THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

SUSAN BETH FARLEY,

Grievant,

v.

Docket No. 07-HHR-161

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

BUREAU FOR CHILDREN AND FAMILIES and

DIVISION OF PERSONNEL,

Respondents.

DECISION

Susan Beth Farley, Grievant, employed by the Department of Health and Human Resources ("DHHR") as a Health and Human Resources Specialist, Senior, filed this grievance on April 9, 2007, challenging a determination by the Division of Personnel ("DOP") that she was not qualified for a Community Services Manager position that she was seeking to gain. Her Statement of Grievance reads as follows:

> The Logan Community Service Manager Position was posted in December, 2006. The minimum qualifications are listed as: Training: Graduation from an accredited four year college or university. Experience: Six years of full- time or equivalent part-time paid experience in a human services related area, two years of which must have been in a program administration capacity. Substitution: Post Graduate education in a human services related area may be substituted, utilizing an established formula, for the non-program administration experience.
>
> Mr. Kimbler, Regional Director, contacted me on 2/28/07 and asked me if I still wanted the job. I stated that I did. He said he had submitted my name and was looking forward to working with me. I do not know how a great many people found out that I was to be the next Logan CMS but many congratulated me from Region 2 and the State Office.

I received a letter from the WV Division of Personnel on 4-5-07, dated 4-3- 07, that stated that I am not eligible for this position because I have Regents Bachelors Of Arts Degree that I received from Marshall University in December, 2003. The letter stated that the six years of experience required must be obtained after the degree is awarded. The letter further stated that “Since a BOR (Board of Regents) degree may be awarded on the basis ofa combination of work experience and college credits, experience used to award college credit may not be used to meet the experience requirement of job specification. [sic]

I feel that this is unfair and has caused me embarrassment among my peers. First, I have approximately 25 plus years of experience in related fields. I needed only 44 hours to be awarded the degree. I was awarded additional hours but they were not necessary. This interpretation equates 44 college hours with 25 years of experience. In other postings, no more than 15 hours are equated to a year of experience. Also the posting does not indicate in any manner that a Board of Regents Degree will be treated differently from any other degree. There is no warning postscript that would indicate that I might not be eligible if I have a Board of Regents Degree. I moved into Health and Human Resources Specialist Senior position 10 months after I received my degree and my eligibility was never questioned.

I e-mailed Billie Jo Steryle-Anderson, Director of Personnel, and asked for the specifications, rules, etc. that guided this decision. Her response named the July 1, 1998, Guide for Interpreting Job Classification Minimum Training Requirements. I have looked on the DOP website and cannot find such a publication. I would like to know if this guide was adopted by the Board and I would like a copy of the minutes when it was adopted. I do not doubt her word that such a publication exists and I will request a copy. However, I think it is unfair that my eligibility is determined by a guide that is not readily available to staff and stipulations like the one she has presented me with should be part of the general specifications listed with a job posting. I know of several people who are trying to better themselves by obtaining a Board of Regents Degree and have no clue that there are other stipulations that staff does not know about.

I think I am very qualified for this position having worked in this agency, for over 16 years and having been a supervisor for the DHHR for 7 years. In completing the Board of Regents process, I had to list many tasks that I have performed as a worker and as a supervisor. Please remember that you do not do a task once, but many times. Therefore, even though I was awarded hours based on the successful knowledge of certain tasks, theories or behaviors, I performed those tasks many times which should be able to count for the experience portion of the job specifications. In the Board of Regents Degree I was awarded 9 hours from management classes. Your interpretation means that all 7 years of my experience, repeating the same tasks many times over, has been reduced to 9 college hours. This seems arbitrary and unfair to me.

RELIEF SOUGHT: I ask that I be declared eligible for this position, Logan Community Service Manager II. I ask that this position be left vacant until I have exhausted all of

the avenues of appeal. I also ask for compensationfor the Damage of my reputation and social standing. (See footnote 1)

This grievance was denied at the lower levels. DOP was joined as an indispensable party to the claim by Order entered on November 29, 2007. Grievant appealed to Level IV on May 11, 2007. A Level IV hearing was conducted before the undersigned on March 21, 2008, at the Grievance Board's Charleston Office. Grievant appeared in person, and by Jeffrey K. Matherly, Esq. DHHR appeared by Jennifer K. Akers, Assistant Attorney General. DOP appeared by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on April 21, 2008, upon receipt of the parties' fact/law proposals.

