DON GORDON,

Grievant,

v. Docket No. 05-DOH-445

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent,

and

WILLIAM JOSEPH HARRIS,

Intervenor.

D E C I S I O N

Don Gordon ("Grievant"), employed by the Division of Highways ("DOH") as a Transportation Worker 3 - Equipment Operator, filed a level one grievance on November 18, 2004, after he was not selected for the position of Storekeeper 3. For relief, Grievant requests instatement as Storekeeper. The grievance was denied at levels one and two. The successful applicant, William Harris, intervened at level three. Following an evidentiary hearing, DOH Hearing Examiner Brenda Craig Ellis issued a recommended decision granting the grievance in part, ordering an impartial review of Grievant and Intervenor. However, DOH Commissioner Paul Mattox denied the grievance at level three, and appeal was made to level four on December 12, 2005. Grievant and Intervenor, acting *pro se,* and DOH counsel Barbara Baxter, agreed that a decision could be made based upon the lower-level record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by Grievant and DOH on or before February 14, 2006. (See footnote 1) **The following facts have been derived from a preponderance of the evidence made part of the record at levels one through three.**

Findings of Fact

1. Grievant has been employed by DOH, classified as a Transportation Worker 3 - Truck Driver, since September 1987.

2. On July 23, 2004, DOH posted a vacancy for the position of Storekeeper 3 in Mineral County. This individual leads and participates in the ordering, receiving, recording, storing, and shipping of materials, and/or equipment in a state operated stockroom or warehouse. The minimum qualification for the position include "four years of full-time or equivalent part-time experience as a store clerk or in a clerical capacity in connection with large-scale warehouse operations or in handling material."

3. Acting District Engineer Robert Amtower and Mineral County Administrator John Lusk interviewed the applicants for the Storekeeper position. Nineteen prepared questions were asked of each candidate interviewed. An "Application Evaluation Record" was completed following each interview in which the individual was rated as "Does Not Meet," "Meets," "Exceeds," or "Does Not Apply" in the categories of Education, Relevant Experience, Possess Knowledge, Skills & Abilities, Interpersonal Skills, Flexibility/Adaptability, and Presentability.

4. The interviewers mistakenly determined that Grievant did not possess the relevant experience required, and therefore, did not meet the minimum qualifications for the position of Storekeeper 3. However, he was interviewed, and his relevant experience was addressed. 5. Grievant served as a Tech Sergeant in the United States Air Force Reserves for fourteen years. In this position, he maintained all medical supplies, including rolling stock and individual equipment used by his squadron. As a Reservist Grievant was activated eight to ten times, for periods ranging from forty-five days to eight months. Grievant did not offer a total time for this experience, nor did he identify which years he served in this capacity.

6. Grievant had also worked in a General Motors automotive warehouse from 1965 to 1971, as a receiving clerk in the Receiving Department.

7. Grievant's prior work provided him experience in maintaining a monthly warehouse inventory, handling vendor documentation, and handling overages, shortages, and damaged products. This experience was not included on Grievant's application but was documented on a separate sheet of paper.

8. Intervenor had been employed by DOH since December 2002, and had been classified as a Transportation Worker 2 - Equipment Operator, until November 12, 2004, when he began

to temporarily fill the position of Storekeeper 3.

9. Intervenor's relevant prior experience included working as a salesman for two businesses selling truck parts, from June 1989 to February 1996. Grievant indicated on his application that inventory work was part of his duties at both jobs. He also completed inventory work while at a motorcycle shop, from July 2000 to August 2001.

Discussion

In a selection case it is Grievant's burden is to demonstrate DOH violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or wasclearly 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). Further, 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 ofthe 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 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. <u>When any benefit such as a promotion, wage increase or transfer is to be awarded,</u> or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, <u>and a choice is required between two or more employees in the classified service as to who will receive the benefit</u> or have the benefit withdrawn, <u>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</u> 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.) Also, 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). Naturally, Grievant believes that his past experience is comparable to Intervenor's, and that his eighteen years of seniority should have caused the interview committee to select him for this position. The record is somewhat confusing in that the interviewers determined Grievant did not meet the minimum qualifications; however, that error did not result in an arbitrary and capricious decision because all of Grievant's experience was considered. Mr. Amtower testified that he found Intervenor had the most practical and recent experience for the position, making him better qualified than Grievant to perform the multitude of tasks required of a storekeeper in a maintenance organization. Because Intervenor was found to be better qualified than Grievant, it was unnecessary to use seniority as a determinative factor in the selection of Storekeeper 3. Clearly, reasonable minds could differ as to the best candidate for this position. In such cases, the undersigned is simply not permitted to substitute her judgment for that of the selection committee. In the instant case, the evidence establishes that both Grievant and Intervenor met the minimum qualifications for the position, but that Intervenor's experience was more recent and more relevant than Grievant's. Therefore, the determination that Intervenor would be a better fit for the assignment was not unreasonable, without consideration, or in disregard of facts and circumstances of the case, and cannot be found arbitrary and capricious. Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

___1. In a non-disciplinary matter, Grievant has the burden of proving his grievance by a

preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A- 6. 2. Seniority is to be considered when two employees with substantially similar or equal qualifications are being considered for the award of a benefit such as a promotion, wage increase, or transfer. *W. Va. Code* § 29-6-10(4). 3. Seniority is merely a factor to be considered, and is not determinative, as an employer retains the discretion to select a less-senior applicant with greater qualifications. *Lewis v. W. Va. Dep't of Admin.*, Docket No. 96-DOA-027 (June 7, 1996).

4. "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). 5. Grievant has failed to prove by a preponderance of the evidence that he was the most qualified employee for the position of Storekeeper 3, or that DOH's decision in that regard was arbitrary and capricious or contrary to any rule or statute.

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 thisdecision. 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: FEBRUARY 28, 2006

_____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Intervenor declined the opportunity to file proposals at level four.***