THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DIANA KINCAID,

Grievant,

v. **Docket No. 04-PEDTA-179R**

WEST VIRGINIA PARKWAYS,
ECONOMIC DEVELOPMENT AND
TOURISM AUTHORITY,

Respondent.

D E C I S I O N

On or about May 17, 2002, Diana Kincaid ("Grievant"), employed by the West Virginia Parkways Economic Development and Tourism Authority ("PEDTA"), as a part- time Toll Collector, filed a level one grievance following her nonselection for a full-time position. For relief, Grievant requested instatement as a full-time toll Collector. Following an evidentiary hearing at level four, Administrative Law Judge Janis Reynolds denied the grievance after concluding that Grievant had failed to prove that PEDTA had violated any rules or regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. Grievant appealed the decision to the Kanawha County Circuit Court for review.

By Order entered on June 17, 2005, the Honorable Louis H. Bloom ruled that ALJ Reynolds had erred in denying the grievance based on a finding that Grievant was not qualified for the position, rather than addressing whether the hiring procedures were arbitrary and capricious. Judge Bloom further ruled that the procedure was indeed flawed when Respondent's administrators failed to provide the selection board with Grievant's "call out" records for the previous fifteen months. These records had been provided for theother applicants, but not for Grievant who had been limited to working three days a week due to medical reasons, for the two months prior to the selection. The grievance was remanded to the Grievance Board "for further consideration and entry of a decision

which includes a finding of arbitrary and capricious hiring procedures." Further hearings were to be scheduled, if necessary, to determine what effect the arbitrary and capricious finding had on the grievance.

After mediation attempts failed, additional level four hearings were conducted by Administrative Law Judge Paul Marteney in the Grievance Board's Charleston office on April 20, 2006, August 4, 2006, and November 15, 2006. Grievant was represented by John D. Wooton, Esq. Of the Wooton Law firm. PEDTA was represented by A. David Abrams, Jr., General Counsel. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before February 12, 2007. Upon the resignation of Judge Marteney, the grievance was transferred to the undersigned on August 30, 2007.

The following facts have been derived from a preponderance of the credible evidence made a part of the original level four hearing and the level four hearing conducted on remand.

Findings of Fact

1. Grievant has been employed by PEDTA as a part-time Toll Collector at all times pertinent to this grievance. Part-time Toll Collectors are guaranteed to work three shifts a week, but are subject to "call out" for additional hours of work.

2. On or about February 11, 2002, Grievant started working only three shifts a week, pursuant to a doctor's order. Because of her medical status, Grievant was notsubject to "call out."

3. In April 2002, PEDTA posted eight full-time Toll Collector positions. The posting for the positions stated the "[w]orkweek is a 40-hour week performed in 5 x 8-hour days; shift work, holiday, weekends, alternating days off, subject to be on call." Prior to interviews being conducted three additional positions became vacant, for a total of eleven.

4. PEDTA appointed a selection board consisting of six administrators. The board members rated each candidate in the following areas:

Criteria	Possible Points
Toll Collector Performance	15
Experience	15
Availability (call outs, etc.)	15
Interview Response to Questions	10
Appearance	5

Communication	10
Leadership Potential	5
Education	5

5. Grievant applied and was interviewed by the Selection Board on May 1, 2002. Upon compilation of the total scores awarded to each candidate, Grievant was ranked 16th of the 17 applicants.

5. The selection board members were provided certain information regarding the applicants, including their call out history. In the information provided to the selection board, there was no data listed about Grievant's call outs, but there was a notation on the spreadsheet stating, “(Note: currently requesting 3-day week).” 6. Even though no official data was provided regarding her call outs, Grievant was awarded points in the category “Availability” by the board members as follows: 5, 5, 8, 6, 8, and 7.5. One member noted that his allocation was an estimate.

Discussion

In a selection case, a grievant must prove, by a preponderance of the evidence, that she was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). In a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation 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). An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. *Thibault, supra*. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). “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 judgemay not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep't of Health*

and Human Res., Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Subsequent to the Circuit Court's ruling that PEDTA acted in an arbitrary and capricious manner when it failed to provide Grievant's call out information, it remains only to determine what, if any, effect the action had on her nonselection. In support of the claim that she would have received one of the full-time positions had her call out information been provided to the selection board, Grievant submitted a substantial number of documents. A multitude of “Earnings Statements,” calendars and “Toll Foreman Daily Report of Activity” sheets have been submitted to verify Grievant's call out record. Due to the sheer bulk of the records, it may be reasonably assumed that this is not the format of the information provided to the selection board. As raw data, its usefulness is negligible. Although one of the board members did testify that she *could* have given Grievant more favorable scores had the information been provided in the same manner as the other candidates, any determination as to how that individual, or the remaining five members, may have scored Grievant differently is entirely speculative. Clearly, Grievant had already been given some credit in this category, and there is simply no basis upon which to determine that her standing would be elevated from sixteenth to eleventh.

Therefore, the undersigned concludes that Grievant has failed to establish that PEDTA's failure to provide her call out information for consideration during the selection of eleven full-time Toll Collectors deprived her of one of the vacancies. It is further noted that notwithstanding the determination of PEDTA's Director of Human Resources that Grievant was technically qualified for the position, she remained ineligible for the positiondue to a medical condition which rendered her unable to assume the duties of a full-time position in 2002.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusion of Law

1. In a selection case, a grievant must prove, by a preponderance of the evidence, that she was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. In a selection case, the grievance procedure is not intended to be a "super interview," but

rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994).

3. 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).

4. Grievant has failed to prove by a preponderance of the evidence that any error committed by PEDTA when it failed to include her call out data, along with that of the other applicants, to the selection board resulted in her nonselection for the position of full- time Toll Collector.

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision tothe 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)(repealed) (*but see Executive Order No. 2-07*, May 8, 2007). 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: OCTOBER 1, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE