EILEEN BROWN,

Grievant,

v. **Docket No. 02-HEPC-429**

HIGHER EDUCATION POLICY COMMISSION/

FAIRMONT STATE COLLEGE & TECHNICAL COLLEGE,

Respondent.

D E C I S I O N

Eileen Brown, Grievant, employed by Fairmont State College & Technical College (FSC&TC) as an Adjunct Instructor in the Interpreter Training Program, filed a level one grievance on November 12, 2002, in which she alleged the selection of a Sign Language Interpreter Instructor was fundamentally flawed. For relief, Grievant requested instatement, with back pay and benefits. The grievance was denied at level one by Blair Montgomery, Provost, of FSC&TC. The matter was not processed at level two, and was denied by President Daniel J. Bradley following a level three hearing. Appeal was made to level four on December 20, 2002, and an evidentiary hearing was conducted on March 7, 2003. Grievant appeared *pro se*, and FSC&TC was represented by Assistant Attorney General Kristi McWhirter. The grievance became mature for decision upon receipt of post-hearing submissions on or before May 1, 2003.

The essential facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by FSC&TC for approximately four years as an Adjunct Instructor in American Sign Language Interpreting (ASLI), a two-year, Associate's degree program.

2. By posting dated March 15, 2002, FSC&TC announced a vacancy for theposition of Instructor or Assistant Professor in Sign Language Interpreter. The only qualification for the position was a Bachelor's degree or equivalent in ASL, with a Master's degree preferred. Completion of interpreter training program; certification from a Registry of Interpreters for the Deaf (RID) or the National Association of the Deaf (NAD) was also preferred.

3. Two applicants, Grievant and Ruby Losh, were selected to be interviewed for the position.

Donna Cork, the Program Coordinator and Instructor, Sandy Kiger, an Adjunct Instructor in the ASLI program, and Beth Slusser, instructor, interviewed Ruby Losh in May 2002. Mr. Montgomery then interviewed Ms. Losh individually.

4. On June 17, 2002, Ms. Cork, and Ms. Kiger interviewed Grievant. Rich McCormick, Assistant Provost of the FSC&TC, interviewed Grievant in Mr. Montgomery's absence.

5. Grievant has completed 85% of the requirements for a Bachelor's Degree in Education, and 95% of the requirements for an Associate's Degree in Interpreting. At the time, Grievant was a candidate for recertification for the NAD Certificate of Competence, and also a candidate for the American Sign Language Teacher Association (ASLTA) Certification. (See footnote 1) Grievant had approximately 480 hours of documented professional development in ASL and established Sign Works, a sign language interpreting services business. 6. Ms. Losh is hearing impaired and relies totally on sign language to communicate. She holds a Bachelor of Science degree in Business Administration, and has been enrolled in graduate course work in Deaf Education. She has five years experience as a part-time ASL instructor for FSC&TC, and is a member of the NAD Interpreter Assembly. Ms. Losh did not hold the ASLTA Certification at the time the position was filled.

7. Ms. Cork recommended that Ms. Losh be awarded the position. Provost Montgomery then conferred with Mr. McCormick, and sent the recommendation to President Bradley.

8. Ms. Losh was subsequently awarded for the position. Her selection was based primarily on the fact that she holds a Bachelor's Degree, and Grievant does not.

Discussion

In a non-selection grievance the burden of proof is upon Grievant to demonstrate that FSC&TC acted in an arbitrary and capricious manner in selecting Ms. Losh. Turner v. HEPC/Bluefield State College, Docket No. 01-HEPC-511 (Feb. 1, 2002); Booth v. W. Va. Bd. of Trustees, Docket No. 94-BOT-066 (July 25, 1994). 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 argues that there were irregularities in the interview and selection process, that Ms. Cork had preselected the successful applicant, and, that her overall qualifications established that she was better qualified than Ms. Losh. FSC&TC asserts that the irregularities in the selection process were due to the fact that many faculty members are away during the summer. FSC&TC concedes that the search could likely have been better managed, but denies any preselection had taken place, and asserts that Ms. Losh was considered the most qualified applicant because she has a Bachelor's degree.

Grievant's concerns regarding the interview process are understandable. Ms. Losh was interviewed by a panel of four, while Grievant was interviewed by three individuals. Only Ms. Cork

and Ms. Kiger participated in both interviews. The general practice at FSC&TC is to convene a search committee typically composed of at least five members. However, Ms. Cork explained that it is difficult to assemble a full committee during the summer months since many faculty are unavailable. Ms. Cork did not explain the process she followed in attempting to convene a committee, nor did she explain why the two interviews were not conducted on the same day. Since only two applicants were to be interviewed, conducting them on the same day would have insured they both were evaluated by the same individuals. Further, there was no evidence that the process was uniform in that the same questions were posed to each applicant, or that the applicants were rated numerically.

This situation was further complicated by the fact that Ms. Cork had previously publicly stated that she would attempt to secure Ms. Losh a full-time position at FSC&TC. Certainly, this creates the appearance of preselection by Ms. Cork. There is no evidence that Ms. Cork actively lobbied the other participants in the search to select Ms. Losh, but as Program Coordinator, some deference may have been given to her choice. Even if this in fact occurred, Ms. Slusser, Ms. Kiger, and Mr. Montgomery all testified that preference would be given to a candidate who holds any degree. Ms. Kiger additionally stated that she believed Ms. Losh was better qualified because as a deaf person, sign language is her native language.

Finally, Ms. Cork twice advised Provost Montgomery incorrectly that Ms. Losh held ASLTA certification. Ms. Cork testified that she had apparently misunderstood, and that due to some mix-up in paperwork, Ms. Losh did not hold that certification at the time she was hired. This incident further supports the perception of preselection. Nevertheless, the evidence establishes that Ms. Losh was selected simply because she was Ms. Cork's first choice.

The ASLI Associate's Degree program at FSC&TC is not yet accredited. Ms. Slusser, Ms. Kiger and Mr. Montgomery all testified that a degree, regardless of discipline, was the primary reason each recommended Ms. Losh for the position. Mr. Montgomery explained that hiring instructors with a degree is critical for purposes of establishing credibility among peers, and he opined that President Bradley would likely have rejected any applicant who did not possess a degree.

Given that neither Grievant nor Ms. Losh met the minimum qualification, the choice of Ms. Losh over Grievant for the position was not unreasonable. Likewise, it would not have been unreasonable for the committee to have chosen Grievant over Ms. Losh. Eitherwas an excellent candidate, and the undersigned cannot simply substitute her judgment over that of FSC&TC as to which candidate to

select.

The following conclusions of law support the decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to demonstrate that FSC&TC acted in an arbitrary and capricious manner when selecting an Instructor or Assistant Professor for the Sign Language Interpreter program. 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, withoutconsideration, 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. Grievant did not prove by a preponderance of the evidence that the selection process, or that the decision to select Ms. Losh 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 Marion County. Any such appeal must be filed within thirty (30) days ofreceipt 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.

DATE: JUNE 10, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *Grievant did not provide her NAD Certificate of Competence until the level three hearing, so it would not have been considered by the selection committee.*