THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

STEVE PERRY,
Grievant,

v. **Docket No. 2012-0422-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Steve Perry, filed this grievance on October 15, 2011, challenging his non-selection for a posted position in his district. He seeks to be made whole including selection for the position. This grievance was denied at level one by letter dated October 10, 2012, authored by Sandra Castillo, Grievance Evaluator. A level two mediation session was conducted on March 13, 2013. Grievant perfected his appeal to level three on March 22, 2013. A level three hearing was conducted before the undersigned Administrative Law Judge on August 16, 2013, at the Grievance Board's Westover office location. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Robert Miller, Legal Division. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on October 21, 2013.

Synopsis

Grievant failed to meet his burden and demonstrate that Respondent's selection process was flawed. Grievant did not demonstrate that the decision to not select him for the position in question was unlawful or an action that was arbitrary and capricious.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievant is classified as a Transportation Worker 3 Equipment Operator in District Seven with the Division of Highways ("DOH"). Grievant has been employed with the DOH for approximately fourteen years.

2. Grievant applied for a vacant Transportation Crew Supervisor 1 position, which was posted on August 15, 2011.

3. Grievant and three other internal applicants applied for and were interviewed for the Transportation Crew Supervisor 1 position.

4. The selection panel for the posting was composed of Jason Hunt, Assistant Maintenance Engineer, Rick Taylor, County Administrator and Peggy Carpenter, Human Resources Director. Interviews for the position were conducted on September 7, 2011.

5. A summary of the interview is written on an "Application Evaluation Record." The form is used agency wide during the interview process. The form indicates whether the applicant meets, does not meet, or exceeds the minimum requirements for the job postings. Additionally, there is a comment section for the interviewers to note any pertinent information during the interview.

6. All four candidates were asked the same written questions and rated on the same qualifications including education, relevant experience, knowledge, skills and abilities, interpersonal skills, flexibility/adaptability and "presentability."

7. Respondent selected Carl Mealey, who listed a hiring date with Respondent of May 2004, for the supervisor position.

8. Mr. Mealey's record indicates that his overall evaluation by Mr. Hunt and Mr. Taylor was "exceeds," while Grievant's overall evaluation was "meets." Ms. Carpenter's record indicates that Grievant and Mr. Mealey were each scored as "meets" on the overall evaluation.

9. Grievant contests the validity of Mr. Mealey's disclosure on his application that he possessed eighteen years of employment in a supervisory role with a glass factory located in Lewis County. Mr. Mealey asserts on his application that he was a glassworker supervising six workers at Glass Works West Virginia, LLC, from 1984 until 2002. Glass Works West Virginia existed as a business under that name from October 2000 until July 2003. Grievant concludes that Mr. Mealey could not have been accurate in his application.

10. Grievant indicated on his application that several times a month he would oversee a crew of four to seven employees. Grievant contests Respondent's apparent decision to discount his supervisory experience reported on his application.

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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Grievant applied for the Transportation Crew Supervisor position in Lewis County and was not chosen. Grievant asserts that he is more qualified, and has more experience than the successful applicant. Grievant argues that his experience surpasses that of Mr. Mealey. Grievant was involved in training Mr. Mealey when he was initially hired by the DOH, and that he is often asked to assume a supervisor's position in his organization. DOH counters that it properly followed its procedures on posting and filling the vacancy and that because Grievant was not the best suited candidate for the position he was not selected.

Unsuccessful applicants, such as Grievant, who grieve their non-selection for a posted position bear the burden of proving, by a preponderance of the evidence, that the employer "violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).

As previously noted, it is well-established that the Grievance Board's job is not to engage in the selection process but rather to conduct a “review of the legal sufficiency of the selection process.” *Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). In conducting such review, the Grievance Board has consistently held that “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.” *Jordan*, *supra*.

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. 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 action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). 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." *Id.* (*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 a board of education. *See generally, Harrison v. Ginsberg,* [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli*, *supra*.

Grievant is qualified for the position, and it is undisputed that Grievant possesses more years of service with DOH than the successful applicant. However, these facts alone do not necessarily make Grievant's qualifications greater than or substantially equal to the successful applicant's. 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 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).

The record established, by a preponderance of the evidence, that Mr. Mealey's eighteen years of supervisory experience that he attained while at the glass factory was essential in his selection for the crew supervisor position in Lewis County. Grievant was given credit for his supervisory experience and his years at the DOH. However, Mr. Mealey's years of supervisory experience outweighed that of Grievant based on the information submitted on their applications. Contrary to the mere assertions of the Grievant, the record did not establish that Mr. Mealey embellished his application concerning experience in the area of supervision. The decision to not offer the Grievant

the Crew Supervisor position was not arbitrary and capricious. Respondent provided a reasonable explanation for not selecting the Grievant for the position.

The following conclusions of law support the decision reached.

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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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. 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. Grievant did not meet his burden of proving the selection process was insufficient or fatally flawed.

4. Grievant failed to prove that the selection of Mr. Mealey for the Crew Supervisor position was an arbitrary and capricious decision.

For the forgoing reasons, the grievance is hereby **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 (eff. July 7, 2008).

Date: November 26, 2013

Ronald L. Reece
Administrative Law Judge