THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

TIMOTHY JONES, SR.,

Grievant,

v. **Docket No. 07-DOH-340**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Timothy Jones, Sr. ("Grievant"), initiated this proceeding on March 14, 2007, alleging he should have been selected for a Transportation Crew Supervisor 2 ("Supervisor 2") position for which he applied. After denials at the lower levels, Grievant appealed to level four on September 7, 2007. A level four hearing was held in the Grievance Board's office in Westover, West Virginia, on April 21, 2008. Grievant was represented by Richard J. McGervey, AFSCME (See footnote 1) Staff Attorney, and Respondent was represented by counsel, Robert Miller. This matter became mature for consideration upon receipt of the parties' fact/law proposals on May 22, 2008.

Synopsis

Grievant contends that he should have been selected for a Transportation Crew Supervisor 2 position over the successful applicant, who had less seniority as a DOH employee. The successful applicant was deemed to be more qualified, due to his knowledge of the Core Maintenance Plan, his supervisory experience, and his positiveattitude. Such factors are proper considerations when

selecting a candidate for a supervisory position.

Grievant also contended that Respondent failed to consider performance evaluations of the applicants, as required by the Division of Personnel's Administrative Rule. However, the evidence established that the performance ratings were discussed and considered, and one of the interviewers was familiar with all of the applicants' evaluations. Moreover, the successful applicant's rating was higher than Grievant's, so the selection decision would have remained the same. The grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") for approximately 30 years. He is currently classified as a Transportation Crew Chief -- Maintenance, and he has been serving in a crew leader or foreman capacity for the past three years.

2. On November 8, 2006, Respondent posted a vacancy for a Supervisor 2 position in Mineral County, District Five.

3. Four DOH employees applied for the vacancy, including Grievant.

4. Interviews were conducted by Tom Staud, District Eight Engineer and Regional Director over District Five, and Robert Amtower, District Five Engineer. JohnLusk, Highway Administrator for Mineral County and Grievant's supervisor, was present during the interviews, but recused himself from the selection decision. (See footnote 2)

5. The chief responsibility of the Supervisor 2 is to supervise all field operations for the county, including organizing and planning work and assigning crews to specific jobs.

6. The Maintenance Division of DOH has recently adopted a "Core Maintenance Plan," which involves coordination, planning and scheduling of all maintenance work on a county-wide basis.

7. Although the interviewers did not have the performance evaluations of the applicants in front of them during the interviews, they discussed the evaluations prior to making a hiring decision. Mr. Amtower was familiar with all of the applicants, as their supervisor, and he knew that all had good evaluations with very similar ratings.

8. Charles Staggs, a Transportation Crew Chief _ Maintenance in Mineral County, was

selected to fill the vacancy. He had been a DOH employee for approximately sixteen years, and he had been working as a crew leader for approximately ten years.

9. For the calendar year of 2005, Mr. Staggs had a performance evaluation score of 2.39, and Grievant had a score of 2.30, both of which are in the “meets expectations” range.

10. Mr. Staggs was selected because of his superior understanding and knowledge of the Core Maintenance Plan, supervisory experience, demonstrated positive attitude, and grasp of the goals of the organization.

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). In such cases, 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 simply substitute her judgment for that of [the employer].” *Trimboli v. Dep't of Health and HumanResources*, 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 the selection decision at issue was arbitrary and capricious with regard to two issues. First, he believes that, because he had more seniority as a DOH employee, he should

have been selected over Mr. Staggs. Second, he contends that performance evaluations were not properly considered, as required by applicable rules.

Grievant bases his claims, in part, upon the provisions of W. Va. 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.)

In the instant case, Respondent counters that seniority was not required to be considered as a determining factor, because Mr. Staggs' qualifications were deemed to be superior; seniority is only considered when the applicants are deemed to be equal or similar. 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 thebasis 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). Although less tenured with DOH, Mr. Staggs had been performing crew leader duties for much longer than Grievant, and his knowledge and understanding of the Core Maintenance Plan was a key factor in the decision. Also, as this 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 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).

Grievant further argues that, because the interviewers admitted that they did not specifically look at the performance evaluations of the applicants at the time of the interviews, this violated the requirements of the Division of Personnel's (“DOP”) Administrative Rule, 143 CSR 1 (2007). Section

15 of that Rule states, in part, that "[t]he appointing authority shall consider performance evaluations as well as other recorded indicators of performance in determining salary advancements and in making promotions, demotions, and dismissals." However, as Respondent has pointed out, the performance ratings of the applicants were, in fact, considered and discussed by the interviewers. As Mr. Amtower testified, Mr. Staud asked about the evaluations of the applicants, because he did not work directly with any of these employees. Because he was their supervisor, Mr. Amtower was familiar with their ratings, which were all in the "meets expectations" range, and he relayed this information to Mr. Staud. Moreover, and more importantly, Mr.Staggs had a slightly higher performance rating than Grievant. Therefore, even if the evaluations had been specifically reviewed and placed "in front of" the interviewers at the time the decision was made, as Grievant contends they should have been, the decision would still have been in favor of Mr. Staggs over Grievant.

Accordingly, a review of the evidence of record establishes that Grievant has failed to prove by a preponderance of the evidence that the selection decision at issue was unlawful, unreasonable, or arbitrary and capricious. 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).

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 Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994).

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 v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

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'tof Health and Human Resources*, 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).

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. Performance evaluations and other recorded measures of performance are to be considered by an employer when selecting an employee for promotion. Division of Personnel Administrative Rule, 143 CSR 1, Section 15 (2007).

8. Grievant has failed to prove by a preponderance of the evidence that the selection decision at issue was unlawful, unreasonable, arbitrary and capricious, or an abuse of Respondent's discretion.

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 thegrievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 29-6A-7 (repealed) (See footnote 3) . Neither the West 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 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: July 18, 2008

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DENISE M. SPATAFORE

Acting Chief Administrative Law Judge

Footnote: 1

"American Federation of State, County and Municipal Employees."

Footnote: 2

Apparently, Mr. Lusk felt that his relationships with the various applicants could call his judgment into question regarding selection of a candidate.

Footnote: 3

In 2007, the Legislature, 2007 Acts ch. 207, 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, which continue to control the proceedings in this case.