Synopsis

Grievant is employed by DHHR, currently working for the Division of Training as a Health and Human Resource Specialist, Senior. In December of 2006 a Community Service Manager 2 position was posted for Logan County. Grievant submitted an application for the position. Grievant interviewed for the position on January 26, 2007. At some point after the interview, the Regional Director for DHHR informed Grievant he would be recommending her for the position. DHHR submitted Grievant's documents to DOP for review and consideration. DOP contacted DHHR to inform them that there was a problem with Grievant's qualifications for the Community Service Manager 2 position. Due to Grievant possessing a Regents Bachelor of Arts degree, DOP did not use work experienceprior to obtaining the degree due to the outstanding question of how much work experience was used toward that degree.

This question concerning Grievant's past work experience caused DOP to be uncertain as to Grievant's qualifications. The need for DOP clarification from the institution awarding this degree was communicated to Grievant. Nevertheless, DOP did not receive any additional information from Grievant in regard to her Regents BA degree, and the work experience utilized by the institution in granting the degree. Based upon all the information presented to the DOP, Grievant did not possess the minimum qualifications for the position. This determination by DOP was reasonable based upon the available information, and was not arbitrary and capricious.

After thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by the DHHR for more than sixteen years, and has held the position of Health and Human Resources Specialist, Senior, since 2004.

2. In late 2006, DHHR posted a job opening in Logan County for the position of Community Services Manager 2 ("CSM2"). Grievant submitted an application for the position.

3. The minimum qualifications for the CSM2 are as follows:

Training:

Graduation from an accredited four-year college or university.

Experience:

Six years of full-time or equivalent part-time paid experience in a human services related area. Two years of which must have been in a program administration capacity.

Substitution:

Post graduate education in a human services related area may be substituted, utilizing an established formula, for the non-program administration experience.

4. Grievant interviewed for the CSM2 position on January 26, 2007. At some point after the interview, James Kimbler, Regional Director, DHHR, informed Grievant that he would be recommending her for the CSM2 position.

5. DHHR submitted Grievant's documentation to DOP for review and consideration. After an initial review, DOP requested a copy of Grievant's transcript from DHHR. Grievant's transcript reflects a Regents Bachelor of Arts Degree from Marshall University.

6. In order to receive a Regents Bachelor of Arts Degree from Marshall University, a student must complete a total of one hundred and twenty-eight semester hours, which can be in the form of, among other things, transfer credits from other colleges or universities, and faculty evaluation of life and work experiences.

7. After receipt and review of Grievant's transcript, the DOP contacted DHHR to inform them of a problem with Grievant's qualifications for the CSM2 position. The DOP cannot utilize any work experience prior to the award of a Regents degree until they receive clarification as to the amount of work experience used in obtaining the degree.

8. When reviewing a Regents degree, DOP contacts the agency and requests that they inform the employee to obtain a letter from the institution granting the degree stating what experience or how much experience was used to award the hours toward thedegree. Once DOP receives the information from the institution, DOP can then reevaluate an employee's documentation, and can use any remaining work experience not utilized toward meeting the work experience requirement of the qualifications.

9. Mr. Kimbler contacted Grievant informing her of the problem with her eligibility for the position. Grievant contacted DOP to ask about the requested information. The DOP responded by letter dated April 3, 2007, in which she was told that she was not eligible for the CSM2 position because the six years needed to meet the experience requirement for the job must be after the degree is awarded. Level IV Grievant's Ex. 3. This decision was based on an interpretation of the July 1, 1998, Guide for Interpreting Job Classification Minimum Training Requirements.

10. Section 9 of the July 1, 1998, Guide for Interpreting Job Classification Minimum Training Requirements states that since a Board of Regents degree ". . . may be awarded on the basis of a combination of work experience and college credits, experience used to award college credit may not be used to meet the experience requirements of the job specification." Level IV Grievant's Ex. 4.

11. Grievant submitted twelve portfolios to Marshall University in an effort to obtain her Regents degree. Grievant was awarded sixty-nine credit hours for her portfolios. She needed forty-four hours to have enough hours for her degree. Grievant did not offer any specific evidence of work experience hours used in obtaining the Regents degree.

