TOMMY REYNOLDS,

Grievant,

v. **Docket No. 03-HEPC-294**

HIGHER EDUCATION POLICY COMMISSION/

WEST VIRGINIA UNIVERSITY - INSTITUTE OF

TECHNOLOGY,

Respondent.

D E C I S I O N

Grievant, Tommy Reynolds, an employee at West Virginia University - Institute of Technology ("WVUT"), filed this grievance on July 31, 2003. Grievant grieves his non- selection for the position of Supervisor of Campus/Building Services. As relief, Grievant seeks instatement into the position. (See footnote 1) (See footnote 2)

This grievance was denied at all lower levels, and Grievant appealed to Level IV on September 21, 2003. A Level IV hearing was held November 7, 2003, at the Grievance Board's Charleston Office. (See footnote 3) The parties agreed to submit their proposed findings of factand conclusions of law by November 25, 2003, whereupon the matter became mature for decision.

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 at WVUT for twenty-nine years, and had been classified as an Assistant Building Supervisor for four years. Grievant had been serving as the Interim Supervisor of Campus/Building Services for over a year at the time the position was posted. Prior to his position as Assistant Building Supervisor, Grievant had served as Building Service Worker, Lead. Grievant has a high school education.

2. On March 12, 2003, WVUT posted the position of Supervisor of Campus/Building Services.

3. Grievant applied, as did Ron Crowe, the successful applicant.

4. Mr. Crowe had been employed at WVUT for 25 years and had been in the position of Building Service Worker, Lead/Foreman for 20 years. At the time of his application, he was the Interim Assistant Building Supervisor. He earned a Regents Degree in 1994, and had supervisory training and experience in the military before he began his work at WVUT.

5. Upon review of the applicants, WVUT decided three internal candidates should be interviewed for the position.

6. The Interview Committee was formed by Grievant's upper level supervisor and the section hiring authority, Charles Burdette. The Committee was then trained by the Social Justice Officer.

7. The Interview Committee developed interview questions, and these questions were also reviewed and approved by the Social Justice Officer.

8. The Interview Committee was made up of Mr. Burdette, Gina Swope, Administrative Assistant, Robert Carder, Building Service Worker II, and Barbara Crist, Director of the Library. The candidates were interviewed on April 14, 2003.

9. Three of the four members ranked Mr. Crowe as the most qualified candidate. Mr. Carder, even though he ranked Mr. Crowe higher on the Candidate Referral/Evaluation Form, selected Grievant as the best qualified, as he believed Mr. Crowe did not work well under pressure. Mr. Carder ranked Mr. Crowe second.

10. Mr. Burdette sent Mr. Crowe's name forward as the recommended candidate.

11. As is her practice, President Karen LaRoe interviewed the applicants on May 1, 2003.

12. Shortly thereafter, Mr. Burdette retired, and President LaRoe delayed the hiring process for the Supervisor of Campus/Building Services position, in order to fill Mr. Burdette's position and to allow this new person input into the hiring.

13. Mike Neese, Dean of Students and Assistant to the President, was selected to fill Mr. Burdette's position. He and Jim Darling, Interim Manager of Maintenance and Grievant's first level supervisor, interviewed Mr. Crowe and Grievant on July 11, 2003.

14. Both Mr. Neese and Mr. Darling recommended Mr. Crowe for the position.

15. President LaRoe agreed with the selection, and Mr. Crowe received the position.

16. The reasons cited for Mr. Crowe's selection over Grievant were his better communication skills, motivation leadership style, and superior education.

Issues and Arguments

Grievant presented several arguments. First, Grievant asserts he was better qualified and had more seniority than the successful applicant. Second, Policy WVU-HR-3 was not followed. Third, The Interview Committee lacked the "expertise, training, and experience in custodial/building services" to make a proper selection. Fourth, it was a conflict of interest for President LaRoe to make the final hiring decision and to conduct the Level II conference. (See footnote 4)

Respondent argues there were no violations within this hiring process, all policies were followed, and the best qualified candidate was selected.

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. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

In a selection case, 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). This Grievance Board recognizes that selection decisions are largely the prerogatives of management. While the individuals who are chosen should be qualified and able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. Skeens-Mihaliak v. Div. of Rehabilitation Serv., Docket No. 98-RS-126 (Aug. 3, 1998); Ashley v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR- 070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket Nos. 89- WCF-208/209 (Aug. 7, 1989). 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.

Grievant's burden is to demonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. Surbaugh v. Dep't of Health and Human Serv., Docket No. 97-HHR-235 (Sept. 29, 1997). If a grievant can demonstrate 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 can require the employer to review the qualifications of the grievant versus the successful applicant. Thibault, supra; Jones v. Bd. of Trustees/W. Va. Univ., Docket No. 90-BOT-283 (Mar. 28, 1991).

