GLADYS KAUFF,

Grievant,

v. **Docket No. 05-CORR-197**

DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

D E C I S I O N

___Gladys Kauff, Grievant, filed this grievance on May 11, 2005, against her employer the Division of Corrections/Mount Olive Correctional Complex ("MOCC") alleging she should have been selected for a Secretary 1 position. Her relief sought was to have an impartial review of the applicants, and, if she were selected, to be granted the position or the compensation of a Secretary 1.

This grievance was denied at all lower levels, and Grievant appealed to Level IV on June 7, 2005. A Level IV hearing was held on October 20, 2005. (See footnote 1) Grievant was represented by Joseph Coy, 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 November 18, 2005.

Issues and Arguments

Grievant asserted: 1) the successful applicant should have been disqualified because of incorrect information given on her application; 2) proper selection procedures were not followed; and 3) one member of the Interview Committee was rude to her duringthe interview process. (See footnote 2) Respondent maintained Ms. Slayton did not falsify her application, and Policy 132, which controls the selection of non-correctional employees, was followed. Additionally, Respondent averred the best qualified applicant for the position was selected.

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 by the Division of Corrections ("CORR") for approximately ten years. At the time of selection, she was employed as an Office Assistant 3. Over the years, she has been upgraded twice as the warden's secretary. Grievant cannot take shorthand.

2. On April 5, 2005, a vacancy was posted for a Secretary 1. This is a non- uniformed position with MOCC. This position was expected to take shorthand.

3. Grievant and Rebecca Slayton, also an employee at MOCC, applied for the position, along with other applicants.

4. Terri Arthur, Human Resources Manager at MOCC, reviewed the applications and selected six applicants to be interviewed, who were deemed to meet the minimum qualifications set out in the Division of Personnel's class specifications. This list included Grievant and Rebecca Slayton.

5. Interviews were conducted by a committee consisting of then Major Paul Parry (the warden's designee), Ms. Arthur, and Sherry Cook, Case Manager. 6. The applicants were asked standard questions, and required to type a brief memo. Contrary to Grievant's assertion at Level III, this was not a "typing test" as that term is typically used. There was a typing exercise where the applicants were to write a brief memo introducing themselves and their skills.

7. Ms. Slayton has been employed by MOCC since 1998. She began as an Office Assistant 2, and at the time of the selection, was classified as an Office Assistant 3. Contrary to Grievant's assertion, Ms. Slayton did not "prevaricate" on her application as she did work for two executive staff members, prepared payroll, and assigned work to subordinate staff. Although not clearly specified in the record, the undersigned Administrative Law Judge determined, through a review of the interview notes and Ms. Slayton's application, that she can take shorthand.

8. After the interviews, the Interview Committee deliberated and found three candidates who were very qualified for the position. (See footnote 3) Because one of the three top applicants worked for Ms. Arthur, and one of these applicants worked for Major Parry, the Interview Committee asked Ms. Cook to study the remaining applicants and identify whom she felt was the best qualified for the position and why. After this discussion, the Interview Committee unanimously recommended Ms. Slayton for the position that afternoon.

9. Ms. Slayton was chosen, in part, because of her answers given during the interview, especially the answer of how she would deal with e-mails and time-sensitive requests for information.

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). 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).

As discussed in McCauley v. Division of Corrections, Docket No. 00-CORR-244 (Aug. 2, 2001) and Workman v. Division of Corrections, Docket No. 04-CORR-384 (Feb. 28, 2005), the selection process for non-correctional officer positions with CORR is governed by the provisions of Policy Directive 132.00. That Policy only requires a committee of up to three people, including the warden or his designee, to 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 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 ignoredimportant 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).

As previously noted in Workman, there are no specific requirements in the policy regarding the interview process, other than there will be a committee including the warden or his designee 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." Policy 132; Workman, supra. This is exactly what happened in this situation.

While Grievant asserted the fact the decision was made that same day demonstrates the successful applicant was pre-selected, she herself stated she did not have proof of this assertion. As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." Bakerv. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998). Grievant's contention that Ms. Slayton falsified her application is also not borne out by the evidence. Deputy Warden William Vest, who was one of her supervisors at the time, testified Ms. Slayton did indeed perform all the tasks she identified on her application.

Additionally, the response Grievant saw as rude, while somewhat off handed, was a compliment given because she answered a question skillfully and in-depth. Further, this member of the Interview Committee was counseled for the glib remark. The undersigned Administrative Law Judge finds the remark was meant as praise, and Grievant appears to have taken offense where none was intended.

Grievant has not met her burden of proof and proven any of the assertions set out in the Issues and Arguments section. Grievant did not establish any flaws in the interview process or establish Policy 132 was not followed. She did not prove the successful applicant falsified her application and did not demonstrate the selection was arbitrary and capricious or clearly wrong.

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. No violations of Corrections' Policy Directive 132.00 were proven.

4. Grievant did not establish the successful applicant falsified her application.

5. Grievant has failed to prove by a preponderance of the evidence that Respondent's selection decision was arbitrary and capricious.

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

ADMINISTRATIVE LAW JUDGE

Date: February 10, 2006

Footnote: 1

A prior Level IV hearing was held on September 6, 2005, by then Administrative Law Judge Jackie Custer, and after discussion, was continued so the parties could conduct more discovery. Thereafter, the undersigned Administrative Law Judge was assigned the case.

Footnote: 2

At Level III, Grievant argued the scores on the "typing test" were not considered. This issue was not addressed at Level IV and is deemed abandoned.

Footnote: 3

Initially, the Interview Committee planned to use sick leave information to assist them in their deliberations, but later determined this action would be incorrect and did not use this data in making its decision.