THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

EARLENE JOHNSON,

Grievant,

v.

Docket No. 07-HHR-083

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

Earlene Johnson ("Grievant") initiated this proceeding on February 22, 2007, alleging she should have been selected for a Child Support Supervisor 2 ("Supervisor") position. She seeks placement in the position as relief, to be housed in Lincoln County, costs and damages. The grievance was denied at all the lower levels and appealed to level four on March 13, 2007. (See footnote 1) The first day of the level four hearing was conducted on January 16, 2008, before Chief Administrative Law Judge Janis I. Reynolds, at the Board's Charleston Office. Due to Ms. Reynolds retirement, this case was reassigned to the undersigned Administrative Law Judge to complete the proceedings. The second day ofthe level four hearing was conducted on April 30, 2008, at the Board's Charleston Office. Grievant was represented by Dwight J. Staples, Esquire. Respondent was represented by Jennifer K. Akers, Assistant Attorney General. David Alter, Esquire, also appeared as counsel for the Bureau for

Child Support Enforcement. The matter became mature for decision upon receipt of the last of the parties' findings of fact and conclusions of law on August 26, 2008.

Synopsis

Grievant alleges that she should have been interviewed for a Child Support Supervisor 2 ("Supervisor") position posted by the Bureau of Child Support Enforcement. Grievant asserts a violation of Department of Health and Human Resources Policy Memorandum 2106, and the Division of Personnel Administrative Rule on the hiring of applicants. Grievant is currently employed with the Bureau of Children and Families. Respondent counters that they had a number of qualified applicants from within the Bureau of Child Support Enforcement ("BCSE"). Accordingly, BCSE chose to interview candidates who were already BCSE employees.

The evidence established that Respondent BCSE had enough qualified internal applicants. BCSE reasoned that they wished to promote from within, from a pool of applicants who knew current BCSE duties, policies and practices, and to afford all BCSE employees the opportunity to advance from within. Respondent's decision was reasonable, and it was not arbitrary and capricious. Therefore, this grievance is denied.

After a detailed review of the entire record, including the transcript of the level three hearing and the recording of both days of hearing convened at level four, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by the West Virginia Department of Health and Human Resources in the Bureau for Children and Families ("BCF") as an Economic Service Supervisor. Grievant was formerly employed by BCSE, but left at some point to take a position with BCF.

2. In February 2007, a vacancy was posted by BCSE for a Supervisor position in Boone and Lincoln Counties (Region V).

3. A number of individuals applied for the position, both from inside and outside BCSE.

4. BCSE determined that they would interview 5 applicants. Of those 5, all were BCSE employees and were qualified for the position.

5. Karen McComas, Regional Manager, consulted with Larry Lefevre, Director of Field Operations and her supervisor, regarding which candidates to interview. Mr. Lefevre decided that they had enough viable candidates within BCSE, and they would only interview current BCSE

employees for the position.

6. Prior to informing applicants of this decision, Ms. McComas contacted the Personnel Director for BCSE for an opinion on conducting the interviews. Ms. McComas was informed that BCSE was not required to interview applicants working outside the Bureau, at least when the Bureau had enough qualified internal applicants. 7. BCSE interviewed the applicants chosen, and selected whom they thought were the best candidates to interview for the position. The successful candidate was a BCSE employee.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

This is not the normal posture for a grievance in which non-selection is challenged. Successful applicants must be chosen for a position from the pool of candidates interviewed. Since Grievant was not interviewed, she cannot be directly awarded the position. Accordingly, an inquiry into her qualifications as the best candidate for the position is not appropriate. The only legal issue is whether Grievant had a right to be interviewed, and if BCSE was clearly wrong or acted in an arbitrary and capricious manner by denying her an interview. The burden of proof remains with Grievant to prove her claim by a preponderance of the evidence.

The "arbitrary and capricious" standard of review is a deferential one which presumes an agency's actions are valid as long as the decision is supported by substantialevidence or by a rational basis. *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). "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, 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.

Grievant contends that she was qualified for the Supervisor position, and should have been granted an interview. BCSE argues that they had a number of qualified applicants within the Bureau, and they chose to interview five candidates who were BCSE employees. BCSE asserts that nothing about the interview process was unreasonable or arbitrary or capricious since the applicants interviewed were chosen from a sufficient pool of qualified suitable applicants.

Grievant relies heavily on an alleged violation of Policy Memorandum 2106 (Grievant's Exhibit 2, level four). The purpose of this policy is to provide “generalguidelines for considering applicants for posted positions, conducting employment interviews and making a selection from the candidates in a manner consistent with Department policies, Division of Personnel Administrative Regulations and applicable Federal and State Civil Rights law.” Concerning the guidelines for considering applicants, the policy provides the following:

> The Office Director/Administrator or designee(s) may, at their discretion, choose to interview all applicants who meet the minimum qualifications, or choose only to interview those applicants who clearly possess the best qualifications for the position. Those applicants who meet the minimum qualifications but are not selected for interviews should be notified as soon as possible that their application was received, appreciated and considered and that more qualified persons applied and were offered interviews. They should be invited to apply for future positions for which they qualify.

