THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

SPIRO MITIAS,

Grievant,

v. **Docket No. 05-PSC-365**

Janis I. Reynolds

Senior Administrative Law Judge

PUBLIC SERVICE COMMISSION,

Respondent,

and

CHERYL RANSON,

Intervenor.

D E C I S I O N

Grievant, Spiro Mitias, filed this grievance against his employer the Public Service Commission ("PSC") on June 1, 2005, over his non-selection for the position of Public Utilities Director.

This grievance was denied at all lower levels, and Grievant appealed to Level IV on September 30, 2005. Three days of hearing at Level IV were held on December 9 and 19, 2005, and January 23, 2006, at the Grievance Board's Charleston office. Grievant was represented by Robert F. Williams, Esq., Intervenor was pro se, and PSC was represented by Richard Hitt, Esq. and Belinda Jackson, Esq. The parties asked to

submit responsive briefs and requested extensions in which to file these. The last responsive proposals of Grievant were due on or about June 27, 2006. These proposals were not received, and the undersigned Administrative Law Judge deemed this grievance mature for decision on August 18, 2006, after no response was received from an inquiry from the Grievance Board.

Synopsis

Grievant makes multiple arguments. He asserts: 1) the selection process was not a fair, competitive review process; 2) the selection was not made in a timely manner; (See footnote 1) 3) the selection of Intervenor for the position was discriminatory and the result of favoritism due to her political affiliations; (See footnote 2) 4) his non-selection was the result of age discrimination as he is over fifty years old; (See footnote 3) 5) his non-selection was the result of racial discrimination; (See footnote 4) 6) Intervenor did not meet the minimum qualifications for the position; (See footnote 5) and 7) his qualifications were superior to the successful applicant. Respondent asserts the most qualified applicant was selected after a full and complete review of the applicants, Intervenor's qualifications were far superior to Grievant's, and they were reviewed and accepted by the Division of Personnel as meeting the requirements of the classification. Additionally, Respondent avers there was no discrimination or favoritism demonstrated during the selection process, the selection decision was timely made, and the selection was not the result of political favoritism.

Intervenor asserts she met all the qualifications for the position, has the education training and skills to perform the duties of the position, and was more qualified than Grievant. Additionally, both Respondent and Intervenor noted correctly that many of Grievant's "facts" in his proposals were not supported by the evidence.

The undersigned Administrative Law Judge found Grievant did not meet his burden of proof and establish any of his assertions had merit.

Additional Issues

Throughout this grievance, filed on June 1, 2005, about the selection process for the Public Utilities Director position, Grievant repeatedly endeavored to call into question prior actions by the PSC regarding Intervenor's employment, during 2003 - 2005, the hiring of other employees for administrative positions, during 2003 - 2005, and to "grieve" for other applicants who were not selected for the Public Utilities Director position, but who did not file a grievance. Respondent and Intervenor objected to these issues and assertions arguing: 1) these employees did not grieve; 2) the assertions about prior actions are untimely; 3) the other positions are not at issue; and 4) these assertions are not identified in the Statement of Grievance. The undersigned Administrative Law Judge held at hearing: 1) Grievant could not use his grievance to assert the rights of others who had chosen not to grieve their non- selection; 2) Grievant did not grieve these prior actions at the time they occurred and could not grieve them now; (See footnote 6) and 3) the Statement of Grievance could not be amended at Level IV over the objections of Respondent and Intervenor pursuant to prior directions given the Grievance Board by the West Virginia Supreme Court of Appeals in Hess v. West Virginia Department of Health and Human Resources, 189 W. Va. 357, 432 S.E.2d 27 (1993), which states, "the final level of the grievance procedure where alteration of the substance of a grievance under W. Va. Code, 29-6A-3(j), can occur is at Level III."

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. It should be noted that there were three days of hearing at Level III, as well as three days of hearing at Level IV. Additionally, there were numerous exhibits.

