WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES CURTIS HILL,
Grievant,

v. **Docket No. 2012-0154-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Grievant, James Curtis Hill, filed this grievance against Respondent, the West Virginia Department of Transportation/Division of Highways ("DOH"), on August 11, 2011, challenging his non-selection for the posted position of Mail Runner in District Nine. The relevant statement of grievance provides:

> I applied for mail run job per DOT1100968 7-26-11. I received a letter stating that I was not recommended for the position, but the way I interpreted the posting, I am or was qualified for the job.

Relief sought:

> I want the job[.]

A conference was held at level one on August 22, 2011, and the grievance was denied at that level on September 8, 2011. Grievant appealed to level two on September 21, 2011, and a mediation session was held on February 6, 2012. Grievant appealed to level three on February 15, 2012. A level three hearing was held before the undersigned Administrative Law Judge on July 9, 2012, in the Grievance Board's Beckley facility. Grievant appeared in person and by representative, David Hedrick. Respondent was represented by Robert Miller, Legal Division, DOH. This matter became mature for decision on August 17, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Grievant did not submitt a fact/law proposal.

Synopsis

Grievant is classified as a Transportation Worker 3 Craft Worker with the Department of Transportation/Division of Highways, Respondent. Grievant applied for a mail runner position with Respondent in District Nine and was not the successful applicant.

Subsequent to the interview process, an employee, other than Grievant, was awarded the posted position. Grievant has not established by a preponderance of the evidence that Respondent's selection was improper. Grievant failed to demonstrate that the selection decision made was arbitrary, capricious or clearly wrong. Most importantly, Grievant did not demonstrate he was the most qualified applicant. Accordingly, this 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 Respondent since November 19, 1997. Grievant is currently classified as a Transportation Worker 3 Craft Worker (TW3CW) in District Nine.

2. Sherry A. Davis, the successful applicant, is currently classified as a Mail Runner (MAILRUN) in District 9 and has been employed by Respondent since July 25, 2011. She was previously employed as a temporary employee, classified as a Transportation Worker 1 Craft Worker (TW1CW).

3. Lisa King is classified as an Administrative Service Manager 1 (ADSMG1) in District 9 and has been employed with Respondent since March 1, 1990.

4. Steve McCoy is classified as a Highway Equipment Supervisor 2 (HWS2) in District 9 and has been employed with Respondent since November 9, 1987.

5. A vacancy for a Mail Runner (MAILRUN), job posting DOT1100968, was posted on April 18, 2011.

6. There were eight applicants who applied for the position. Steve McCoy and Lisa King conducted and held interviews with the applicants on June 13, 2011.

7. All of the candidates for the position submitted an Application for Examination, the standard DOH job application, which was subsequently reviewed by the interviewers. Candidates also submitted additional material along with their applications.

8. All of the candidates were asked the same questions during their respective interviews. Copies of the interview questions are of record. Each candidate was also given an opportunity to ask questions during the interview and each candidate spent approximately the same amount of time in their respective interviews.

9. All of the candidates for the position submitted Applications for Examinations and were rated by the interviewers in various categories with regard to their qualifications for the position and this information was recorded on an Application Evaluation Record. Candidates were rated on qualifications including education, relevant experience, possesses knowledge, skills & abilities, interpersonal skills, flexibility/adaptability and presentability.

10. Pursuant to the Application Evaluation Record, prepared for Grievant, the interviewers awarded Grievant a rating of “Meets Expectations” in all applicable categories

except for “Relevant Experience” where he was rated as “Does Not Meet.” In the “Comments Section” Mr. McCoy wrote and Ms. King signed: “This applicant has many good skills as an equipment operator. I do feel this job is beneath his skill level and using this caliber of employee in this job would be a disservice to Highways. Not selected as well, due to his salary would be too great for this job classification.” (Resp. Ex. 2.)

11. In the Application Evaluation Record, prepared for Ms. Davis, the interviewers gave her an “Exceeds” in two categories, a “Meets Expectations” in seven categories. In the “Comments Section,” written by Mr. McCoy and signed by Ms. King, it is written: “This applicant has shown us that she can do the required tasks that this job entails. She has demonstrated her ability two different times as a temporary employee in this same job, doing a very good job both times. She not only knows the route and the people but has shown that bad weather driving is no problem for her.” She also possesses a Commercial Driver’s License (CDL). (Resp. Ex. 3.)

12. Upon completion of the interview and evaluation process, Sherry A. Davis, was selected for the mail runner position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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, supra*. 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)).

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

Grievant contends that he should have been awarded the Mail Runner (job posting DOT1100968) position. It is Grievant's proposition that Respondent unlawfully deprived him of the position. Grievant is of the opinion that his prospective salary was unduly held against him.

Interviewer McCoy, a Highway Equipment Supervisor 2, candidly stated that Grievant's salary was a concern or factor he considered with regard to whether Grievant should be awarded the position. Grievant's salary is believed to be within the salary range of the posted position, but in excess of what a mail runner traditionally is compensated. Grievant's prospective salary was a factor considered by Interviewer McCoy, but is not established to be the quintessential factor. Supervisor McCoy specifically stated it was not the only rationale for awarding the position to Ms. Davis. The successful applicant had relevant work experience. Supervisor McCoy acknowledged that Grievant was a good employee but did not feel Grievant's prior experience with heavy equipment readily

translated to the requirements of the mail runner position. 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. *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-304 (July 18, 2008); *McKinney, et al., v. Dep't of Transp./Div. of Highways,* Docket No. 2008-0316-CONS (Dec. 27, 2007); *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).

It is established that the successful applicant, Sherry A. Davis, has the education, training with computer software used, and the personality to do well with the position offered. Further, Ms. Davis had demonstrated her ability to perform the duties of the position during her temporary employment. The interviewing agents of Respondent were very above board with their analysis. (*See* R. Exs. 2 and 3.) While their individual assessment and factor analysis is not to Grievant's liking, the thought process as explained by documents of record and independent testimony of interviewers, Lisa King and Steve McCoy, such is not established to be unreasonable. Nor has the selection process been found to be arbitrary, capricious or clearly wrong.

Grievant may truly believe he was not given a fair opportunity, however, he has not established this as fact. Grievant has not established unreasonable conduct by Respondent's agents. In review of Grievant's qualifications, interview scores and employment history with Respondent, it cannot be said that the Respondent's selection of applicant Davis was without due consideration, or in disregard of pertinent facts and circumstances of the job responsibilities. In this case, the interview/selection panel

explained their reasoning in determining that applicant Davis should be awarded the position over Grievant, and the undersigned does not find abuse of the ample discretion afforded Respondent regarding this decision. Grievant has not proven there was a flaw in the selection process which necessitates the reversal of Respondent's discretion. Selection decisions are largely the prerogative of management. Grievant has failed to establish the selection process was arbitrary and capricious or DOH's choice of the successful applicant was an abuse of discretion.

The following Conclusions of Law are appropriate in this matter:

Conclusions of Law

1. 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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. 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).

3. 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*.

4. 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 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. *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-304 (July 18, 2008); *McKinney, et al., v. Dep't of Transp./Div. of Highways,* Docket No. 2008-0316-CONS (Dec. 27, 2007); *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. Grievant has failed to establish that the selection of the successful applicant for the posted mail runner position was arbitrary and capricious, unreasonable or clearly wrong. Grievant failed to demonstrate an unlawful flaw in the selection process.

7. Respondent's determination that the successful applicant was the best qualified applicant for the position was based upon relevant factors and was not arbitrary or 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 the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: February 5, 2013

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Landon R. Brown
Administrative Law Judge