THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

KIMBERLY BRYANT,

Grievant,

v. **Docket No. 05-DMV-403**

Janis I. Reynolds

Senior Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF MOTOR VEHICLES,

Respondent.

D E C I S I O N

Grievant, Kimberly Bryant, filed this grievance against her employer the Division of Motor Vehicles ("DMV") on June 27, 2005. Her Statement of Grievance reads:

> Denied Managers Position For the Beckley Regional DMV
>
> In knowledge skills and abilities I have did all but selection has not [sic]
>
> Performed these duties routinely for this specific job posting Bulletin # 567
>
> Relief sought: Back pay from when selection started on payroll organizational 5441 and position of Transportation Manager I on posting 567 from 5/2/05 thru 5/16/05

This grievance was denied at all lower levels. Grievant appealed to Level IV on November 2, 2005, and on June 27, 2006, after several continuances for good cause, a Level IV hearing was held

in the Grievance Board's office in Charleston. Grievant was represented by Belinda Morton, and DMV was represented by Janet James, AssistantAttorney General. This case became mature for decision on August 18, 2006, the date the parties' proposed Findings of Fact and Conclusions of Law were to be submitted. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by DMV as a Supervisor 3 in the Beckley office.

2. Sometime in April or May 2005, the Transportation Service Manager 1 position for the Beckley office was posted, and Grievant and several other individuals applied. (See footnote 2)

3. Sometime thereafter, John Haynes, Regional Office Operations Manager, conducted interviews for the position and reviewed the applications of the candidates. He then discussed the selection process and the reasoning for his choice with his supervisor, David Godbey. Mr. Godbey concurred with Mr. Haynes. Mr. Haynes selected Mr. Perdue as the most qualified applicant for the position. Mr. Perdue turned down the position, and it was then offered to Natasha White, as the second most qualified applicant. (See footnote 3) She accepted.

4. Grievant has been employed by DMV since April of 2000. She was hired as a Customer Service Representative, then worked as a Lead Customer Service Representative, and was then promoted to a Supervisor 2. At the time of the interviews,Grievant was classified as a Supervisor 3. (See footnote 4) She completed an Electronic Engineering Technician course in 1985.

5. Grievant, and others in her office, were trained by their interim supervisor, James Ford, to perform many of the tasks associated with the manager's position, such as opening, closing, and inventory. This training occurred over a period of several years, and Grievant served as a supervisor during this time period. In September 2004, Grievant began approving leave slips, and scheduling and evaluating employees. There were no complaints about Grievant's work performance.

6. Mr. Haynes found Grievant's answers to be "just O.K.," and not what he was "looking for" in the individual he wanted to select for the position. Additionally, Grievant's demeanor during the interview did not indicate an individual with the forcefulness needed in the manager's position.

7. The successful applicant, Ms. White, has been employed by DMV since March of 2000 and

worked in the Morgantown office. She was hired as a Customer Service Representative, then worked as a Lead Customer Service Representative. During the time she worked in the Morgantown office, she frequently filled in for her supervisor who was ill. The successful applicant has a Baccalaureate degree, had owned her own business, and had worked in banking, thus, was used to dealing with money. She had experience in supervising as well. 8. During her interview, Mr. Haynes found Ms. White provided "solid answers" to the questions asked, and comported herself well. He had received also good reports from her work in Morgantown.

Synopsis

Grievant asserts she was the most qualified applicant for the position, as she had performed all the duties of the position in the past. Grievant also asserts Mr. Haynes had a personal relationship with the successful applicant, and that is why she was selected for the position

Respondent asserts that while Grievant met the minimum qualifications for the position, she was not the most qualified. Respondent points to the successful applicant's education, supervisory experience, and interview performance to demonstrate the successful applicant was the best choice to fill the position.

It should be noted Grievant did not meet her burden of proof and demonstrate Mr. Haynes had a personal relationship with the successful applicant prior to her selection. As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998).

Given that Grievant failed to show a flaw in the selection process, or that she was the most qualified, she has not met her burden of proof.

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 capriciousmanner, or was clearly wrong in its decision. Surbaugh v. Dep't of Health and Human Serv., Docket No. 97-HHR-235 (Sept. 29, 1997). This claim must be proven by a preponderance of the evidence, which means Grievant must provide enough evidence for the undersigned Administrative Law Judge to decide her 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).

In matters of non-selection for state employees, the grievance process is not intended to be a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehab. 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. Dep't of Health and Human Res., 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).

Additionally, 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 wasarbitrary 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 has failed to meet her burden of proof and establish the selection process was arbitrary and capricious or DMV's choice of the successful applicant was an abuse of discretion. While Grievant met the minimal qualifications for the position and was interviewed, she did not demonstrate she was more qualified than the successful applicant, or there was a flaw in the selection process.

The above discussion will be supplemented by the following conclusions of law.

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. Grievant did not meet her burden of proof and demonstrate by a preponderance of the evidence that Respondent's selection decision was arbitrary andcapricious or an abuse of discretion, nor did she demonstrate she was more qualified than the successful applicant.

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.

JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Date: September 29, 2006

Footnote: 1

Grievant's attorney did not submit these proposals.

Footnote: 2

The posting was not submitted into evidence.

Footnote: 3

At times, the successful applicant is also referred in the record as Ms. Showalter.

Footnote: 4

Because Grievant's application was rather sloppily completed, it is somewhat difficult to assess the times she held

certain positions.