CAROLYN KITCHEN,

Grievant,

v. **DOCKET NO. 04-WCC-414**

WORKERS' COMPENSATION

COMMISSION,

Respondent.

DECISION

On April 5, 2004, Carolyn Kitchen filed a grievance, directly at level three, against her employer, the Workers' Compensation Commission, stating:

> I applied for the Investigator II position with Fraud and Abuse for the Logan Field Office in January 2004. As of February 18, 2004 no one had contacted me regarding an interview. The same day I was informed that a previous applicant had already been selected and notified by Lisa Prater, Supervisor. This individual was told how much his salary would be and who he would be working with in the Logan Office. I came back to my office that morning and e-mailed Lisa Prater asking when she would be interviewing for the position. She e-mailed me back that afternoon and wanted to know if I could come to Charleston on February 23, 2004 at 10:00 a.m. The person that informed me of this individual being hired was the selected applicant's wife, Teresa Shepard. I did not confirm this individual was definitely hired until March 31, 2004.

Grievant stated the relief she is seeking as, “I am requesting to either (1) Receive the Investigator II position in the Logan Office with back pay or (2) Received [sic] difference in pay between my yearly salary and the selected individual hired. I also want attorney fees.”

The matter was submitted for consideration at level four based on the record developed at level three. Grievant was represented by counsel, Michael Niggemeyer. Respondent was represented by counsel, David M. Fryson. The matter became mature for decision on February 4, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Based on a preponderance of the evidence, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as an Investigator 2 in the Logan Field Office.

2. In October 2003, the Workers' Compensation Office of Inspector General was created, and Respondent posted two Investigator 2 positions in its Fraud and Abuse Criminal Surveillance Unit, based in Logan. These positions were in a different unit than Grievant's, and are paid approximately 30% more than Grievant was then making.

3. Grievant applied for one of the new positions, but prior to being interviewed, she sent an e-mail to Lisa Prater, Manager of the Fraud and Abuse Investigations Unit, withdrawing her application, but stating she may be interested in a similar position in the future if it became available.

4. Both positions were subsequently filled, but one of the incumbents left at the end of 2003, and a new posting was issued on January 12, 2004, for an Investigator 2 position. Grievant submitted a new application based on the new posting. 5. Alan Shepard was a candidate for the previous two postings. He was not selected, but was considered the 3rd-best candidate. When the new position was posted in January, Ms. Prater contacted him to see if he was still interested, rather than re- interviewing all the applicants. He was, and Ms. Prater began processing the paperwork to hire him into the new opening.

6. Grievant was never contacted about the second position, but after talking to Mr. Shepard's wife, she emailed Ms. Prater about the job. Ms. Prater then scheduled an Interview with Grievant and stopped processing the paperwork to hire Mr. Shepard. She assured Grievant she would be given the same consideration as any other candidate for the job.

7. Grievant was an internal candidate who submitted her application to Respondent's personnel department, while Mr. Shepard was an external candidate who applied to the Division of Personnel and was placed on the register for Investigator 2.

8. Ms. Prater and David Plantz interviewed Grievant on February 23, 2004. They used the same standard set of interview questions asked of all the candidates when they were interviewed for the earlier posting.

9. As part of the selection process, Ms. Prater and Mr. Plantz did not verify the information contained on the applications or contact references for the applicants.

10. Mr. Shepard's application, filed with the Division of Personnel, listed prior employment as a retail Senior Department Manager from June, 1988 to October, 2002; as a hospital Kitchen Supervisor from March, 1988 to June, 1988; and as a Royal Military Police Corporal from January,

1977 to June, 1988, among other, less recent, jobs. All ofhis prior listed employment was in his native England. He has a Business Studies degree from Plymouth University.

11. Grievant's application lists her employment history as: Investigator II for Respondent from April, 1991 to August, 1999; (See footnote 2) and Child Advocate Paralegal for the Department of Health and Human Resources from July, 1975 to April, 1991. She also lists 54 hours of college credit, but no college degree.

12. Neither Grievant nor Mr. Shepard listed any references or provided any past evaluations.

13. Both Ms. Prater and Mr. Plantz felt Mr. Shepard interviewed better than Grievant, and Mr. Shepard was hired into the position.

DISCUSSION

In non-disciplinary matters Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). Since Grievant's counsel made no opening statement or closing argument, and filed no proposed findings of fact and conclusions of law, his theory as to why Grievant should be entitled to the position is somewhat inscrutable. The tenor of his questioning implied such issues as a failure to hire Grievant because she was female, that Mr. Shepard had fabricated his credentials, and even that Grievant should have been preferred for homeland security reasons because she was a U.S. citizen and Mr. Shepard is British. Despite three days of hearing at level three and a voluminous record, no evidence was adduced to support these possible theories. Grievant's counsel identified no rule, policy or law that Respondent may have failed to follow. Grievant did testify that she felt she was better qualified than Mr. Shepard. However, 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 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. *Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998). 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*.

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)). "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 [the employer]." *Trimboli, supra; Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). “[The Supreme Court of Appeals of West Virginia] has advised that a circuit court may not reverse a decision of an administrative agency simply because it would have decided the case differently.” *Berlow v. West Virginia Bd. of Medicine*, 193 W.Va. 666, 672, 458 S.E.2d 469,475 (1995). The same proscription would apply to Grievance Board review of an agency's management decision.

