THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

RICHARD CARTER,

Grievant,

v. **Docket No. 06-DEP-341**

Janis I. Reynolds

Senior Administrative Law Judge

DEPARTMENT OF ENVIRONMENTAL

PROTECTION,

Respondent.

D E C I S I O N

Grievant, Richard Carter, is employed by the Department of Environmental Protection ("DEP"). He asserts he should have been selected to fill the position of the Chief Communications Officer during her absence, and he now requests the compensation he would have received if he had been placed in the position.

This grievance was filed on June 12, 2006, and denied at Levels I, II, and III. Grievant appealed to Level IV, and a Level IV hearing was held on November 28, 2006. Grievant represented himself, and DEP was represented by Ron Brown, Assistant Attorney General. This case became mature for decision on January 17, 2007, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Synopsis

Grievant makes several assertions. First, he avers Lalena Price, who received a temporary upgrade/reallocation, was not qualified for the position. Second, he contendsthe rules governing temporary upgrades were not followed, and he was more qualified for the position. Third, Grievant asserts Ms. Price has been the subject of favoritism.

Respondent asserts there was no violation of any statute, policy, rule, or regulation, and the temporary upgrade policy was followed. Additionally, DEP notes the Division of Personnel determined the interim employee met the qualifications for the position and no favoritism was shown.

Grievant did not meet his burden of proof and demonstrate he should have received the interim position.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a Public Information Specialist 3, Pay Grade 14. He has been employed by DEP since January 1999 and has performed a variety of duties. He currently works mainly as a videographer. He has a Board of Regents Degree in broadcasting and that is the focus of his experience and training. His starting salary was $27,816, and his current salary is $47,892. In November 2002, when Andrew Gallagher was DEP's Chief Communications Officer, he gave Grievant supervisory authority over all Public Information Office staff and directed Grievant to serve as acting director in his absence. (See footnote 2)

2. Ms. Price is employed as a Public Information Specialist 2, Pay Grade 12. She has been employed by DEP since February 2003. She supervises the publication ofDEP's newsletter, handles media and citizen inquires, writes and edits press releases, and writes speeches and talking points for the Cabinet Secretary. In performing her newsletter duties, Ms. Price routinely assigns duties to others who work on this project with her. Since 2005, she has filled in for Ms. Greathouse. She has a degree in journalism and has worked for as a freelance writer and a newspaper reporter and manager. Her starting salary was $34,008, and her current salary is $42,012.

3. In 2005, Jessica Greathouse, Chief Communications Officer with DEP, took maternity leave. At that time, she asked Ms. Price to perform those parts of her tasks which did not involve

supervision. Ms. Price performed these tasks well, but did not receive an upgrade or additional compensation. (See footnote 3)

4. In Spring 2006, Ms. Greathouse was planning for maternity leave for the birth of her second child. Ms. Greathouse again planned to ask Ms. Price to perform those parts of her tasks which did not involve supervision. However, this time, Ms. Greathouse was aware employees could be temporarily upgraded and receive compensation for assuming additional duties. She sought help from DEP's Human Resources on how to proceed, and the process to upgrade Ms. Price started on May 18, 2006.

5. Because Ms. Greathouse, as Chief Communications Officer, serves in an exempt position, Ms. Price could not be upgraded to this position. DEP worked with the Division of Personnel to find the classified position that would be the best fit for the soon- to-be assumed duties. 6. The Division of Personnel approved Ms. Price to be temporarily reallocated to an Administrative Services Manager 1 during the time she assumed many of Ms. Greathouse's duties. On June 6, 2006, Ms. Price was informed of this decision.

7. Ms. Greathouse informed her staff of Ms. Price's new duties on or about May 23, 2006, but clearly informed them Ms. Price would not be covering supervisory duties and all time sheets, leave approval, and disciplinary issues would be dealt with by Assistant Director Randy Huffman.

8. During Ms. Greathouse's second absence, Ms. Price did delegate some assignments to other employees when she was unable to complete all her normal duties, plus those she had assumed.

9. Ms. Greathouse did review all of her employees before she selected Ms. Price for the temporary upgrade, but concluded Ms. Price had the "skill set" to perform the required duties. Key required skills were writing ability and knowledge of the Cabinet Secretary's preferences in speech writing and talking points.

Discussion

___As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. See also Holly v. Logan

County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "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 and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the grievant has not met his or her burden. Id.

Grievant basically raises four issues, and they will be addressed individually.

