. In this capacity, Carpenter was required to be thoroughly familiar with the statutes relating to all of the various types of West Virginia taxes. At the time he applied for the Supervisor position, Carpenter had been a Lead Worker for over two years.

4 4. Carpenter holds a bachelor of science degree in business administration, with 12 hours in

accounting. He is currently working on his master's degree.

5 5. Carpenter has experience in managing his wife's beauty salon and an historic hotel. Other business activities include acquiring, developing, and managing rental properties. He has also acquired pertinent experience while serving as a member of the governing boards of at least four different groups dedicated to various civic and public interests. In addition, Carpenter has experience in writing successful grant applications.

6 6. In his capacity as a Taxpayer Services Representative, Carpenter drafted technical letters for his supervisor. He also taught tax seminars to various civic and professional groups.

7 7. The job description for the posted the position of Tax Unit Supervisor I, with a closing date of November 23, 2004, included, in pertinent part, “graduation from an accredited four-year college or university.” However, experience could be substituted for the college degree requirement. Specifically, the degree requirement could be met with “five years of . . . experience in the area of assignment as determined appropriate by the appointing authority, two years of which must have been in a lead worker, supervisory or administrative capacity.” In addition, there was a special requirement of six semester hours of accounting.

8 8. Rush and Carpenter were among eight applicants for the position as Tax Unit Supervisor I (“Supervisor”) at AMU who were interviewed by Linda Morris, Assistant Director of the Internal Auditing Division (“Assistant Director Morris”). Tr.26, 36-40. Assistant Director Morris was also familiar with Rush and Carpenter through on-the-job contact over the years.

9 9. Both during the interview and during her contact with Carpenter throughout the normal course of their duties, Assistant Director Morris noted that Carpenter was quite articulate. She could not make the same comment regarding Rush.

10 10. Assistant Director Morris also perceived that Carpenter exuded a positive attitude about his job but, again, the same could not be said of Rush.

11 11. During the interviews, Assistant Director Morris looked for qualities she would expect to find in a good manager. In particular, she identified good interpersonal skills, good communication skills, and related knowledge.

12 12. Assistant Director Morris ultimately selected Carpenter over the other candidates because Carpenter interviewed well, had good oral and written communicationskills, exhibited a good attitude, had good interpersonal skills, had a good, broad-based knowledge of tax, and had a

demonstrated ability to deal with the public.

13 13. Oates thought it was important for a manager to be able to do the work of the employees who worked under that manager's supervision. Consistent with this theory, Oates considered Rush the better applicant for the Supervisor position because she could already do all of the work of a Tax Audit Clerk Senior.

14 14. By contrast, Assistant Director Morris did not think it was a detriment that Carpenter did not have the technical knowledge to step in and do the work of a Tax Audit Clerk Senior. As Assistant Director Morris remarked, she was attempting to fill a managerial position, not a Tax Audit Clerk slot. The successful applicant for the Supervisor slot would be able to acquire pertinent technical knowledge while on the job.

15 15. There is no dispute that Rush is a good Tax Audit Clerk Senior who knows her job.

16 16. After Assistant Director Morris selected Carpenter as the most qualified applicant, Linda Bennett, Director of Internal Auditing, reviewed his application and confirmed that Assistant Director Morris had checked his references.

Discussion

An unsuccessful applicant, such as Rush, who grieves her non-selection for a posted position bears the burden of proving, by a preponderance of the evidence, that the employer “violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision.” *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005) (citing *Surbaugh v. Dep't of Health & Human Serv.*, Docket No. 97-HHR-235 (Sept. 29, 1997)). “The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).” *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

As previously noted, it is well-established that the Grievance Board's job is not to engage in the selection process but rather to conduct a “review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv*., Docket No. 93-RS-489 (July 29, 1994).” *Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). In conducting such review, the Grievance Board has consistently maintained that “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.” *Jordan v. Div. of Highways*, Docket No. 04-DOH-202

(Jan. 26, 2005)(citing *Skeens-Mihaliak v. Div. of Rehab. Serv*., Docket No. 98-RS-126 (Aug. 3, 1998)).

At the heart of this grievance there is a difference in philosophy about what practical knowledge needs to be brought to management positions in general and the position ofTax Unit Supervisor I of AMU in particular. Rush and her mentor, Oates, believe that, at the outset of assuming that position, the person who supervises AMU should be able to perform all of the tasks that Rush and her fellow employees in the AMU perform. Rush phrased her argument succinctly at Level III when she asserted that “my 15 years in the Department in the Accounts Monitoring Unit makes me a better qualified applicant for the Tax Unit Supervisor I position.” Tr.5.

By contrast, Assistant Director Morris was not concerned with finding a candidate who could function as a Tax Audit Clerk Senior. She was interested in finding a suitable candidate with management skills or the potential to develop good management skills. As Assistant Director Morris explained, the technical skills could always be learned by the successful applicant.