This Memo does not indicate that any individual has the right to be interviewed. In addition, it does not state that a bureau must interview candidates outside a bureau when a pool of internal qualified candidates have applied. West Virginia Division of Personnel memorandum entitled “Best Practices Regarding Appointments in the Classified Service” states that, “Interviewers should give Due Consideration to at least five (5) qualified applicants for each posted vacancy (or all eligible applicants when less than five (5) qualified persons are available).” Due consideration is defined as “reviewing the official applicant-completed DOP application for examination and interviewing qualified current or former merit system employees and all eligibles ranked above an applicant selected for

employment." However, the guide indicates that, "This document is intended to represent the best practices regarding appointments in the classified service. This document is not a policy promulgated by the State Personnel Board. The information it contains should not be construed to supercede any law, rule, or policy." The record indicates that shortlybefore the interviews were conducted, one individual scheduled to be interviewed decided to withdraw her name from consideration. It appears that BCSE gave due consideration to each application in deciding who should be interviewed. Due to the cancellation of one of the interviews, BCSE was within its discretion to give due consideration to four candidates instead of five. To adopt a hard fast rule that five candidates must be interviewed, as Grievant suggests, runs contrary to the broad discretion that agencies are afforded in conducting interviews.

James Wells, Assistant Director for Employee Relations with the West Virginia Division of Personnel, opined that screening down to a reasonable pool of applicants to fill a position is within the discretion of a manager or supervisor. He further indicated that a bureau is allowed to limit interviews to internal candidates as long as it has a sufficient pool of candidates to allow for an open competition. Mr. Wells pointed to the Division of Personnel's Administrative Rule, found at 143 C.S.R. 1 § 11.1(a), which states:

> In filing vacancies, appointing authorities shall make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. Whenever practical and in the best interest of the service, an appointing authority may fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the classified service based on demonstrated capacity and quality and length of service.

Mr. Wells stated, citing the above, that an appointing authority, such as a manager or supervisor in the instant case, has the discretion to fill a position without considering applicants employed outside the bureau. Mr. Wells also acknowledged that the "Best Practices Memorandum" was not a legislatively mandated rule or law; accordingly, BCSE was not required to follow the practices found in the Memo. Grievant asserts in her proposals that she was treated differently in that she was excluded from the applicant pool merely because she was applying from another bureau. (See footnote 2) This is simply not the case. The record of this grievance reveals that seven individuals applied for the position. Five of those seven were granted interviews. The two not chosen were Grievant and another individual, both of whom were employed outside BCSE. This is not disparate

treatment, but an exercise of discretion by BCSE in deciding how to conduct the interviews. It is understandable that Grievant is concerned that some of the level three and level four testimony indicated that when she left BCSE to go to work for the Bureau of Children and Families, it was an indication to that Bureau that Grievant no longer wished to advance with BCSE. The undersigned does not agree with that reasoning. However, that does not mean BCSE was required by law, rule, or policy to interview outside of their respective Bureau.

The preceding review of the applicable policy, and rule does not suggest that any particular individual must be interviewed. Nor do these policies and rules state that a bureau must interview candidates outside the bureau when they already have a number of internally qualified applicants. Grievant failed to establish by a preponderance of the evidence that BCSE violated any legislatively mandated law or rule in not interviewing her for the Supervisor position in question.

The following Conclusions of Law support the decision reached.

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. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

2. "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).

3. "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).

4. Division of Personnel's Administrative Rule, found at 143 C.S.R. 1 § 11.1(a), states:

> In filing vacancies, appointing authorities shall make an effort to achieve a balance between promotion from within the service and the introduction into the service of

> qualified new employees. Whenever practical and in the best interest of the service, an appointing authority may fill a vacancy by promotion, after consideration of the eligible permanent employees in theagency or in the classified service based on demonstrated capacity and quality and length of service.

5. A review of the applicable policy, and rule does not suggest that any particular individual must be interviewed. Nor do these policies and rules state that a bureau must interview candidates outside the bureau when they already have a number of internally qualified applicants.

6. Grievant failed to establish by a preponderance of the evidence that BCSE was clearly wrong, or acted in an arbitrary and capricious manner in not interviewing her for the Supervisor position in question.

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. *See* W. Va. Code § 29-6A-7 (*See Footnote 1, supra)*. Neither the West Public 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: September 22, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. The former statutes are controlling in this

case.

Footnote: 2

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