THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

EDWARD KESSLER,

Grievant,

v. **Docket No. 06-DOH-345**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Edward Kessler ("Grievant"), employed by the Division of Highways ("DOH") as a Transportation Crew Supervisor 1, filed a level one grievance on March 29, 2006, challenging his nonselection for the position of Highway Administrator 2 in Mercer County. For relief, Grievant request instatement, a salary increase commensurate with that received by the past supervisor when he was awarded the position, or a cash settlement for the amount of pay he would have earned had he held the position until he is eligible for full Social Security benefits, back pay from the date the position was awarded, and expenses. Grievant's immediate supervisor lacked authority to grant the relief at level one. The grievance was denied at level two, and following an evidentiary hearing at level three. The grievance was appealed to level four on October 10, 2006. A hearing was conducted in the Grievance Board's Beckley office on December 19, 2006, and proposed findings of fact and conclusions of law were scheduled to be filed by January 22, 2007. (See footnote 1) Grievant was represented by J.W. Feuchtenberger, Esq., of Feuchtenberger & Barringer Legal Corporation, and DOH was represented by Barbara L. Baxter, Esq. Upon the resignation of Administrative Law Judge Paul Marteney, the grievance was transferred to ALJ DeniseSpatafore on August 30, 2007. For administrative reasons the case was assigned to the undersigned on October 16, 2007.

Synopsis

___Grievant challenged his nonselection for the position of County Administrator 2, asserting that he

was better qualified than the successful applicant. DOH denied that the selection decision was arbitrary and capricious or otherwise improper. While the reason for the selection was not well articulated, it was based upon the perception that the successful applicant was better qualified. Although Grievant has more seniority, the evidence does not support a conclusion that the decision was arbitrary and capricious. Grievance DENIED.

The following facts have been derived from the record developed at levels three and four.

Findings of Fact

___1. Grievant has been employed by DOH since July 1973, and has held the position of Transportation Crew Supervisor 1 in District Ten at all times pertinent to this grievance.

2. On November 18, 2005, DOH posted a vacancy for the position of Highway Administrator 2, Mercer County. The job duties for this position include assisting in planning and directing a routine highway maintenance program in accordance with established procedures and policies, and providing guidance to county maintenance personnel. 3. The six applicants were interviewed by Everette K. Bailey, Administrative Services Manager for District Ten, Engene Tuckwiller, Assistant District Engineer, and John McBrayer, District Ten Manager.

4. The applicants were each asked the same questions during the interviews, and were rated as “Does Not Meet,” “Meets,” “Exceeds,” or “Does Not Apply” in the categories of education, relevant experience, knowledge/skills/abilities, interpersonal skills, flexibility/adaptability, and presentability.

5. Grievant was rated as “Meets” in the areas of education, interpersonal skills, and presentability. He was rated as “Exceeds” in the areas of experience, knowledge, skills and abilities, and flexibility/adaptablility.

6. Comments included on Grievant's Application Evaluation Record include “[s]ome concern about 'military background' influence on managerial style,” and “[m]uch of supervisory experience at 'crew level (5 - 6 people).”

7. While employed at DOH Grievant has been classified as a TCCMAIN (crew chief) from 1973-2005, with the exception of the 2003 calendar year when he was Acting Assistant Supervisor. As Assistant Supervisor, Grievant was responsible for all DOH fifty- plus employees in Mercer County. Grievant has served as Transportation Crew Supervisor since January 2005, supervising sixteen employees.

8. Rick Delp, the successful applicant, has been employed by DOH since November 1977, and

had been Acting Mercer County Highway Administrator since October 2005. He had previously served as an underground storage tank coordinator from August 2004 through September 2005, a position which did not require the supervision of any other employees. Prior to that, Mr. Delp had been classified as a TCCMAIN from August1996 through August 2004, with the exception of the period December 2003 through April 2004, when he was Acting Interstate Supervisor.

9. The interview committee rated Mr. Delp as “Meets” in the categories of education and presentability, and “Exceeds” in all other categories.

10. The comments on Mr. Delp's application record noted that he is a resident of the county, has good overall knowledge of geography and trouble areas, experience in environmental permit application process, and is a proven supervisor.

Discussion

Grievant asserts that he was the most qualified applicant, and should have been awarded the position of Highway Administrator 2 in Mercer County. DOH argues that while both Grievant and Mr. Delp were well qualified for the position, the selection of Mr. Delp was not unlawful, unreasonable, or arbitrary and capricious.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim 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 footnote 2) "The preponderance standard generally requires proof that a reasonableperson 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 matters of non-selection for state employees, the grievance process is not intended to be 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). 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).

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

Grievant suggests that at best (for DOH's case) he and Mr. Delp have substantially similar qualifications; however, he has more seniority as well as actual supervisory experience which includes time he performed the duties of Acting Mercer County Administrator, although without recognition or pay. Grievant further asserts that DOH erred when he was not given the opportunity to hold the position in an acting capacity during the vacancy, by including the comments on the interview evaluation sheet, and the “Meets” rating in the category of “Interpersonal Skills,” both of which were unsubstantiated by the evidence.

It is undisputed that Grievant has more overall seniority, and more experience supervising other employees, than Mr. Delp. He is also correct in his assertion that DOH provided no basis for the rating in “Interpersonal Skills” or the comments included on the form. Further, DOH concedes that Grievant was denied the opportunity to “try out” for the position, a practice frequently used. Because Grievant has worked in a supervisory capacity for a long period of time, including a stint as the unofficial acting County Administrator, he has suffered no harm as a result of this lost opportunity.

DOH District Manager John McBrayer testified at level four that Mr. Delp was ultimately selected for the position of County Administrator based on his perception that Mr. Delp was better qualified in the areas of interacting with the public and managing the workforce. This is not to say that Grievant is deficient in these areas, simply that Mr. McBrayer found Mr. Delp to be a bit better qualified. As noted in the level three decision, Mr. Delp has worked in various positions which were viewed as beneficial to a CountyAdministrator. In summary, Mr. Delp was selected not as the result of any inaccurate

negative information regarding Grievant, but rather on the diversity of his experience. This decision was not proven to be arbitrary and capricious or otherwise improper.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the

burden of proving his claim 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).

2. In matters of non-selection for state employees, the grievance process is not intended to be 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). 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). 3. 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).

4. Grievant failed to prove that DOH acted in an arbitrary and capricious manner during the selection process for the position of County Administrator 2.

Accordingly, the 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)(repealed) (*but see Executive Order* No. 2- 07, May 8, 2007). 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: OCTOBER 30, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *DOH elected not to file post-hearing proposals.*

Footnote: 2

[2]In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.