Carpenter distinguished himself during the interview process. According to Assistant Director Morris, Carpenter “interviewed very well.” His ability to learn was reflected in the fact that he has an undergraduate degree in the pertinent field of business administration and, in addition to the twelve hours in accounting, is pursuing a master's degree. Based on his application packet and on her interactions with Carpenter, Assistant Director Morris was able to conclude that he has good written and oral communication skills. This was corroborated by the fact that Carpenter was called upon to draft letters for his supervisor and was frequently asked to teach tax seminars to civic groups and tax professionals. Carpenter's experience in running his own business ventures was considered by Assistant Director Morris as indicative that he possesses management abilities. Carpenter is further distinguished from Rush by the extensive working knowledgeof all of the various taxes that he acquired as a result of his experience as a Taxpayer Services Representative.

Rush is correct that she exceeds Carpenter in terms of her length of service with Tax. Pursuant to the provisions of West Virginia Code section 29-6-10(4), “if some or all of the eligible employees have 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 disputed promotion. However, Carpenter and Rush are not similarly qualified. Therefore, seniority is not the determinative factor in selecting the successful applicant, as between Carpenter and Rush.

The Grievance Board has previously determined that "[a]n employer may determine that a less senior applicant is more qualified for the position in question on the basis of particular qualities or qualifications that it determines are specifically relevant." *Allen v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-230 (Sept. 23, 2005)(citing *Lewis v. W. Va. Dep't of Admin.*, Docket No. 96-DOA-027 (June 7, 1996); *Ferrell v. Dep't of Transp.*, Docket No. 04-DOH-240 (Dec. 20, 2004)). Based on the qualities identified by Assistant Director Morris, Carpenter was more qualified than Rush. Therefore, his selection cannot be deemed unlawful, unreasonable, or arbitrary and capricious.

This is, unfortunately, a case of disappointed expectations on the part of Rush. Oates had clearly groomed Rush to be her successor. In addition, Oates did everything in her power prior to her retirement to try to influence the selection process in Rush's favor. Unfortunately for Rush, the classified service is a competitive, merit-based system. Positions are not merely "inherited" and an incumbent does not have the authority to appoint a successor. Like tea at the mad hatter's tea party, Rush was led to expectsomething Oates could not deliver. While undoubtedly well-intentioned, Oates's actions were ultimately harmful to Rush. This should serve as a cautionary tale to all supervisors about encouraging expectations regarding actions over which the supervisor ultimately has no control. By contrast, it speaks to the integrity of Tax's selection process that Oates's efforts were unavailing.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Rush bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 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).

3 3. It is well-recognized that "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)." *Jordan v. Dep't of Transp*., Docket No. 04-DOH-202 (Jan. 26, 2005). Therefore, in a selection case, such as this, a grievant "must prove by a preponderance of the evidence that the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005)(citing *Surbaugh v. Dep't of Health & Human Serv*., Docket No. 97-HHR-235 (Sept. 29, 1997)).

4 4. "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

5 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, 614, 474 S.E.2d 534, 544 (1996)(citing *Arlington Hosp. v. Schweiker* , 547 F. Supp. 670 (E.D. Va. 1982)). "Arbitrary is further defined as being 'synonymous with bad faith or failure to exercise honest judgment.'" *Jenkins-Martin, v. Bureau of Employment Programs/Charleston Job Serv*., Docket No. 98-BEP-285 (Sept. 24, 1998)(citing *Trimboli v. W. Va. Dep't of Health & Human Serv./Div. of Personnel*, Docket No. 93-HHR-322 (June 27, 1997)).

6 6. Rush failed to establish by a preponderance of the evidence that she was the best qualified applicant for the position at issue.

7 7. Rush's greater seniority did not entitle her to the position in question because she and Carpenter were not similarly qualified. W. Va. Code § 29-6-10(4); *Allen v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-230 (Sept. 23, 2005)(citing *Lewis v. W. Va. Dep't of Admin.*, Docket No. 96-DOA-027 (June 7, 1996); *Ferrell v. Dep't of Transp.*, Docket No. 04-DOH-240 (Dec. 20, 2004)).

8 8. Rush failed to establish by a preponderance of the evidence that Tax acted in an unlawful, unreasonable or arbitrary and capricious manner in selecting Carpenter for the position of Tax Supervisor I.

Accordingly, this grievance is **DENIED**.

Any party 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 West Virginia Code section 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:

October 27, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

References to pages in the Level III transcript shall appear as "Tr.__."

Footnote: 2

Lead Workers were selected on a rotating basis in AMU.

Footnote: 3

Although her working title was Unit Manager of AMU, Oates's correct classification title was Tax Unit Supervisor I, which is the position at issue in this grievance.