JASON WORKMAN,

Grievant,

v. **Docket No. 04-CORR-384**

DIVISION OF CORRECTIONS/
DENMAR CORRECTIONAL CENTER,

Respondent.

DECISION

Jason Workman ("Grievant") initiated this proceeding on September 23, 2004, alleging he should have been selected for the position of Institutional Training Officer ("ITO"). The grievance was denied at level one on September 24, 2004, and at level two on September 30, 2004. A level three hearing was conducted on October 20, 2004, and the grievance was denied at that level on October 21, 2004. Grievant appealed to level four on October 30, 2004, and a hearing was held in Elkins, West Virginia, on January 19, 2005. Grievant was represented by Spencer Hill, and Respondent was represented by Charles Houdyschell Jr., Senior Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on February 7, 2005.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by the Division of Corrections ("DOC") since 1997 as a correctional officer. He is assigned to Denmar Correctional Center ("Denmar"),

and has spent the last five years supervising a crew of inmates who perform maintenance work for the West Virginia Division of Highways.

2. Grievant also serves as a training officer for the "CERT" team (Correctional Emergency Response Team) and teaches self defense classes to DOC employees. He has been performing these duties for the past four years, and teaches officers various tactics used during inmate escapes, riots, and other emergency situations. Grievant does classroom instruction, plans training courses, and tests the officers on each training topic. The CERT team at Denmar has been extremely well-evaluated since Grievant has been in charge of the training.

3. Grievant attended Fairmont State College and obtained 110 credit hours toward a degree in Electronic Engineering Technology.

4. During the summer of 2004, a vacancy was posted for ITO for Anthony Correctional Center ("Anthony") and Denmar. This is a non-uniformed position with DOC, which would report to Colonel Randy Perdue at the Corrections Academy. This individual is responsible for development and instruction in staff development and training programs for DOC employees, including in-service training, security procedures, search and seizure, and firearms.

5. Grievant and Regina Eskins, an employee of Anthony, applied for the position, along with other, unidentified applicants.

6. Interviews were conducted by a committee consisting of Mark Williamson (Denmar's warden), Scott Patterson (Anthony's warden), and Eugene Blankenship (Chief of Staff at the Corrections Academy).

7. Grievant and Ms. Eskins were the top two candidates for the position after the interviews were completed. Both were deemed qualified for the position by the Division of Personnel.

8. Ms. Eskins had been employed by DOC since 1998, when she began her career as a correctional officer. In 1999, she was reclassified as a Supervisor I, and was placed in charge of the laundry, which included inmate supervision, ordering supplies, and issuance of clothing to inmates. She also served as mail room supervisor. In 2004, she was placed in charge of the food service department, which included ordering food and supplies, maintaining a budget, supervision and scheduling of staff, meal planning and menus, and preparation of reports. Ms. Eskins has an associate's degree in corrections.

9. After the conclusion of the interviews, Warden Patterson believed Ms. Eskins should be placed in the position, and Warden Williamson favored Grievant. Mr. Blankenship was given the choice to "break the tie", and he ultimately decided that Ms. Eskins should be offered the position.

10. Although all members of the committee agreed that both Grievant and Ms. Eskins were excellent candidates, Ms. Eskins was chosen because of her ability to present herself well, examples she gave during the interview of her organizational and time management skills, her diverse experience and success in those areas, and her degree in corrections.

Discussion

In a selection case such as this, 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). His claim must be proven by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claims are more likely valid than not. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

As was discussed in *McCauley v. Division of Corrections*, Docket No. 00-CORR-244 (Aug. 2, 2001), the selection process for non-correctional officer positions with DOC is governed by the provisions of Policy Directive 132.00. That policy only requires that a committee of up to three people, including the warden of the facility, conduct interviews and select an applicant from those interviewed. There are no standards for selection set forth in that policy, and no specific guidelines regarding the process.

In matters of non-selection for state employees, the grievance process is not that of a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994). Unless proven arbitrary or capricious or clearly wrong, an agency decision regarding promotion will be upheld. *Ashley v. W. Va. Dept. of Health and Human Resources*, Docket No. 94-HHR-070 (June 2, 1995). Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, 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." *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 [the employer]." *Trimboli*, *supra*; *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Grievant contends generally that his experience is more specific to the position in question, which is understandable. As an instructor for DOC, Grievant is indeed already performing many of the duties required of an ITO. In addition, Grievant argues that there were flaws in the interview process, including a lack of “exact answers” required for the interview questions, and the interview committee’s alleged failure to select a candidate at the completion of the interview process. Grievant also contends that Respondent did not verify Ms. Eskins’ experience.

Grievant’s allegations are largely unfounded. As to his contentions regarding the interview and selection process, no violation of Policy Directive 132.00 has been demonstrated. As set forth above, there are no specific requirements in the policy regarding the interview process, other than that there be a committee including the warden that interviews and selects a candidate. The policy only requires that the committee “make a determination regarding which applicant will be selected” and that this determination be made “upon completion of the interview process.” Grievant’s concern that the decision was

not made while the committee was still together as a group is not valid. Mr. Blankenship testified that, since he was the "tie-breaker," he took some time to think about who he thought should be placed in the position, then shared that decision with the other committee members shortly after the interviews. The fact that this decision was not made immediately after interviews were conducted, at that specific time and place, is not a violation of the policy, because it did occur after the interview process was complete.

Grievant's contention that Ms. Eskins' qualifications were not verified is also not borne out by the evidence. She had worked under Warden Patterson at Anthony for several years, he was extremely familiar with her qualifications and duties, and he was on the interview committee. Accordingly, there can be no question that the committee was well-informed regarding Ms. Eskins' experience.

As a CERT trainer, Grievant obviously is highly qualified to offer training in a classroom setting to DOC employees. In fact, all witnesses in this case agreed that Grievant is an excellent instructor and a highly valued employee. Nevertheless, the interview committee opted to place Ms. Eskins in this position, based upon her diverse qualifications in other areas necessary to the position, such as planning and coordinating events and supervising employees. While Grievant's classroom experience was certainly pertinent, it was not the only factor considered to be important for the ITO position. Certainly reasonable minds could differ regarding who was the better choice, but the undersigned simply cannot substitute her judgment for the committee's. The evidence does not establish that the selection decision in this case was arbitrary and capricious.

The following conclusions of law support this decision.

Conclusions of Law

1. In a selection case, Grievant must prove by a preponderance of the evidence that 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).

2. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, 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).

3. Corrections' Policy Directive 132.00 requires that non-correctional officer positions be filled via selection by a committee of no more than three people, chaired by the warden of the facility, who interview and select a candidate.

4. Grievant has failed to prove by a preponderance of the evidence that Respondent's selection decision in this case was arbitrary and capricious or in violation of DOC policy.

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.

Date: February 28, 2005
DENISE M. SPATAFORE
Administrative Law Judge