I. Violation of the temporary upgrade policy

The purpose of Division of Personnel temporary upgrade policy is

> [t]o provide for the approval of a pay differential . . . for employees who, during a specified period of time, perform work on a full-time basis that is envisioned in a Division of Personnel job class of a higher rank as measured by salary range and an increased level of duties and/or responsibilities.

Resp. Exh. 3 at Level III, Division of Personnel's Temporary Classification Upgrades Policy.

Employees who are in the classified service may only be upgraded to a classified service position, and the employee receives a 5% per pay grade increase up to 15%. There is no indication in the policy that the position must be posted, and the only requirement in terms of qualifications is that "[e]mployees proposed for a temporary upgrade shall meet, or be within 3 months of satisfying, the minimum requirements of training and experience for the position to which they will be upgraded." Id. Temporary upgrades are to be approved by the Division of Personnel. Id.

Since Ms. Price could not be upgraded to the exempt Chief Communications Officer position, DEP and the Division of Personnel worked together to find the classification with the best fit for the duties that Ms. Price would be assigned. After review of the documentation originally submitted and additionally requested documentation, the Division of Personnel approved Ms. Price to be upgraded to an Administrative Services Manager 1. Additionally, since Ms. Price was not being placed in the same position that was vacant, what actually occurred was a temporary reallocation. The Division of Personnel Rule, 143C.S.R. 1 § 3.78 defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." Because Ms. Price was assuming "a significant change in the kind or level of duties and responsibilities" she met the requirements, and her temporary reallocation did not violate any rule, regulation, statute, or policy.

II. Qualifications

Grievant's assertions that Ms. Price was not qualified for the position, are just that. He offered no support for his contentions other than his belief the information given to Division of Personnel was not correct and his interpretation of Division of Personnel's Rules. Grievant did not call either an employee from the Division of Personnel or Ms. Price to testify about these assertions. As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998). Without confirmation of his assertions, Grievant cannot meet his burden of proof.

III. Management Decision

In essence, this grievance boils down to Grievant's disagreement with Ms. Greathouse's decision to select Ms. Price for the temporary upgrade/reallocation. This issue 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 itcannot 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, 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)). 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 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. Again, Grievant did not establish a violation of any rule, regulation, or statute, and he also did not demonstrate the decision to select Ms. Price was arbitrary and capricious, given she had successfully completed the duties before and had the required skills to meet the demands of the position.

IV. Favoritism

Grievant also asserted Ms. Price had been treated more favorably than he in relation to salary increases. 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." In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of favoritism by showing:

> (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 has not met his burden of proof. He has not demonstrated that Ms. Price was treated more favorably than he.

Indeed, Grievant's claim of favoritism is difficult to understand. A review of the salaries of Grievant and Ms. Price indicate the following: Grievant is an eight-year employee, his starting salary was $27,816, and his current salary is $47,892. Ms. Price is a four-year employee, her starting salary was $34,008, and her current salary is $42,012. (See footnote 4) Grievant received an approximately $20,000 increase over eight years while Ms. Price has received an $8,000 increase in four years. This evidence does not demonstrate favoritism toward Ms. Price.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance 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. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "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). 2. Grievant did not meet his burden of proof and establish the temporary upgrade of Ms. Price violated any statute, policy, rule, or regulation, nor did he establish the Division of Personnel's finding Ms. Price was qualified for the position was in error.

3. An Administrative Law Judge may not 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).

4. "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).

5. 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 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).

6. Management decisions are judged by the arbitrary and capricious standard.

7. "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 amanner 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, 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

8. Grievant did not meet his burden of proof and establish Ms. Greathouse's selection of Ms. Price for the temporary upgrade was an arbitrary and capricious act.

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."

10. To establish a case of favoritism a grievant must establish:

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

11. Grievant did not demonstrate Ms. Price had been treated more favorably than he in regard to salary increases.

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.

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Janis I. Reynolds

Senior Administrative Law Judge

Date: March 30, 2007

Footnote: 1

The undersigned Administrative Law Judge notes many of the cases Grievant cited as supporting his assertions in his proposals were education cases. Because the education statutes that apply to hiring are very different from the rules and regulations governing state hiring practices, these cases are not on point and will not be addressed.

Footnote: 2

There is no indication in the record that the process Grievant wants DEP to follow in this temporary upgrade was followed when Grievant was selected to serve as the acting director.

Footnote: 3

It appears Grievant may have sought to grieve this assignment, but understood or was told there was no grievable event because there was additional compensation.

Footnote: 4

The salary Grievant quoted to make this assertion was the temporary reallocation salary. As this is not the normal salary of Ms. Price, the undersigned Administrative Law Judge did not use it in assessing favoritism, as there was no finding of wrongdoing in the selection process.