PRASADARAO B. MUKKAMALA,

Grievant,

v.

DOCKET NO. 02-RS-430

WEST VIRGINIA DIVISION OF

REHABILITATION SERVICES,

Respondent.

D E C I S I O N

Grievant, Prasadarao B. Mukkamala, filed this grievance against his employer, the West Virginia Division of Rehabilitation Services ("Rehab") on or about July 5, 2002:

> Dr. Mukkamala applied for the position of Permanent Medical Director at the West Virginia Rehabilitation Center Hospital RSO2020.
>
> This is the same position that was posted by the Division of Rehabilitation Services in the Spring of 2001. Dr. Mukkamala applied for that position then. It was withdrawn by the administration with no justification and now it is posted again with some minor alterations.
>
> Dr. Mukkamala is eminently qualified for the position. Dr. Mukkamala believes that none of the other applicants are qualified. Dr. Parikshak was selected as Permanent Medical Director. Dr. Parikshak is not qualified for that position. This amounts to blatant discrimination.
>
> Relief Sought: The appointment of Dr. Parikshak as Permanent Medical Director be canceled and Dr. Mukkamala be appointed as Permanent Full Time Medical Director.

The grievance was denied at level one by Narendra Pakishak, M.D. on July 22, 2001. Level two was apparently by-passed, and a level three hearing was held on October 4, 2002. Grievance Evaluator Katherine L. Dooley recommended the grievance be deniedby decision dated December

10, 2002, and Interim Director Janice Holland adopted that recommendation by Order dated December 10, 2002. Grievant appealed to level four on December 19, 2002, and the parties subsequently agreed to submit the matter on the record developed below. This matter became mature for decision on April 11, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Sharon Iskra, Esq., Hunt and Lees, P.C., and Rehab was represented by Warren Morford.

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

February 27, 2001 Application for Examination of Dr. Mukkamala.

Ex. 2 -

June 5, 1978 Certificate from the American Board of Physical Medicine and Rehabilitation.

Ex. 3 -

1989-2000 Job Performance Evaluations for Dr. Mukkamala.

Ex. 4 -

July 31, 2000 memorandum from Dr. Mukkamala to William Tanzey and Janice Holland.

Ex. 5 -

July 31, 2000 memorandum from Dr. Mukkamala to Janice Holland, William Tanzey, Michael Meadows, and James P. Quarles.

Ex. 6 -

August 7, 2000 memorandum from William Tanzey to James Quarles, Steve Hill, Michael Meadows, Janice Holland, Dr. Mukkamala, and Dr. Parikshak.

Ex. 7 -

September 25, 2000 memorandum from Dr. Mukkamala to Janice Holland, William Tanzey, and James Quarles.

Ex. 8 -

September 29, 2000 memorandum from William Tanzey to Dr. Mukkamala, Janice Holland, James Quarles, and Steve Hill.

Ex. 9 -

February 16, 2001 Career Opportunity Posting for Physician Director.

Ex. 10 -

March 14, 2001 memorandum from William Tanzey to Dr. Mukkamala, James Quarles, and Steve Hill.

Ex. 11 -

August 1, 2001 memorandum from William Tanzey to Dr. Mukkamala.

Ex. 12 -

February 19, 2002 Medical Staff Meeting Minutes.

Ex. 13 -

March 7, 2002 Career Opportunity Posting for Physician Director.

Ex. 14 -

March 13, 2002 Application for Examination of Dr. Mukkamala.

Ex. 15 -

April 15, 2002 Employee Performance Appraisal of Dr. Mukkamala.

Ex. 16 -

July 31, 2002 Level III Decision and Order.

Ex. 17 -

June 21, 2002 memorandum from Bill Tanzey to Dr. Mukkamala.

Ex. 18 -

July 5, 2002 letter from Julee Zimmer, MSW, and Yasmin Matheson, MSW.

Ex. 19 -

July 1, 2002 letter from Edward Ray Spencer, MSW.

Ex. 20 -

January 31, 2001 Application for Employment of Dr. Parikshak.

Level Three Rehab Exhibits

Ex. 1 -

Section 2. Comprehensive Integrated Inpatient Rehabilitation Programs.

Ex. 2 -

Medical Director Interview Questions.

Ex. 3 -

American Medical Directors Certification Program, Inc. Certificate of Dr. Parikshak, 2002-2008.

Grievance Evaluator's Exhibits

Ex. 1 -

May 20, 2002 letter from Brian J. Boon to Laine Wilder, with attachments.

Testimony

Grievant testified in his own behalf, and presented the testimony of Kenneth Wright, William Tanzey, Narendra Parikshak, Ivan Salazar, Lisa Castilla, Heather Fouch, Shirley Starkey, and Dickie Lanham. Rehab presented no additional witnesses.

Based upon a review of the record in its entirety, I find the following material facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is currently employed by Rehab, and is board certified in physical medicine and rehabilitation medicine.
2. From July 1980 through July 2000, Grievant was the Medical Director of Rehab.