Findings of Fact

1. In February 2003, David Ellis, the long-time, well-respected, and

knowledgeable Public Utilities Director retired. (See footnote 7)

2. In March 2003, Mr. Ellis' position was posted, and applications were received, but a selection decision was never made. Intervenor applied for this position, and Mr. Ellis, who remained as a consultant at PSC, remembered her qualifications favorably. 3. On October 28, 2004, the Public Utilities Director position was posted again and the deadline for application was November 12, 2004.

4. In July 2003, Intervenor was hired by PSC as a temporary Utilities Analyst 2, a classified exempt position, by Mike Browning, after Ed Staats in the Governor's Office suggested Intervenor as someone with competency and ability. Mr. Staats had worked with Intervenor during her service with Workers' Compensation and in the Governor's office and found her to be a quality employee. Grievant became a permanent employee in August 2003. After Intervenor was hired at PSC, Mr. Staats became the PSC Chairman, in September 2003.

5. In her first position with PSC, Intervenor worked mostly with the complex regulations needed to enforce the new coal truck legislation. During this time, Intervenor worked in many areas and basically did whatever her supervisor, Mike Browning and then- PSC Chairman Staats asked her to do. Later, Intervenor was reallocated to Quality Assurance Director. In July 2004, Intervenor was placed as Interim Public Utilities Director and served in this position until she received the position permanently on May 12, 2005.

6. During this same time period Grievant asserts Intervenor was reallocated to positions without posting, Grievant was reallocated twice, with a salary increase of $15,000.

7. Intervenor received a Bachelor of Science in Secondary Education, magna cum laude in 1980, and then taught science and math at Nitro High School for eight years. She received a Bachelor of Science in Accounting in 1989 and a Masters in Business Administration in 1997. Intervenor became a Certified Public Accountant in

1990. Intervenor has worked in accounting and auditing for many years, supervised employeesboth with the state and in other businesses, and has completed the General Electric Six Sigma Black Belt Training. Intervenor has certifications in the areas of Risk Management, Insurance, and Compensation. She was involved in rate-making decisions with Workers' Compensation Commission and Fiscal Risk Analyst in the Governor's Office, but had no experience in utilities regulatory work until she began her employment with PSC.

8. At the time of the selection, Grievant, a fifteen-year employee, was classified as a Utilities Analyst Manager. For much of his time at PSC, he has dealt with mostly non- complex cases requiring lower-level accounting and auditing skills.

9. Grievant has a Bachelor of Science with a major in Business Administration, and a minor in psychology. He also took 12 hours of accounting classes. Grievant also took one semester in Business at what was then called the College of Graduate Studies. He has experience in running his own businesses, such as gas stations, restaurants, and markets, and is a real estate agent. Grievant no longer works in the Utilities Division. (See footnote 8) Grt. Nos. 6 & 9 at Level IV and Agency No. 1 at Level III.

10. There was no testimony about the political party of either Grievant or Intervenor. There was no testimony about the age of either Grievant or Intervenor. There was no testimony about the race of either Grievant or Intervenor.

11. Prior to then-Chairman Staats interviewing the candidates and reviewing their applications, he completed a detailed listing of what type of abilities and competencies he was looking for in the person who would fill the position. He believed there were some areas that needed improvement and a new direction at PSC. 12. All candidates' applications were reviewed against the standard outlined in Finding of Fact 11, and all candidates were interviewed using the same set of questions. Chairman Staats interviewed most of the candidates, but some interviews were completed by others. Both Intervenor and Grievant were interviewed by Chairman Staats.

13. The selection process was completed within the required time frames. Test. Sharpe, Level III Hearing; Grievant's Exh. 2 at Level III.

14. Mr. Ellis, Grievant's long time supervisor in the Public Utilities Division, noted Intervenor would have been on his short-list of candidates for the Public Utilities Director position. He also testified he did not believe Grievant had the necessary competencies to fill the position. Test. Ellis, Level IV Hearing; Test. Ellis in Deposition dated Oct. 28, 2005.

15. The Division of Personnel reviewed Intervenor's qualifications and found she met the minimum qualifications of the classification.

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 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).

I. Selection 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's decision regarding promotion/selection 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).

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).

