WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CHARLES R. FREELAND,

Grievant,

v. **Docket No. 2008-0225-DHHR**

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/

HOPEMONT STATE HOSPITAL,

Respondent.

DECISION

Charles R. Freeland ("Grievant") initiated this grievance on August 5, 2007, alleging he should have been selected over the successful applicant for the position of Supervisor of Housekeeping at Hopemont State Hospital. The grievance was denied at level one on August 28, 2007, and a mediation conducted on February 14, 2008, was unsuccessful. After appeal to level three, a hearing was conducted in the Grievance Board's office in Westover, West Virginia, on July 11, 2008. Grievant was represented by Shelia Nestor and Wanda Tucker of AFSCME, and Respondent was represented by B. Allen Campbell, Senior Assistant Attorney General. This matter became mature for consideration at the conclusion of the level three hearing.

Synopsis

Grievant contends that he should have been selected for a Supervisor 1 position in the Housekeeping department. He believed that his 24 years of employment as a housekeeper at the

facility made him more qualified than the successful applicant, who had only been employed at Hopemont for seven years. However, seniority is not required to bethe determinative factor when the applicants are not similarly qualified, and Respondent established that the successful applicant demonstrated superior qualities as a supervisor and had a far better interview than Grievant. The Grievance Board has previously recognized that, when selecting supervisors, employers may consider qualifications that are deemed to be specifically pertinent to that type of position. The grievance is denied.

Findings of Fact

1. Grievant has been employed by Respondent for 24 years as a housekeeper at Hopemont State Hospital ("Hopemont"). For the past seven years, he has served in the position of Lead Housekeeper, a lead worker position requiring him to schedule, oversee, and review the work of other housekeeping employees.

2. In July of 2007, Hopemont posted the position of Housekeeping Supervisor. An interview committee was assembled by Human Resources Director Kitty Dilley, consisting of herself, Linda Shaffer (Assistant Director of Nursing) and Rodney Burke (Manager of Inventory).

3. Ms. Dilley and Ralph Raybeck, Hopemont Administrator, compiled 20 interview questions to be asked of the five individuals who applied. Committee members used an "Applicant Interview Rating" chart to rate each applicants' responses in the categories of oral expression, intelligence/reasoning process, judgment and objectivity, tact and sensitivity, appearance, poise and confidence, and leadership potential. Responses were rated on a scale of one to five, with five being the most possible points.

4. The interview questions were designed to be pertinent to the duties of the position, including a few questions regarding specific cleaning procedures, along with several questions pertinent to supervision of employees. At Ms. Dilley's request, Grievantcomposed some questions regarding specific cleaning situations and the applicable substances/procedures, and two of them were used during the interviews.

5. After the interviews, each committee member prepared an "Interview Report," rating each applicants' interview responses in the areas of knowledge, communication skills, education, related experience, growth potential, and overall evaluation. They also provided comments regarding the

applicants' strengths and weaknesses, along with a recommendation as to whether the individual should be hired.

6. Each committee member's scores for the applicants were totaled and averaged. Linda Hall rated the highest, with a total score of 32, and Grievant was second, with a score of 30.

7. Ms. Hall was hired for the supervisor position. She had been employed at Hopemont for seven years as a housekeeper, had served as Lead Housekeeper, and had her own cleaning business prior to her employment with Respondent. Ms. Hall was selected because she answered the interview questions thoroughly, asked pertinent questions of her own, demonstrated superior knowledge of housekeeping issues, displayed a positive attitude, and gave the best responses regarding supervisory/management issues.

8. Although Grievant demonstrated an excellent knowledge of chemicals and cleaning processes, he did not express himself well during the interview. Ms. Dilley's experience with Grievant had been that, as a lead worker, he had favored some employees over others and had difficulties working well with other departments, such as nursing. He seemed unsure of some of his answers during the interview and did not ask any questions of his own. He was perceived by the committee to have solid knowledge and goodleadership potential, but he did not demonstrate as much knowledge or supervisory ability as Ms. Hall did.

Discussion

In a selection case, a grievant must prove, by a preponderance of the evidence, that he was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). 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 Rehabilitation Serv*., Docket No. 93-RS-489 (July 29, 1994).

The 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*.

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)). “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 simplysubstitute her judgment for that of [the employer].” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

Grievant contends that his seniority and experience entitle him to the supervisor position over Ms. Hall. He testified that, prior to working in the housekeeping department, he had worked in laundry and maintenance, giving him pertinent experience Ms. Hall did not have. He cites West Virginia Code § 29-6-10(4), which states, in pertinent part:

> 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 transfer is 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.

(Emphasis added.) However, in order for this provision to be implicated, the applicants must be similarly qualified; in the instant case, Respondent contends that Ms. Hall demonstrated superior qualifications to Grievant, particularly in the areas of leadership and supervisory abilities. In Ms. Dilley's words, Grievant answered the interview questions “like an employee, not a supervisor.” Therefore, he was deemed not to be as qualified as Ms. Hall.

As recently discussed in *Jones v. Department of Transportation*, Docket No. 07- DOH-340 (July 18, 2008), “[a]n employer may determine that a less senior applicant is morequalified 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); *Ferrell v. Dep't of Transp*., Docket No. 04-DOH-240 (Dec. 20, 2004). Also, as the Grievance Board

has held many times, when a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp*., Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen, supra*; *See Ball v. Dep't of Transp*., Docket No. 04-DOH-423 (May 9, 2005). Although Grievant certainly has far more seniority than Ms. Hall, she was deemed by the interview committee to have demonstrated superior supervisory qualities, which is a determination within Respondent's discretion to make. The parties not being similarly qualified, Respondent was not required to consider seniority.

Grievant also contended that Respondent failed to follow its Policy Memorandum 2106, "Employee Selection." That policy provides, in pertinent part:

> When selecting one employee from among several applicants, demonstrated ability, work history, references, education and the interview should be considered. The ultimate selection decision should be based upon the interviewer's judgment as to which candidate would best do the job. Hiring decisions should be based on an individual's qualifications for the essential duties of the position.

Although it is understandable that Grievant would perceive his lengthy employment as a housekeeper and knowledge of the department as making him more qualified, as the policy states, the ultimate decision is based upon a determination as to which candidate would do the best job. In this case, the members of the committee explained their reasoning in determining that Ms. Hall would make a better supervisor than Grievant, and theundersigned cannot find any abuse of the ample discretion afforded them regarding such decisions.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a selection case, a grievant must prove, by a preponderance of the evidence, that he was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *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 Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994).

2. 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. 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*.

4. "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 v. Dep't ofHealth and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

5. "An 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); *Ferrell v. Dep't of Transp*., Docket No. 04-DOH-240 (Dec. 20, 2004); *See Jones v. Department of Transportation*, Docket No. 07-DOH-340 (July 18, 2008).

6. When a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp*., Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen v. Dep't of Transp*., Docket No. 05- DOH-230 (Sept. 23, 2005); *See Ball v. Dep't of Transp*., Docket No. 04-DOH-423 (May 9, 2005).

7. Grievant has failed to establish by a preponderance of the evidence that Respondent's selection decision was arbitrary and capricious or clearly wrong.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that thecertified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: December 23, 2008

DENISE M. SPATAFORE

Administrative Law Judge