Ms. Prater and Mr. Plantz clearly had a preconception of which candidate they wanted to hire into the position, but Grievant failed to show how this was improper. They had considered Mr. Shepard based on his prior interview and application credentials. After Grievant made it known that she was interested in the new position opening, (See footnote 3) she was ostensibly given the same opportunity to be interviewed as all the other candidates.

Grievant's evidence leads to a strong inference that Mr. Shepard's hiring was a foregone conclusion even after she made her interest in the position undeniably apparent. Whether she was actually given a fair chance is a function of Ms. Prater's credibility and a stark comparison of her qualifications with Mr. Shepard's. Placing the hiring decision in this light reveals Respondent did not actually give Grievant fair consideration, but instead attempted to justify its preselection after the fact.

Ms. Prater's testimony that she did not believe Grievant was still interested in the position is not credible. The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. "The fact that this testimony is offered in written form does not alter this responsibility. *Browning v. Mingo County Bd. of Educ.*, Docket No. 96-29-154 (Sept. 30, 1996). Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity toperceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest,

or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994). In this case, the conclusion that Ms. Prater's testimony is not credible is based on its implausibility _ for her to believe Grievant was not interested in the new Investigator 2 opening makes no sense given that Grievant submitted a new application for the job after having expressly stated, when she withdrew her first application, that she would likely be interested in future openings.

Respondent's Exhibits Nos. 2 and 3 reveal Grievant and Mr. Shepard were not given an identical set of interview questions, even though Ms. Prater assured Grievant she would be given the same interview chance as the prior candidates. Since Ms. Prater and Mr. Plantz testified Mr. Shepard presented better in the interview, which was their deciding factor, this small difference (See footnote 4) becomes more important. The answers to the interview questions as recorded by Ms. Prater do reveal some differences, when viewed objectively, that could give rise to differing opinions of the candidates. For example, Grievant stated she did not really know what she does well or what special talents she possessed. In contrast, when Mr. Shepard was asked what quality would most contribute to his career success, he articulated a penchant for tenacity and zeal for teamwork. On the other hand,Grievant described her personal strengths as her personality, ability to communicate and her computer skills, but when Mr. Shepard was asked to describe himself, his answer was, “An English male married to a hillbilly” who is confident, sympathetic and does not like to be cheated.

Looking beyond the interview answers, Grievant clearly has the edge on Mr. Shepard in terms of qualification for the job, simply by virtue of her experience in the same position for the same agency. Grievant has been an Investigator 2 for Respondent since 1991. She is intimately familiar with the agency, its mission, its systems and procedures. Mr. Shepard's practical experience in the role is nil, even with his military police experience, which he quit three years before Grievant was first classified as an Investigator 2.

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)." As stated in the preamble to the Division of Personnel's Administrative Rule, “[a]ll appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness.” The decision reached by Respondent in this case is implausible based on the evidence of Grievant's relative qualifications for the job in question. Her fitness for the job is evident by her performance of it as a long-term employee of Respondent, and the superior merit of her application compared to Mr. Shepard's is self-evident. The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH- 287 (Jan. 22, 1996).

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). This Grievance Board recognizes 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. *Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998). 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*.

3. 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)). "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 [the employer]." *Trimboli, supra; Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). 4. “[The Supreme Court of Appeals of West Virginia] has advised that a circuit court may not reverse a decision of an administrative agency simply because it would have decided the case differently.” *Berlow v. West Virginia Bd. of Medicine*, 193 W.Va. 666, 672, 458 S.E.2d 469, 475 (1995). The same proscription would apply to Grievance Board review of an agency's management

decision.

5. Demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

6. Ms. Prater's testimony that Grievant was fairly considered for the position in question is not credible.

7. 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 andcapricious 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 (1982)." *Trimboli*, *supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01- 20-470 (Oct. 29, 2001).

8. Grievant met her burden of proving Respondent's choice of Mr. Shepard over her was arbitrary and capricious.

For the foregoing reasons, this grievance is **GRANTED**. Respondent is ordered to instate Grievant into the position in question. As attorney's fees are not available as relief at level four, they are not awarded. (See footnote 5)

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, and 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 EmployeesGrievance 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.

March 2, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

No proposed findings were submitted on Grievant's behalf at either level three or four.

Footnote: 2

She has continued in that position until the present time.

Footnote: 3

It was unexplained why Ms. Prater still thought Grievant was uninterested in the job despite her renewed application.

Footnote: 4

For example, Mr. Shepard was asked, "What motivates you to put forth your greatest effort?" and Grievant was asked, "What motivates you to excel?" Other questions did not have direct analogs.

Footnote: 5

In level four grievance hearings, an "Administrative Law Judge has no authority to award attorney's fees under the law. Stollings v. Div. of Envtl. Protection, Docket No. 97-DEP-411 (June 8, 1998); Chafin v. Boone County Health Dep't and Div. of Personnel, Docket No. 95-BCHD-362 (June 21, 1996). See e.g., Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986)." Wyant v. W. Va. Dep't of Trans./Div. of Highways, Docket No. 00-DOH-219 (Nov. 29, 2000).