WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ALINE WORKMAN,
Grievant,

v. **Docket No. 07-HHR-128**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT,
Respondent.

DECISION

Aline Workman ("Grievant") initiated this proceeding on February 28, 2007, alleging she should have been selected for a Child Support Supervisor 2 ("Supervisor") position. She seeks placement in the position as relief. The grievance was denied at levels one and two, and, following a level three hearing convened on March 12, 2007, it was denied at that level on April 16, 2007. Grievant appealed to level four on April 20, 2007.[1]

A level four hearing was conducted by Administrative Law Judge Thomas Gillooly on April 21, 2008, in the Grievance Board's Charleston office. Grievant was represented by Gordon Simmons, Steward, West Virginia Public Workers' Union, and Respondent was represented by Jennifer K. Akers, Assistant Attorney General. The parties submitted post-

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[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 CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA.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.

hearing proposals by May 21, 2008. Because Mr. Gillooly is no longer employed by the Grievance Board, this grievance was reassigned to the undersigned administrative law judge on August 18, 2008.

Synopsis

Grievant alleges that she should have been selected for a Supervisor 2 position for the Lincoln and Boone County area of Region V. She contends that the interview process was flawed, that the committee failed to consider factors which would have favored her, and that she was more qualified than the successful applicant.

The evidence established that Respondent's decision to hire the successful applicant was based upon pertinent factors. She had performed successfully as a Child Support Specialist 3, stepping in for her supervisor and mentoring new employees, while carrying her own caseload. She also had experience as a supervisor in the private sector. Grievant's experience as an employee of the Customer Service Center was not as relevant to the Supervisor position, so she did not score as well during the interview and selection process. Respondent's decision was well-reasoned, and it was not arbitrary and capricious. Therefore, the grievance is denied.

After a detailed review of the entire record, including the transcript of the level three hearing and the recording of the 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 Bureau for Child Support Enforcement ("BCSE") as a Child Support Specialist 3 at the Customer Service Center in Charleston, West Virginia. She has held her current classification for 15 years.[2]

2. On an unspecified date, a vacancy was posted for a Supervisor position in Boone and Lincoln Counties (Region V). Grievant had previously worked in Region V.

3. A committee conducted interviews on February 16, 2007. The committee included Karen McComas, Regional Administrative Manager for Cabell County, Larry LeFevre, Director of Field Operations, and two BCSE attorneys.

4. Four applicants, including Grievant, were interviewed for the Supervisor position.

5. All applicants were asked identical questions from a list of 23 prepared questions. Their answers were ranked from 1 to 5, with 1 being unacceptable and 5 being excellent.

6. The members of the committee scored the applicants' answers individually during the interviews, and then the total score for each applicant was averaged. After the interviews, as a group, the committee compiled a "Candidate Comparison Chart," discussing the applicants and awarding scores for each applicant in the categories of Interview (the average score), Education, Past Experience/Demonstrated Ability, and Leadership or Growth Potential.

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[2]Grievant also testified that she had "worked for the state" for 24 years, but she did not specify whether all of her employment had been with Respondent or another agency.

7. References were not consulted for any of the applicants, because all of them had worked for BCSE in Region V, and their work was familiar to the committee.

8. The highest scoring applicant and the selected individual was Donna Williams. At the time of the interviews, she had been employed by the BCSE for nine years and was classified as a Child Support Specialist 3. She had previously worked as an Accounting Technician and as a Legal Assistant for BCSE. In her capacity as a Child Support Specialist, she had served as a back-up supervisor, and she had several previous years of experience as a supervisor with a private employer.

9. Ms. Williams was selected because of her extensive supervisory experience and excellent communication skills as demonstrated during the interview. As a Child Support Specialist 3, she had frequently served as a supervisor and had mentored new employees, while still carrying a full caseload of her own. The committee believed that, because she had performed well in the same position as the employees she would be supervising, along with her supervisory skills and experience, she was the best applicant for the position.

10. At the Customer Service Center, Grievant had not served as a supervisor in any capacity, nor had she mentored new employees or carried a caseload.[3]

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.*

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[3]From Grievant's representative's questioning of certain witnesses, it appears that Grievant may have worked as a backup supervisor for BCSE prior to moving to the Customer Service Center, but no specific details regarding when or how this occurred have been established in the record of this grievance.

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).

The 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 judge may 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).

Grievant contends that the interview committee refused to consider four factors which favored her: seniority, attendance, references, and performance evaluations. She

believes that Respondent failed to follow the provisions of its Policy Memorandum 2106, "Employee Selection" in failing to give Grievant the benefit of these factors. A large portion of Grievant's argument centers upon Ms. McComas' testimony that the interview was weighed more heavily than other factors, such as education or experience. She also contends that Respondent erred by not specifically contacting references for each of the applicants.

Policy Memorandum 2106 provides guidelines for factors which may be considered during the interview process, but also states that "[w]here appropriate, different factors can be weighed on the needs the job entails." It provides that the Candidate Comparison Chart should be "used as a tool in the selection process." Most of Grievant's contentions are based upon the language of the policy which states that, when several applicants are being considered, "demonstrated ability, work history, references, education and the interview should be considered."

Grievant believes that the last portion cited from the policy, set forth above, requires that references be checked and credit be given for tenure. It is undisputed by Respondent that these two factors were not specifically considered in this selection decision, but it points out that the policy does not specifically *require* that these factors be measured, but states that they "should" be considered. Indeed, it states that "[t]he ultimate selection decision should be based upon the interviewer's judgment as to which candidate would best do the job." Performance evaluations and attendance are not discussed at all in the policy.[4]

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[4]However, Ms. McComas testified that Grievant voluntarily brought her evaluations to the interview, and they were reviewed by the committee. Apparently, the evaluations

As explained by committee members in their testimony, Ms. Williams was selected for this Supervisor position based upon her supervisory experience, her excellent performance of the job duties of a Child Support Specialist (the position she would be supervising daily), and her work as a mentor for new employees. Conversely, Grievant was ranked third of the four candidates. As a Customer Service employee, she was not working a caseload, acting as a back-up supervisor, or serving as a mentor. Therefore, her experience was deemed not to be as relevant as Ms. Williams'. The undersigned does not conclude that Respondent's decision was arbitrary and capricious. The evidence proves that it was based upon rational considerations.

It must be noted that Grievant has argued extensively that Respondent gave inappropriate consideration to Ms. Williams' prior experience as an Accounting Technician for the BCSE. However, the undersigned feels compelled to point out that it was Ms. Williams herself who, in her level three testimony, opined that this particular experience made her more qualified for the Supervisor position. While Grievant has attempted to argue that Respondent improperly required accounting experience as part of the necessary qualifications for the job, this is simply not true. When questioned about Ms. Williams' experience at level four, Ms. McComas did agree that this was a consideration in selecting her, due to the financial issues peculiar to the child support arena, but she did not state that it was a minimum qualification for the position. Nevertheless, Respondent's determination that Ms. Williams' familiarity with BCSE's accounting system was a pertinent qualification for a Supervisor position in that department was certainly not unreasonable.

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had not been requested, so no other applicants' evaluations were reviewed.

The following conclusions of law are appropriate in this matter.

Conclusions 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). 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).

2. 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).

3. 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*.

4. "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 judge may 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).

5. Grievant has failed to establish by a preponderance of the evidence that Respondent's selection decision was arbitrary and capricious or clearly wrong.

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. *See* W. VA. CODE § 29-6A-7 *(repealed*, *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: August 29, 2008

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DENISE M. SPATAFORE
Administrative Law Judge