LEONARD COOPER,

Grievant,

v v.

Docket No. 05-DOH-416

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Leonard Cooper ("Grievant") initiated this proceeding on June 3, 2005, challenging his non-selection for the position of Transportation Crew Chief, but the relief sought was not articulated. The grievance was denied at Level I on June 22, 2005, and at Level II on July 8, 2005. Grievant waived the statutory time frame for conducting the Level III hearing, and it was held on September 7, 2005. Grievant also waived the statutory time frame for the issuance of the Level III decision to include November 1, 2005. On that date, the grievance was denied. After appeal to Level IV, the parties (See footnote 1) agreed to submit this matter for a decision based upon the record developed below. (See footnote 2) At that time, the parties were informed that if they wished to supplement the record with proposed findings of facts and conclusions of law they must be submitted no later than January 5, 2006, (See footnote 3) when it became mature for decision.

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

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") since 1997. He is currently classified as a Transportation Worker II, Equipment Operator in McDowell County.

2. On April 7, 2005, DOH posted a vacancy for the position of Transportation Crew Chief Maintenance ("TCCMain") in McDowell County.

3. The minimum qualifications for the position required a valid West Virginia Motor Vehicle Operator's License or a Commercial Driver's License that may be required after employment.

4. The Knowledge and Skills section of the job description mentioned the ability to operate certain equipment. However, not all of the examples of work or knowledge, skills and abilities listed in the classification specification apply to the position in McDowell County because the work in that particular county does not require each and every example of work or knowledge, skill and ability listed.

5. Grievant and three other applicants were interviewed for the TCCMain position. 6. Interviews were conducted by Everette Bailey, Administrative Services Manager in District 10, and by Earl Crigger, McDowell County Administrator. Also present for the interviews was Office Assistant Linda Smith who took notes.

7. All applicants were asked identical questions.

8. At the conclusion of the interviews, both Mr. Bailey and Mr. Crigger agreed Linda Sheppard was the best person for the position.

9. Ms. Sheppard had been employed by DOH since 1980.

10. In her time at DOH, Ms. Sheppard's performance has been outstanding.

11. When the former TCCMain retired, Ms. Sheppard was made acting crew leader in December 2004.

12. At that time, she was the only employee who requested to fill that position.

13. A Record of Significant Occurrence dated January 21, 2005, indicated that under the supervision of Ms. Sheppard, morale had improved, and the crew worked as a group of instead of as individuals.

14. There were no Records of Significant Occurrence in Grievant's personnel file.

Discussion

As this grievance does not involve a 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket

No. 92-HHR-486 (May 17, 1993).

In a state selection case, an agency's decision as to who is the most qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehab. Serv., Docket No. 93-RS-489 (July 29, 1994). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)). A searching and careful inquiry into the facts is required; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the agency. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Thibault, supra.

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). 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)). Further, if a grievant can demonstrate that the selection process was so significantly flawed that he might reasonably have been the successful applicant if the process had been conducted in a proper fashion, the employer will be required to compare the qualifications of the grievant to the successful applicant. Thibault, supra.

Grievant argues that he is more qualified because he is able to operate most of the equipment in McDowell County, and Ms. Sheppard cannot. He believes that the person selected for TCCMain should be able to operate the equipment. While, equipment operation is not listed as a minimum qualification for the position, it is a necessary component under the Knowledge, Skills and Abilities Section. However, Grievant did not present any evidence to indicate that Ms. Sheppard could not perform equipment operation, and therefore did not meet his burden that the agency's decision was

arbitrary and capricious or clearly wrong. (See footnote 4)

Ms. Sheppard was chosen for the position based not only on her years with DOH, but also her performance during the period of time that she was in the acting position. Ms. Sheppard was the only employee to volunteer to fill the vacancy, and under her direction, the crew began working together, morale increased, and the appearance of the office improved. Grievant alleges that favoritism was shown to Ms. Sheppard by selecting her for the position. He asserts that he did not have the opportunity to work as the TCCMain upon the prior crew chief's retirement. However, it was shown that Ms. Sheppard was the only employee who requested the opportunity, and evidence was presented to support the contention that the crew knew an interim TCCMain was needed. Still, Grievant made no request to be considered to fill that position.

"'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." (See footnote 5) An employee claiming favoritism must also show he is similarly-situated to another employee. Kincaid v. Div. of Corr., Docket No. 98-CORR-144 (1998); Prince, Supra. v. Wayne County Bd. of Educ., Docket No. 90-50-281 (1990). The test to determine whether a grievant has established a prima facie case of favoritism requires a grievant to establish by a preponderance of the evidence:

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

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

(c) that the difference in treatment has caused a substantial inequity to her and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket Nos. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince, Supra. Given the evidence here, Grievant has failed to establish a prima facie case of favoritism. Ms. Sheppard has been an employee of DOH 17 years longer than Grievant. When the former TCCMain retired, Ms. Sheppard was the only person willing to perform the duties of crew chief. In the four months that she filled that position, her performance evaluations indicated she was doing an excellent job in supervising the crew. It also appears as if she is able to perform any/all duties required of her with respect to participating in the crew by overseeing and ensuring that all

issues are addressed.

Accordingly, Grievant has failed to meet his burden of proving that favoritism has occurred with regard to this situation, and his grievance must be denied. The following conclusions of law support this Decision.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his claims 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. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. In a state selection case, an agency's decision as to who is the most qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehab. Serv., Docket No. 93-RS-489 (July 29, 1994). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dep't of Educ., 210 W. Va.105, 556 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)). 3. Grievant failed to prove that Ms. Sheppard did not meet the articulated Knowledge, Skills and Abilities needed to perform the position of TCCMain, and therefore failed in meeting his burden of proof that DOH acted in an arbitrary and capricious manner, or made a decision that was clearly wrong.

4. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." The test to determine whether a grievant has established a prima facie case of favoritism requires a grievant to establish by a preponderance of the evidence:

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

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

(c) that the difference in treatment has caused a substantial inequity to her and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

5. A grievant must establish a case of favoritism by showing, among other elements, that he or she has been treated differently from one or more similarly-situated employees. The Bd. of Educ. of the County of Tyler v. White, 216 W.Va. 242, 605 S.E.2d 814 (W. Va. 2004). Chaddock v. Div. of Corr., Docket No. 04-CORR-278 (Feb. 14, 2005); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004); The Bd. ofEduc. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004). See also, Kincaid v. Div. of Corrections, Docket No. 98-CORR-144 (Nov. 23, 1998); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1998).

6. Grievant has failed to establish a prima facie case for favoritism because both Ms. Sheppard and Grievant had the opportunity to apply to be acting TCCMain when the crew leader retired in December 2004.

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: February 28, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Grievant proceeded pro se, and DOH was represented by legal counsel Barbara L. Baxter.

Footnote: 2

This case was originally assigned to ALJ Janis Reynolds, but due to administrative reasons, it was reassigned to the undersigned Administrative Law Judge.

Footnote: 3

Proposed findings of fact and conclusions of law were received from Respondent, but not from Grievant.

Footnote: 4

The decision issued at Level III indicated that Mr. Crigger had testified that not all of the examples of work or knowledge, skills and abilities listed in classification apply to the position at Yeager because the work does not require each and every example of the work or knowledge, skill and ability listed. Upon review of the record, it should be clarified this testimony was provided by Mr. Bailey.

Footnote: 5

W. Va. Code § 29-6A-2(h).