THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

JAMES SELL,

Grievant,

v. **Docket No. 06-HHR-444**

Denise M. Spatafore

Administrative Law Judge

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/

HOPEMONT HOSPITAL,

Respondent.

DECISION

James Sell ("Grievant") initiated this proceeding on October 31, 2006, challenging the posting process for a maintenance worker position at Hopemont Hospital. Originally, Grievant sought "the money for the position posted," then amended his relief at level four to be placed in the maintenance worker position. The grievance was denied at levels one and two, and a dismissal order based upon failure to state a claim upon which relief could be granted was issued prior to hearing on November 20, 2006. Grievant appealed to level four on November 28, 2006. A level four hearing was held in Westover, West Virginia, on March 19, 2007. Grievant was represented by Sheila Nestor, and Respondent was represented by Jennifer K. Akers, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 12, 2007.

Synopsis

Respondent posted a maintenance worker position, for which Grievant applied. However, after

the position was posted, revised, and reposted, Hopemont officialsdiscovered that there actually was no need for an additional worker in the maintenance department, and decided to fill a different position instead. This was a management decision, it was not arbitrary and capricious under the circumstances, and Grievant did not establish any entitlement to be placed in an unneeded position.

Findings of Fact

1. Grievant is employed by the Department of Health and Human Resources ("DHHR") at Hopemont Hospital. His current position was not stated in the record.

2. The maintenance department at Hopemont has had five positions for the past several years, including the department supervisor, one electrician, one painter and two plumbers.

3. In the early 1990s, Harry Shaffer, who was employed in one of the maintenance positions, (See footnote 1) was injured and became unable to work. Scott Shrout was temporarily hired to file the position, and was later permanently hired as a maintenance employee, where he is still employed.

4. Mr. Shaffer, although unable to work, continued to be an employee of Hopemont's maintenance department, even though his position had been filled by Mr. Shrout.

5. Mr. Shaffer finally resigned in 2006, prompting the maintenance supervisor to post a vacancy for a maintenance worker on September 26, 2006.

6. The original posting was rescinded, and the position was reposted shortly thereafter, with the addition of data entry duties, at the maintenance supervisor's request. 7. Ralph Raybeck, CEO of Hopemont, determined that, because Mr. Shrout had filled Mr. Shaffer's position many years ago, no actual vacancy existed in the maintenance department. Because the facility was in need of a Dietary Manager, and had been cited for not having one, Mr. Raybeck determined that the dietary position would be posted instead, and the maintance worker position would not be filled.

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *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). If the evidence supports both sides equally,

then Grievant has not met his burden. *Id.*

Whether or not to post and fill positions is a management decision, and this type of decision is judged by the arbitrary and capricious standard. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96- DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93- HHR-322 (June 27, 1997). 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, 474S.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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

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 these decisions 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 ofHighways*, 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).

At this point in time, many state agencies do not automatically post a position when an employee retires, resigns, or is promoted. *See Smith v. Parkways Economic Dev. and Tourism Auth.,* Docket No. 00-PEDTA-133 (July 7, 2000); *Staggers v. Div, of Highways*, Docket No. 98-DOH-505 (Apr. 30, 1999); *Law/Bragg v. W. Va. Dep't of Health and Human Res.*, Docket No. 95-HHR-452 (July 17, 1997). “Frequently, the agency examines whether the specific position needs to be filled, whether the assigned duties can be assumed by a current employee, and whether other areas have more pressing needs that require the shifting of the position to another section[,] . . . [and] it is up to the administration of [the agency] to make these decisions.” *Mikles v. Dep't of Environmental Protection*, Docket No. 06-DEP-320 (March 30, 2007).

Although there was apparently some confusion within the maintenance department as to whether or not a vacancy existed, this error was corrected by Mr. Raybeck in his capacity as CEO of the facility. While Grievant may believe that he should be placed in a maintenance position, Respondent is not required to fill a position that does not exist. Unfortunately, the posting and reposting of the position at issue only added to the confusion and the appearance of some possible impropriety. Nevertheless, it is within management's prerogative to decide what the needs of the institution are, and there is no requirement here to add to the maintenance staff. Accordingly, Grievant is not entitled to the requested relief.

The following conclusions of law support this decision.

Conclusions of Law

1. Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *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. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d

1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

3. "A [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions 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).

4. Whether or not to post positions is a management decision, and Grievant has failed to prove Respondent's decision in this case was arbitrary and capricious or a violation of any law, rule, or regulation. 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.

Date: June 26, 2007

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

It was never designated which specific position was Mr. Shaffer's or Mr. Shrout's.