CAROLYN TURNER,

Grievant,

v. **DOCKET NO. 01-HEPC-511**

HIGHER EDUCATION POLICY COMMISSION/

BLUEFIELD STATE COLLEGE BOARD OF GOVERNORS,

Respondent.

D E C I S I O N

This grievance was filed by Grievant Carolyn Turner on August 14, 2001, when she was not selected for a Counselor II position at Bluefield State College ("BSC"). In her statement of grievance she asserted her “education, experience, and qualifications made me the best candidate for the position.” As relief she sought to be placed in the position. (See footnote 1)

The following formal Findings of Fact are properly made from the record developed at Levels III and IV.

Findings of Fact

1. Grievant has been employed by BSC at its Greenbrier Community College Center as a Student Program Advisor since December 1997.

2. In May 2001, BSC posted a Counselor II vacancy, a classified exempt position. The posting states the qualifications as:

> Masters Degree in Counseling or related field with one to two years experience in counseling. Knowledge of career and personal counseling, academic advising and computer skills. The successful candidate will have excellent communication skills and the ability to relate and work with diverse cultural and economic backgrounds.

The posting lists the responsibilities of the position as:

> The counselor provides career and personal counseling support to the enrollment services center. The counselor's main responsibilities include assisting students in recognizing and utilizing personal, social, educational skills and abilities that will enhance their growth. Manages the career resources center, teaches life management skills class, administers career instruments and educational testing. Serves as academic advisor to students assigned to advising center.

Eight people applied for the position, including Grievant and Anthony Dillard. Grievant and Mr. Dillard met the experience and education requirements.

3. A selection committee was formed. The committee members were Cravor Jones, Director of Counseling at Bluefield State College, Kenny Mandeville, Terry Thompson, Pat Gilley, Renando Holland, and Ralph Patsel. Mr. Jones supervises the Counselor II position, and chaired the selection committee. The committee reviewed the applications to determine which applicants met the minimum qualifications, and decided which applicants they would interview. The committee interviewed Grievant, Mr. Dillard, and one other applicant. Each applicant was asked the same questions during the interview.

4. Most of the committee members knew Mr. Dillard and Grievant. They did not discuss the qualifications of the applicants. They took a secret vote, and five members voted to recommend Mr. Dillard, while one member voted to recommend Grievant. Therecommendation was presented to John Cardwell, Director of Enrollment Management at BSC, who supported the committee's recommendation, and presented it to the President of BSC.

5. BSC President Robert Moore selected Mr. Dillard for the position. His decision was based upon his discussions with the Human Resources Director about the qualifications of Grievant and Mr. Dillard, the recommendation of the selection committee and Mr. Jones, who would be supervising the position, the fact that the two candidates were similar, with each having strengths and weaknesses, and his commitment to the Office of Civil Rights to retain an African American where possible. Mr. Dillard is an African American, while Grievant is not.

6. Mr. Dillard has a Bachelors Degree in Criminal Justice, and a Masters Degree in Social Work Administration. He began his employment at BSC in March 1998, as an Educational Outreach Counselor/Multicultural Advisor. In April 2000, he became Director of Alumni Affairs at BSC. Mr. Dillard held an internship under a licensed, independent, clinical social worker at the Children's Home Society. During the course of his internship he counseled children with attention deficit disorder, behavioral type disorders, and other disorders, and conflicts with parent. As an Educational Outreach

Counselor he provided personal counseling to students, and he developed multi-cultural programming for students. He worked as a recruiter for BSC in West Virginia, Maryland, Virginia, and North Carolina. He has acted as room supervisor of students taking various tests, and as a proctor. He has never taught any classes.

7. Grievant has a Bachelors Degree in Psychology, and a Masters Degree in Counseling and Human Development. She teaches Life Management Skills at Greenbrier Community College. Other responsibilities of her position, as detailed on the position information questionnaire ("PIQ") are academic advising and assigning students to advisors, organizing and conducting student orientation, assisting in new programs suchas "Emerging Scholars," administering COMPASS test and providing information to students about other standardized tests, supervising tutoring program, personal counseling, and planning special events, such as the spring awards ceremony. Prior to her employment at BSC, Grievant worked as a student academic advisor at Northern Kentucky University for a year and a half, and as an instructor of a career orientation course for part of that time; she was a graduate assistant academic advisor at Radford University for almost two years; she worked as a summer intern in a summer orientation program; she worked as a resident director at Bridgewater College for five years, during which time she utilized her counseling skills to assist residents; and she worked as a resident assistant at Gardner-Webb University for four years while attending college, utilizing counseling skills.

8. Greenbrier Community College does not have any Counselor positions. Grievant and her supervisor provide personal counseling services to students.

9. The justification for the recommendation presented on behalf of the selection committee was that Mr. Dillard had experience in academic, career, and personal counseling at BSC; he had personal counseling experience during his internship; he was coordinator of a program at BSC which helped high risk students achieve their career goals, and he monitored the academic progress of these students; he had testing experience as an examiner, room supervisor, and proctor for various tests; he had developed multi-cultural programming; he was knowledgeable of the Banner computer system; he had extensive recruiting experience; and he had prior experience in the counseling center, from which Mr. Jones knew he would do well. Mr. Jones felt both Grievant and Mr. Dillard had counseling experience, but he believed Mr. Dillard's internship gave him more expertise, because he was supervised by a licensed clinical social worker, and the person in this position would do

assessment, diagnosis, and treatment. Mr. Jones also found Mr. Dillard's testing experience to be more extensive than Grievant's, becausehe had been room supervisor for various tests. The selection committee found Grievant's career counseling experience to be limited. Grievant did not mention any experience in multi-cultural programming on her resume or during the interview.

10. Recruiting experience was not listed on the posting as a duty or responsibility of the position, nor is it listed as a duty on the PIQ for the position. The person who had previously occupied the Counselor II position at Bluefield State College did a minimal amount of recruiting. Mr. Jones asked Mr. Cardwell if the position would be required to recruit, and was told it would. Mr. Cardwell's view is that everyone in the department is a recruiter at times.

11. Mr. Jones had supervised Mr. Dillard during the course of his employment at BSC. Mr. Jones did not share his personal knowledge of Mr. Dillard's abilities with the selection committee.

Discussion

The burden of proof is upon Grievant to demonstrate that BSC acted in an arbitrary and capricious manner in selecting Mr. Dillard. Booth v. W. Va. Bd. of Trustees, Docket No. 94-BOT-066 (July 25, 1994). (See footnote 2) The arbitrary and capricious standard of review of selection decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the decision maker. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Booth, supra. The undersigned cannot perform the role of a "super- interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Generally, an action is arbitrary and capricious if the decision maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained his decision in a manner contrary to the evidence before him, 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." Id. (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)).

In applying the arbitrary and capricious standard of review, this Grievance Board has further noted that, "[t]he fact that a candidate has the most relevant experience or the most seniority does not necessarily entitle that candidate to a position. Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995)." Rumer v. Bd. of Trustees, Docket No. 95-BOT-064 (May 31, 1995). In an evaluation of whether the decision-maker acted in an arbitrary and capricious manner the question is not, "what are Grievant's abilities," but rather, what did the decision-maker know of Grievant's abilities when deciding she was not the best qualified candidate for the position. Booth, supra. "'[I]f the grievant can demonstrate that the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion,' this Board will require the employer to reevaluate the qualifications of the grievant and the successful applicant. Jones v. Board of Trustees/West Virginia Univ., Docket No. 90-BOT-283 (Mar. 28, 1991)." Bourgeois v. Bd. of Trustees, Docket No. 93-BOT-268A (Mar. 29, 1994).

Grievant argued she was the best qualified candidate for the position, with her years of work experience, and in particular, her experience in academic and personal counseling,and her undergraduate degree in Psychology and Masters Degree in Counseling, as compared to Mr. Dilliard's degrees. She asserted Mr. Dillard had limited training in psychology and counseling. She argued the selection process was flawed, because recruiting, multi-cultural experience, and race were considered.

Respondent pointed out that the issue here is not which candidate was the most qualified, but whether the selection decision was made in an arbitrary and capricious manner. Respondent acknowledged Grievant was well qualified, but argued she had not demonstrated any arbitrary and capricious action.

Grievant is quite correct that the selection committee should not have given any weight to Mr. Dillard's recruiting experience, as it is clear he would have no true responsibility for recruiting. However, this was only one of the reasons for the committee's recommendation. From a review of the posting, the undersigned finds no error in the committee's consideration of Mr. Dillard's multi-cultural experience. Grievant pointed out that she must work with students of diverse backgrounds; however, Mr. Dillard's specific experience in multi-cultural programming was properly considered by the committee.

Grievant was qualified for the position, and had some experience in personal counseling, as well

as the other aspects of the job. She had experience teaching Life Management Skills, while Mr. Dillard did not. However, Mr. Dillard was also qualified for the position, and, contrary to Grievant's assertion, had personal counseling training and experience, as well as multi-cultural programming experience. The choice of Mr. Dillard over Grievant by the committee for the position was not unreasonable, but rather, was based upon sound reasons. Likewise, it would not have been unreasonable for the committee to have chosen Grievant over Mr. Dillard. Either was an excellent candidate, and the undersigned cannot simply substitute her judgment over that of BSC as to which candidate to select. Finally, as to Grievant's argument that President Moore should not have considered Mr. Dillard's race in making his decision, President Moore pointed to an agreement BSC has with the federal Office of Civil Rights, entered into as a result of a 1998 complaint. Under this agreement, BSC agreed to develop a comprehensive plan to recruit, hire, and retain black faculty, among other things. While this was not a faculty position, President Moore testified he has not confined BSC's commitment to faculty positions, and Mr. Dillard's race was a consideration of his. As noted, however, President Moore also looked at the qualifications of the candidates, and the recommendation of both the committee and Mr. Jones, the supervisor. President Moore considered relevant factors in making his decision.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to demonstrate that BSC acted in an arbitrary and capricious manner in selecting Mr. Dillard. Booth v. W. Va. Bd. of Trustees, Docket No. 94-BOT-066 (July 25, 1994).

2. The arbitrary and capricious standard of review of selection decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the decision maker. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Booth, supra. The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

3. Generally, an action is arbitrary and capricious if the decision maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained his

decision in a manner contrary to the evidence before him, 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." Id. (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)).

4. In applying the arbitrary and capricious standard of review, this Grievance Board has further noted that, "[t]he fact that a candidate has the most relevant experience or the most seniority does not necessarily entitle that candidate to a position. Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995)." Rumer v. Bd. of Trustees, Docket No. 95-BOT-064 (May 31, 1995).

5. In an evaluation of whether the decision-maker acted in an arbitrary and capricious manner the question is not, "what are Grievant's abilities," but rather, what did the decision-maker know of Grievant's abilities when deciding she was not the best qualified candidate for the position. Booth, supra.

6. "'[I]f the grievant can demonstrate that the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion,' this Board will require the employer to reevaluate the qualifications of the grievant and the successful applicant. Jones v. Board of Trustees/West Virginia Univ., Docket No. 90-BOT-283 (Mar. 28, 1991)." Bourgeois v. Bd. of Trustees, Docket No. 93-BOT-268A (Mar. 29, 1994).

7. Both Grievant and Mr. Dillard were well qualified. Grievant did not demonstrate a flaw in the selection process, or that the decision to select Mr. Dillard was made in an arbitrary and capricious manner.

Accordingly, this grievance is **DENIED**. Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. 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 Grievance Board with the civil action number so that the record can be

prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: February 1, 2002

Footnote: 1

Grievant's supervisor responded on August 16, 2001, that he was not involved in the hiring process, and could not make a decision on the grievance. Grievant appealed to Level II on August 16, 2001. Apparently Levels II and III were combined and a hearing was held on September 6, 2001, which was mistakenly referred to as a Level II hearing. See W. Va. Code § 18B-2A-4 (2001). The grievance evaluator recommended that the grievance be granted. This recommendation was not accepted by Dr. Robert E. Moore, President. He stated in his letter of September 13, 2001, notifying Grievant of this that he has the responsibility to hire and fire employees, and he was not giving up that right, and he did not agree with the grievance evaluator's finding that Mr. Dillard is less qualified than Grievant for the position. Grievant appealed to Level IV on September 18, 2001 (although the post-mark on Grievant's letter mistakenly reads September 18, 2000). A Level IV hearing was held on December 5, 2001. Grievant was represented by Ron Holt, and Respondent was represented by Jendonnae L. Houdyschell, Esquire. This grievance became mature for decision upon receipt of the parties' written arguments on January 11, 2002.

Footnote: 2

The hiring preferences found in W. Va. Code §18B-7-1(d) are not applicable here, as this was a classified exempt position. The preferences specifically apply to nonexempt classified positions.