"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." 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 a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

The issues raised by Grievant will be addressed one at a time.

A. Qualifications/Seniority

Grievant asserts he was the most qualified and most senior candidate for the position. W. Va. Code §18B-7-1(d), states as follows:

> If more than one qualified, nonexempt classified employee applies, the best- qualified nonexempt classified employee shall be awarded the position. Ininstances where such classified employees are equally qualified, the nonexempt classified employee with the greatest amount of continuous seniority at the state institution of higher education shall be awarded the position.

This Code Section does not come into play unless the applicants are considered to be equally qualified. Here, while WVUT believed both candidates met the minimum qualifications for the position, it did not find Grievant and Mr. Crowe to be equally qualified. Because of his college degree, better interpersonal communication skills, motivational leadership style, and military training and experience in supervision, WVUT found Mr. Crowe to be more qualified. WVUT noted Grievant's seniority and experience, but believed Mr. Crowe was the best choice for the position. The undersigned Administrative Law Judge does not find this decision to be arbitrary and capricious.

B. Policy violation

Although Grievant asserted violations of Policy WVU-HR-3, he did not address this issue at hearing. The evidence of record demonstrates all required policies were followed. **C. Composition of the Interview Committee**

Grievant asserts an Interview Committee must have some in-depth knowledge of the duties of the position. In this circumstance, Grievant believes an Interview Committee should have been chosen that was aware of professional, custodial, cleaning techniques. The undersigned Administrative Law Judge notes Grievant's supervisor, Mr. Burdette, and Mr. Carder, a Building Service Worker II, were both on the Interview Committee. An institution has the discretion to select the Interview Committee, and the undersigned Administrative Law Judge does not find the selection of this Interview Committee was arbitrary and capricious. **D. Conflict of Interest**

Grievant asserts President LaRoe cannot make both the hiring decision, and serve as the Grievance Evaluator at the Level II conference. He maintains this is a conflict of interest. Grievant presented no statute, rule or regulation to support his assertion. Grievances are frequently heard at the lower levels by supervisors who have made the decision that is being grieved. This offers the parties an opportunity to discuss the issue and hopefully work it out. There is no conflict of interest in President LaRoe's actions.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievances 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. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. 2. The role of the undersigned is to review of the legal sufficiency of the selection process, at the time it occurred. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (Jun. 26, 1989).

3. "The exercise of administrative judgment by appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or capricious or clearly wrong." Sloan v. W. Va. Univ., Docket No. BOR-88- 109 (Sept. 30, 1989), at 6.

4. W. Va. Code §18B-7-1(d), states as follows:

> If more than one qualified, nonexempt classified employee applies, the best-qualified nonexempt classified employee shall be awarded the position. In instances where such classified employees are equally qualified, the nonexempt classified employee with the greatest amount of continuous seniority at the state institution of higher education shall be awarded the position.

5. Grievant did not demonstrate a violation of Policy WVU-HR-3.

6. Grievant did not demonstrate Mr. Crowe's selection as the most qualified candidate was arbitrary and capricious.

7. The institution has discretion in designing the make-up of an Interview Committee, and unless there is abuse of discretion, this decision will stand.

8. There was no abuse of discretion in the make-up of the Interview Committee.

9. Grievant did not demonstrate in was a conflict of interest for President LaRoe to hold the Level II Conference.

Accordingly, this grievance is **DENIED**.

Any party 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 16, 2004

Footnote: 1

Grievant also sought "the right to address the issue of back pay and any other related legal issues in another forum and/or outside the venue of the state grievance board." The undersigned Administrative Law Judge will not address this issue, as it is not within her jurisdiction.

Footnote: 2

At the Level IV hearing, Grievant asserted he had other theories why he was not selected for the position, but also stated he had no proof on any of these issues and might present evidence later. The undersigned Administrative Law Judge informed Grievant that Level IV was the last level in the grievance procedure where evidence was taken. Additionally, Respondent objected to these assertions, pointing out Grievant had noted he had no proof. The undersigned Administrative Law Judge informed the parties that without evidence an issue could not be addressed.

Footnote: 3

Grievant represented himself, and Respondent was represented by its counsel, Elaine Skorich, Esq., Assistant Attorney General.

Footnote: 4

Grievant also asserted that because Mr. Burdette did not do anything else in a timely and efficient manner, there is no reason to believe he conducted the Interview Committee correctly. When asked to clarify exactly what he meant, Grievant was unable to do so. It is noted Mr. Burdette did not have input into the final decision as he was no longer working at WVUT at the time. Accordingly, this issue will not be considered further.