12. DHHR filled the position with the next candidate in line after DOP initially determined that Grievant did not qualify for the position. DOP did not receive the requiredinformation from Grievant in regard to her Regents degree, and the work experience utilized by the institution to grant the degree.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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). (See footnote 2)

Grievant asserts the Guide for Interpreting Job Classification Minimum Training Requirements adopted by DOP was an effort to interpret and add further qualifications to the minimum qualifications for the CSM2 position. Grievant argues the Guide is invalid and unenforceable because it was not approved by nor authorized by the State Personnel Board. Grievant argues in the alternative, even if the Guide were a valid statement of policy, Grievant has demonstrated that she meets the minimum qualifications for theposition. Grievant has at least three years of experience earned prior to the award of her degree which were not used to award her credits required for her degree. These three years, coupled with the three years of experience she has after the award of her degree, give her the requisite six years of experience required for the position.

Respondents counter that while Grievant may have eventually been considered by DOP to be qualified for the position had she submitted additional information, based upon the documentation presented to the DOP, the only determination that could be made was Grievant did not possess the minimum qualifications for the position of CSM2. Grievant was therefore ineligible to be selected and placed in the position. In addition, the Guide is simply reference material for staff in DOP to assist them in determining whether or not an application meets the minimum qualifications set out in the classification specification that is assigned to the position the applicant is seeking.

Because the dispute in this grievance is whether Grievant met the minimum qualifications for the position of CSM2, this decision must be evaluated under the arbitrary and capricious standard. 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)). A searching inquiry into the facts is required; however, the scope of review is narrow, and the undersigned may not substitute his judgment for that of the agency. *See generally, Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). Rather, the role of the Board is to review the information provided, and assess whether the actions taken were arbitrary and capricious.

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*.

The undersigned does, indeed, understand Grievant's frustration that, in spite of the belief that she possessed the minimum qualifications for the CSM2 position, she was not approved as qualified by the DOP. Nevertheless, employers are obligated to select applicants who qualify under the terms established by DOP classification and specifications. *Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 97-PEDTA-546 (June 24, 1998); *Edwards v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 97-PEDTA-426 (May 7, 1998). In the instant case, Grievant did not meet those minimum qualifications.

DOP's determination in this regard cannot be found to be arbitrary and capricious. DOP cannot utilize any work experience prior to the award of a Regents degree until they receive clarification from the institution granting the degree stating what experience or howmuch experience was used to award the hours toward the degree. DOP cannot make those determinations, only the institution granting the degree can provide that information. In instances such as this matter, it is customary for employees to submit letters from the institution granting the Regents degree stating what experience hours were utilized toward the granting of their degrees. Based upon this information submitted by the employees, DOP is able to determine what experience could be used to meet the experience requirements of the position. DOP did not receive any additional information from Grievant in regard to her Regents degree, and the work experience utilized by the institution to grant the degree.

Under the circumstances presented, the undersigned does not find DOP's decision on Grievant's qualifications for the CSM2 position to be arbitrary and capricious. DOP explained to Grievant that they could not count hours of work experience twice, meaning for both the education and the experience requirements of the classification. DOP requested that Grievant provide additional information that confirmed all her work experience was not used toward her degree. Because the information requested was not provided, the DOP's decision was based on the information which was received and available for review. The DOP's determination that Grievant did not qualify for the CSM2 position was reasonable, and not in disregard of the facts presented to them.

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 his 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).

2. 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)). A searching and careful inquiry into the facts are required; however, the scope of review is narrow, and the undersigned may not substitute his judgment for that of the agency. *See generally, Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

3. 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). 4. 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*.

5. Employers are obligated to select applicants who qualify under the terms established by DOP classification and specifications. *Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 97-PEDTA-546 (June 24, 1998); *Edwards v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 97-PEDTA-426 (May 7, 1998).

6. Grievant failed to prove DOP acted arbitrarily or capriciously, abused their discretion, or their actions did not have a rational basis. Based upon the information presented to the DOP, a

reasonable determination was made that Grievant did not possess the minimum qualifications for the position of CSM2. Grievant was therefore ineligible to be selected and placed in the position.

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 2). Neither the West Virginia 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 ofthe appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 10, 2008

Ronald L. Reece

Administrative Law Judge

Footnote: 1

Grievant amended her relief sought many times over the course of the grievance process. At Level IV, Grievant's counsel indicated that she was seeking "whatever relief is appropriate." In her proposals, Grievant seeks a pay increase in the amount she would have received had she been promoted to Community Services Manager 2.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and Stat e 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. References in this decision are to the former statutes, which continue to control the proceedings in this case.