Approximately 17% of his time as Medical Director was spent on administrative matters, and 83% of his time was spent providing clinical medical services to Rehab patients.

3. From 1980 through 2000, Grievant received “meets” or “exceeds” ratings on his performance evaluations. LIII G. Ex. 3.

4. In July 2000, Grievant, then 55 years of age, made a personal decision to step down as Medical Director in order to “take it easy.” LIII Mukkamala Test., p. 42. 5. By letter dated July 31, 2000, Grievant notified the appropriate administrators that he wished to step down as Medical Director, but wanted to continue working approximately 90% of his time as a physician specialist physiatrist. LIII G. Exs. 4, 5.

6. On August 7, 2002, Grievant officially stepped down as Medical Director, and Dr. Narendra Parikshak was appointed interim Medical Director. LIII G. Ex. 6.

7. Dr. Parikshak worked in the position of interim Medical Director 25 hours per week, or approximately 69% of full-time equivalent. Thus, under Dr. Parikshak, the Medical Director position was part-time.

8. On February 16, 2001, the position of Medical Director was posted by Rehab. LIII G. Ex. 9. The duties of the position in this posting read, in part:

> THIS SENIOR STAFF MEMBER WILL OVERSEE THE MULTIDISCIPLINARY, POST- ACUTE MEDICAL REHABILITATION SERVICES AT THIS FORTY BED, LICENSED REHABILITATION HOSPITAL. IN *CONJUNCTION* WITH CLINICAL OVERSIGHT OF THE HOSPITAL'S CLINICAL DEPARTMENT HEADS, THIS PERSON WILL PLAN AND CARRY OUT A COMPREHENSIVE PROGRAM OF INPATIENT MEDICAL REHABILITATION SERVICES WITH PATIENTS FROM AROUND WEST VIRGINIA. WILL DIRECTLY SUPERVISE OTHER FULL-TIME OR PART-TIME PHYSICIANS ASSIGNED TO THE REHABILITATION HOSPITAL. THE PERSON SELECTED SHOULD HAVE WORKING KNOWLEDGE AND EXPERIENCE IN THE FOLLOWING AREAS: CARF OR J0INT COMMISSION ACCREDITATION FOR MEDICAL REHABILITATION; THE FIM SYSTEM OF MEDICAL MEASUREMENT; EXPERIENCE IN WORKING DIRECTLY WITH MULTIDISCIPLINARY TEAMS INCLUDING PHYSICAL THERAPY, OCCUPATIONAL THERAPY, SPEECH THERAPY, REHAB ENGINEERING AND TRANSITIONAL LIVING; AND A PHYSICAL MEDICINE BACKGROUND IN DIRECT MEDICAL REHABILITATION SERVICE PROVISION TO DIVERSE DISABILITY POPULATIONS INCLUDING TRAUMATIC BRAIN INJURY, SPINAL CORD INJURY, STROKES AND DEVELOPMENTAL DISABILITIES.

LIII G. Ex. 9 (emphasis in original).

9. The position is advertised as “full-time to 60%” and represents the position held by Grievant for the past 20 years. LIII G. Ex. 9.

10. Grievant and Dr. Parikshak applied for the position. 11. On or about March 14, 2001, both Grievant and Dr. Parikshak were informed by William Tanzey, Administrator, that the posting had been withdrawn. No reason was given for that action. LIII G. Ex. 10.

12. On March 7, 2002, the Medical Director position was posted again. The second posting reads, in part:

> THIS SENIOR STAFF MEMBER WILL WORK 20 HOURS PER WEEK AND WILL OVERSEE THE MULTIDISCIPLINARY POST-ACUTE MEDICAL REHABILITATION SERVICES AT THIS FORTY BED, LICENSED REHABILITATION HOSPITAL. IN CONJUNCTION WITH CLINICAL OVERSIGHT OF THE HOSPITAL'S CLINICAL DEPARTMENT HEADS, THIS PERSON WILL PLAN AND CARRY OUT A COMPREHENSIVE PROGRAM OF INPATIENT MEDICAL REHABILITATION SERVICES WITH PATIENTS FROM AROUND WEST VIRGINIA. WILL DIRECTLY SUPERVISE OTHER FULL-TIME OR PART-TIME PHYSICIANS ASSIGNED TO THE REHABILITATION HOSPITAL. WILL SERVE AS PHYSICIAN ON CALL IN ROTATION WITH OTHER STAFF PHYSICIANS. PERFORMS OTHER RELATED WORK AS REQUIRED.

LIII G. Ex. 13.

13. Grievant and Dr. Parikshak applied for the Medical Director position again by submitting their applications for employment. LIII G. Ex. 14.

14. On April 5, 2002, Grievant interviewed for the position with Mr. Tanzey, Mr. Steve Hill, Manager, Hospital Administration, and James Quarles, Manager, Human Resources.

