THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

CHARLENE PULLEN,

Grievant,

v. **Docket No. 06-DOH-352**

Sue Keller

Senior Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Charlene Pullen ("Grievant"), employed by the Division of Highways ("DOH") as a Transportation Crew Supervisor 1, filed a level one grievance on March 22, 2006, after she was not selected for the position of Highway Administrator 2. Grievant asserted that the decision was arbitrary and capricious, and was the result of favoritism, discrimination, and violation of the Division of Personnel policy which requires that positions be filed on the basis of merit and best fit. For relief, Grievant requested instatement as Highway Administrator 2, and back pay. The grievance was denied at all lower levels, and appeal to level four was made on October 6, 2006. Michael T. Clifford, Esq., and Barbara Baxter, Esq., counsel for Grievant and DOH, respectively, agreed to submit the grievance for decision based on the lower-level record. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by DOH on November 20, 2006. Grievant elected not to file proposals at level four.

The following facts have been derived from a preponderance of the credible evidence made part of the lower-level record.

Findings of Fact

1. Grievant has been employed by DOH since 1978. During her employment she has held numerous positions in the Maintenance Division, beginning as a stenographer, office assistant,

complaints investigator, and equipment analyst. In 1988, she moved to the position of analyst and Interstate I-64 office assistant, until 1995, when she became an analyst and area maintenance assistant. In 1997, Grievant transferred to Transportation Engineering Technician Trainee, and in 2000, moved to the position of Transportation Engineering Technician Trainee in construction inspection. Grievant has held the position of Supervisor at the I-64 headquarters since 2002.

2. On February 3, 2006, DOH posted a vacancy for the position of Highway Administrator 2 ("HWYADM2") in Wayne County. This employee, sometimes referred to as the County Administrator, is responsible for administering all maintenance activities in a county. The minimum qualifications for the position is a Bachelor's degree in engineering, business, public administration, or related field. Relevant experience may be substituted for the required training on a year for year basis. This individual supervises approximately 38 employees in Wayne County.

3. Six individuals applied for the HWYADM2 position. Grievant was the sole female applicant.

4. All of the applicants were found to be minimally qualified, and were interviewed by James Roberts, then-Administrative Services Manager for District 2, Dave Bevins, Maintenance Engineer for the District, and Keith Chapman, District Manager.

5. Each applicant was posed questions from a prepared form which included inquiries regarding qualifications, interpersonal skills, flexibility and adaptability, andpresentability. The interviewers conferred and rated the applicants as "does not meet," "meets," or "exceeds" in each of the designated categories.

6. Grievant was rated as "exceeds" in the area of relevant experience, "does not meet" in the area of interpersonal skills, and "meets" in all other categories. Mr. Chapman noted under "comments" that Grievant had "problems in past dealing with others, not always flexible in dealing with change." This comment was based on a representation by Mr. Bevins that he had documentation of problems Grievant had experienced with private citizens and other DOH employees

7. The position was offered to Richard Wellman. Mr. Wellman has worked at DOH since 1976, with extensive experience in highway construction. He additionally had a positive reputation for his supervision of 40 to 45 employees. The interviewers rated Mr. Wellman as "exceeds" in the categories of education, knowledge & abilities, and leadership ability. He was rated as "meets" in all other categories. Under the "comments" section, it was noted that Mr. Wellman exhibited "strong communication & leadership skills, calm assessment of issues."

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §§ 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* §§ 29-6A-6."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 & 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). 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).

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 thatof [the employer]." *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

At level three, Grievant limited her argument to discrimination based on gender. (See footnote 1) "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

W. Va. Code § 29-6A-2(d). The West Virginia Supreme Court of Appeals has interpreted this definition of "discrimination" as limiting the jurisdiction of the Grievance Board to claims arising not from the status of the Grievant as a member of a protected class, but rather to claims founded on differences between similarly situated employees that are not attributable to their actual work duties.

In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" In order to establish a claim of discrimination, an employee must establish a *prima facie* case. The grievant must show by a preponderance of the evidence:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004). (See footnote 2) Grievant unquestionably has more experience in the maintenance division than Mr. Wellman, and that fact was acknowledged by the rating of "exceeds" in the area of relevant experience. It appears that the strongest concern of the interview committee was Grievant's interpersonal skills. Mr. Bevins indicated that he had documentation establishing problems in that area. Such concerns are relevant and may be considered by employers when filling positions.

The selection of Mr. Wellman, was based on his ratings of "exceeds" in education, interpersonal skills, and leadership ability, and DOH has established that he was a better qualified candidate than Grievant. Finally, the simple non-selection for a position does not amount to discrimination as used in the grievance process. *Prasadarao v. Div. of Rehab. Serv.,* Docket No. 02-RS-430 (May 14, 2003). In conclusion, the evidence presented does not prove that the selection decision was arbitrary and capricious, clearly wrong, or the result of discrimination.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law in support of this decision.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim by a preponderance of the evidence. Procedural Rules of theW. Va. Educ. & State Employees

Grievance Bd. 156 C.S.R. 1 §§ 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6.

2. 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).

3. 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).

4. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." *W. Va. Code* § 29-6A-2(d).

5. The West Virginia Supreme Court of Appeals has interpreted this definition of "discrimination" as limiting the jurisdiction of the Grievance Board to claims arising not from the status of the Grievant as a member of a protected class, but rather to claims founded on differences between similarly situated employees that are not attributable totheir actual work duties. *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

6. The simple non-selection for a position does not amount to discrimination as used in the grievance process. *Prasadarao v. Div. of Rehab. Serv.,* Docket No. 02-RS-430 (May 14, 2003).

7. Grievant has failed to prove that the selection decision was arbitrary and capricious, clearly wrong, or the result of discrimination.

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.

DATE: DECEMBER 15, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *Accordingly, the allegations regarding favoritism and violation of DOP policy need not be addressed.*

Footnote: 2

[2]In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treatingan employee differently based on one of the impermissible factors stated in the Act (race,religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).