A review of the qualifications and experience listed in the Findings of Fact establish Intervenor, while possessing little experience in the specific area of utility regulation, did have extensive experience in auditing, accounting, supervising, and other types ofregulation and assessment. Mr. Ellis, while not stating Intervenor would have been his final selection for the position, did indicate Intervenor would have been on his "short list."

Grievant, while having many years in public utilities regulation, did not possess the necessary abilities and skills to manage the Public Utilities Division. As stated by Mr. Ellis:

> at lower, non-complex-type cases, my recollection is that Spiro handled those, but had not reached the level of being assigned to complex utility cases on his own. And my observation would be he was not on a track, on a learning curve, that would appear he was reaching that level or would reach that level.

Deposition at 53 - 54.

Mr. Ellis also indicated he would consider hiring "a strong accountant, an auditor with no regulatory experience" to fill the Public Utilities Director position. Id.

Grievant has failed to establish there was a flaw in the selection process. All candidates were interviewed, all were asked the same questions, and all were compared to a pre-established standard. While it is true Chairman Staats had found through his work with Intervenor both at Workers' Compensation and Fiscal Risk Analyst in the Governor's Office, that Intervenor was a multi-talented, hard-working individual, Intervenor's performance in both the written and verbal portions of the application process demonstrated she is more qualified than Grievant.

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

II. Management Decision Another focus of Grievant's case was his assertion that Intervenor was not the best or most qualified choice for the position of Public Utilities Director, and PSC had selected the wrong applicant. As alternative relief, Grievant requested that if he was not selected to fill the position, he wanted the assessment of the applicants redone or the position reposted. Grievant basically wished to identify what skills and abilities the successful applicant should possess. Clearly, Grievant wished to substitute his judgment for that of PSC.

This issue is a management decision which is judged by the arbitrary and capricious standard. Additionally, the West Virginia Supreme Court of Appeals has noted this Grievance Board's jurisdiction to resolve grievances, as defined in W. Va. Code § 29-6A-2(i), does not provide authority for an Administrative Law Judge to substitute her management philosophy for that of the employer. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997); See Settle v. W. Va. Parkways Economic Dev. and Tourism

Auth., Docket No. 00-PEDTA-031 (May 23, 2000); Bennett v. Dep't of Health and Human Res., Docket No. 99-HHR-517 (Apr. 26, 2000); Terry v. Dep't of Transp./Div. of Personnel, Docket No. 99-DOH-207 (Mar. 17, 2000). "A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. See Olson v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-513 (Apr. 5, 2000)(citing Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997))." Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-030R (Nov. 20, 2002).

This Grievance Board has frequently ruled that, "[a] [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless thesedecisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997). See W. Va. Code § 29-6A-2(i); Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997). Here, Grievant did not meet that burden of proof. Grievant did not establish a violation of any rule, regulation, or statute. Additionally, while he certainly disapproves of the selection of Intervenor, Grievant has not demonstrated the decision to select Intervenor as the Public Utilities Director was arbitrary and capricious.

III. Political favoritism

Grievant asserts political favoritism and cronyism. Cronyism is defined as "favoritism shown to cronies without regard for their qualifications. . . ." (The American Heritage Dictionary 342 (2d college ed. 1991)). W. Va. Code § 29-6A-2 (h) defines "favoritism" as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Administrative notice is taken that the West Virginia Supreme Court of Appeals has revised the legal test for discrimination and favoritism claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d

814, 818 (2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 9)

> (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.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant did not meet his burden of proof and demonstrate Intervenor was treated more favorably because of her political affiliations. Indeed, it is unknown what her party affiliation is. Further, it is clear Governor Wise was not Intervenor's strongest supporter because he did not continue to fund her section on risk analysis, her employment in that area ended on June 2003, she was laid off, and she collected unemployment for a short time. Additionally, while it is true Mr. Staats suggested her name to Mr. Browning for her initial position at PSC, there was no pressure to hire Intervenor, and a review of her qualifications demonstrates she was more than qualified for the temporary position she received, Utility Analysis 2.