15. Dr. Parikshak was selected as Medical Director on or about June 21, 2002. LIII G. Ex. 17.

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. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va.Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

The standard of review the selection process of a state employee is whether the decision was arbitrary and capricious. 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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-

081 (Oct. 16., 1996).

While a searching inquiry into the facts is required to determine if an action is 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. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). 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. Dept. of Educ., No. 29066 (W. Va. 2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996).

If a grievant can demonstrate the selection process was so significantly flawed that he might reasonably have been the successful applicant if the process had been conducted in a proper fashion, the employer will be required to compare the qualifications of the grievant to the successful applicant. Thibault v. W. Va. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). Grievant contends the original job posting for Medical Director was withdrawn after he applied for the position, and was changed in an effort to tailor the position to the Interim Director, Dr. Parikshak. He further contends that he, not Dr. Parikshak, is more qualified for the position of Medical Director.

Both Grievant and Dr. Parikshak had applied for the first posting, and both received letters stating the posting had been withdrawn. No specific reason was given to either of them for the withdrawal of the posting.

Mr. Tanzey testified there were four reasons the first posting in February 2001 was withdrawn: 1) Rehab was not pleased with the job Grievant had done as Medical Director; 2) the administration was not sure the hospital was going to remain open; 3) revenue at the hospital was down; and 4) there was concern that the Department of Rehabilitative Services' budget could not support the hospital. Given the state of flux the hospital was in at the time of the first posting, Mr. Tanzey decided it would not be fiscally responsible to hire a full-time Medical Director at that time.

A year later the situation was a bit more positive, and the administration decided to post the Medical Director position again. This time, they had the benefit of observing Dr. Parikshak, and decided they liked the way things were being done under his direction. It was clear to them that the administrative duties of the Medical Director did not amount to a full-time position, and the first thing that was done was to redraft the posting of the position as a half-time position. Of course, in the past,

the Medical Director position also included the clinical duties which were being performed by Grievant, but since Grievant was still there at the hospital performing those duties, it was decided to separate them out from the Medical Director position. Therefore, the successful applicant for the Medical Directorposition would not necessarily have to be a physiatrist to perform the duties required of that position.

Both Grievant and Dr. Parikshak applied for the second posting, and the position was awarded to Dr. Parikshak. While Grievant certainly surpasses Dr. Parikshak in years of experience, the testimony of Mr. Tanzey was that the administration did not want Grievant to return as Medical Director. They were looking for a new direction to take the hospital, and believed Dr. Parikshak could assist in that endeavor.

When advertising for state classified service positions, all job postings should be accomplished ten (10) working days before the date of filling the position. The posting shall include a description of duties, job classification, and job location. Supervisors are to make job specifications available to employees so they can determine the minimum qualifications of the job. See W. Va. Code § 29-6-24.

Rehab complied with all applicable job posting requirements set forth by statute, as well as by the Division of Personnel Administrative Rule, in posting the Medical Director position. Rehab presented credible evidence as to why the position was withdrawn and later reposted. Furthermore, the evidence is clear that Rehab administration, while very satisfied with Grievant's performance as a clinical physician, was not satisfied with the way Grievant performed the duties of administrator. Even Grievant testified he did not like the day-to-day administrative duties associated with the position, such as hiring, firing, evaluations, and leave slips, and delegated those duties to the Hospital Manager, Mr. Hill. Grievant also testified his dislike of administrative details was one of the reasons he decided to step down from the position in the first place. There is no evidence that Rehab would have forced Grievant out of the Medical Director position, but once he voluntarily steppeddown, the administration seized upon the opportunity to take the hospital in a new direction with a new Director.

Grievant also contends he was the victim of discrimination with regard to his non- selection as Medical Director. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination,

an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

A simple non-selection for a position does not amount to discrimination as used in the grievance process. Moreover, Grievant was treated exactly the same as Dr. Parikshakwith regard to the application requirements and the interview process, even down to the questions asked during the interview.

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. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. The standard of review the selection process of a state employee is whether the decision was arbitrary and capricious. 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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996).

3. While a searching inquiry into the facts is required to determine if an action is 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. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). 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. Dept. of Educ., 210 W. Va. 105, 556 S.E.2d 72, citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996). 4. If a grievant can demonstrate the selection process was so significantly flawed that he might reasonable have been the successful applicant if the process had been conducted in a proper fashion, the employer will be required to compare the qualifications of the grievant to the successful applicant. Thibault v. W. Va. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

5. When advertising for state classified service positions, all job postings should be accomplished ten (10) working days before the date of filling the position. The posting shall include a description of duties, job classification, and job location. Supervisors are to make job specifications available to employees so they can determine the minimum qualifications of the job. See W. Va. Code § 29-6-24.

6. Grievant has failed to prove by a preponderance of the evidence that the selection process was flawed, or that the selection of Dr. Parikshak for the position of Medical Director was arbitrary and capricious.

7. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

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that he is similarly situated, in a pertinent way, to one or more other employee(s);

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that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

8. Grievant has failed to establish a case of discrimination.

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 the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: May 14, 2003