Further, the placement of Intervenor into the position of Public Utilities Director does not meet the definition of cronyism. Intervenor met the qualifications for the position. While reasonable minds may differ about what qualifications the Public Utilities Director should have, Intervenor's selection does not rise to the level of "preferential, exceptional, or advantageous treatment" in her selection for the position, vis-a vis Grievant.

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 his burden of proof and demonstrate by a preponderance of the evidence that Respondent's selection decision was arbitrary and capricious or an abuse of discretion, or that he was more qualified than the successful applicant. Grievant did not establish a flaw in the selection process.

4. This Grievance Board does not have the authority to substitute its judgement for the management philosophy of the employer. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997). See Settle v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 00-PEDTA-031 (May 23, 2000); Bennett v. Dep't of Health and Human Res., Docket No. 99-HHR-517 (Apr. 26, 2000); Terry v. Dep't of Transp./ Div. of Personnel, Docket No. 99-DOH-207 (Mar. 17, 2000). 5. "A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. See Olson v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-513 (Apr. 5, 2000)(citing Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997))." Vance v. Jefferson County Bd. of

Educ., Docket No. 02-19-030R (Nov. 20, 2002).

6. A grievant's belief that an agency's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. Va. Code § 29-6A-2(i). Management decisions are judged by the arbitrary and capricious standard. See Rice v. Dep't of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997); Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997)

7. Grievant did not demonstrate any statute, policy, rule, or regulation has been violated, or that the actions of PSC were arbitrary and capricious.

8. Cronyism is defined as "favoritism shown to cronies without regard for their qualifications. . . ." (The American Heritage Dictionary 342 (2d college ed. 1991)).

9. W. Va. Code § 29-6A-2 (h) defines "favoritism" as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Administrative notice is taken that the West Virginia Supreme Court of Appeals has revised the legal test for discrimination and favoritism claims raised under the grievance procedure statutes.

10. To establish a case of discrimination a grievant must demonstrate:

> (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.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

11. Grievant has failed meet his burden of proof and establish political favoritism or cronyism.

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.

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Janis I. Reynolds

Senior Administrative Law Judge

Date: September 29, 2006

Footnote: 1

It is unclear to the undersigned Administrative Law Judge why Grievant continues to assert this argument, as this issue was resolved through testimony and Exhibit 2 at Level III. While the announcement was not made to other PSC employees prior to the end of the six-month selection time period set out by Division of Personnel Rules, the actual WV-11 was approved within that time period. This exhibit conclusively demonstrates the numerous, required approvals were given on May 10 and 11, 2005.

Footnote: 2

No evidence about Intervenor's or Grievant's political party was offered as Grievant did not testify, and Intervenor was not asked her party affiliation.

Footnote: 3

The was no testimony on this issue, as Grievant did not testify, and Intervenor was not asked her age. The undersigned Administrative Law Judge found in the documents that Grievant and Intervenor are both over forty. Grievant

failed to demonstrated age played any role in the selection process.

Footnote: 4

Although Grievant did not testify, Grievant's attorney asserted in his proposals that Grievant was Arab-American. This assertion is contradicted by Grievant's application for the position, in which he states he state he is "Asian or Pacific Islander." This application informed the applicant that "white" means "a person having origins in any of the original people of Europe, North Africa or Middle East." Grt. No. 19 at Level III. Accordingly, this issue will not be addressed further as there was no testimony about race or indication it had any effect on the outcome of the selection.

Footnote: 5

Lowell Basford, Assistant Director in charge of Division of Personnel's Classification and Compensation Section, testified at Level III that all transactions involving Intervenor met the Division of Personnel's rules and regulations, and Intervenor met the minimum qualifications for the position of Public Utilities Director. Grievant's assertion that Intervenor did not meet the minimum qualifications is merely his opinion. This issue will not be addressed further.

Footnote: 6

The undersigned Administrative Law Judge also finds the assertions about prior positions is moot, as Intervenor is no longer serving in these positions, and it is unclear what relief could be granted.

Footnote: 7

He was qualified as an expert witnesses at the Level IV hearing.

Footnote: 8

This change was not explained.

Footnote: 9

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., treating an 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/favoritismclaims 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).