BEFORE THE WEST VIRGINIA PUBLIC

EMPLOYEES

GRIEVANCE BOARD

JUDY KARAN MURPHY,

Grievant,

v.

Docket No. 2008-0680-DOT

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION / DIVISION OF

HIGHWAYS,

Respondent.

DECISION

Grievant Judy Karan Murphy applied for the position of Secretary II ("SEC 2") in the Maintenance Department of the Division II Office of the Division of Highways ("DOH"). The Division II office is located in Huntington, West Virginia. The position had been filled on a temporary basis by another employee after the retirement of the incumbent secret80-ary in the office. Grievant had heard numerous rumors that the District Maintenance Supervisor had already decided that the employee temporarily filling the position would be the successful applicant for the SEC 2 position and that it was useless for anyone else to apply. Notwithstanding the office gossip, Grievant went through the interview process. When Ms. Murphy was not selected for the position, she filed a grievance at level one, alleging that the successful applicant was predetermined to get the job before the hiring process was started. The level one grievance was filed on June 6, 2007, with Grievant's immediate supervisor, George Colegrove. Mr. Colegrove issued a level one response on June 8, 2007, stating that he was without authority to resolve the grievance. A level two hearing was held on June 15,

2007, before Keith E. Chapman, the DOH District Managerfor District II. On June 21, 2006, a response was issue by Mr. Chapman denying Grievant's claim. Grievant appealed to level three where an order was entered stating that Grievant moved to have the grievance transferred to the "new" grievance procedure. That motion was granted and the level three hearing under the old procedure was cancelled. (See footnote 1) An unsuccessful effort at mediation was attempted on January 8, 2008, and the grievance was set for a hearing before Administrative Law Judge, Thomas J. Gillooly. The grievance hearing was conducted on two separate days, May 6, 2008 and May 29, 2008, at the Charleston, West Virginia Office of the Public Employees Grievance Board. On both occasions, Grievant Murphy represented herself and the DOH was represented by Robert Miller, Esquire. On June 30, 2008, the last party submitted proposed findings of fact and conclusions of law and the grievance became mature for decision. (See footnote 2)

Synopsis

Grievant alleges that the Supervisor for the Division II Maintenance Department, Edward Armbrewster, had made it clear before the interviews were held, that he intended to fill the SEC 2 position with Shelly Marcum. She complains that the predeterminedoutcome renders the selection process meaningless and fatally flawed. (See footnote 3) The evidence does indicate that Mr. Armbrewster may have made some unfortunate statements prior to the interviews that could have led employees to be concerned about the process. However, there was insufficient evidence to prove these comments, or the attitude they reflected, affected the ultimate outcome of the selection process. Nor was it proven that the process was biased and therefore arbitrary or capricious. Consequently, the grievance must be denied. The following findings of fact are based upon a thorough review of the entire record in this grievance.

Findings of Fact

1. Grievant has several years of experience doing various clerical duties in numerous settings. She spent approximately fourteen months as a Secretary 1 with the Workers' Compensation Commission in 2002 and 2003. At the time of the events that gave rise to this matter, Grievant was employed by the DOH in the District Shop of the District II Huntington Office as an Office Assistant III ("OA 3"). Her supervisor was George Colegrove and she had been serving in that position since March of 2006.

2. A Weekly Vacancy Report Bulletin was published by the DOH listing the position of SEC 2 in the District II Maintenance Office. The posting was open for applications from December 12, 2006 through January 10, 2007. 3. Six people who applied for the job met the minimum qualifications for the SEC 2 position, including Grievant Judy Murphy and Shelley Marcum. These six individuals were all interviewed for the position.

4. Prior to the posting of the SEC 2 position, Shelly Marcum served in the position in a temporary status for a period of approximately six months. This period represented the time between the previous secretary's retirement and the filling of the vacant position.

5. Before assuming the temporary assignment, Ms. Marcum had worked as an OA 3 in the District II Maintenance Office and assisted the secretary in the performance of her duties. Marcum had also temporarily filled a SEC 1 position for the first six months of 1998 during the selection process of a new SEC 1.

6. Edward Armbrewster is a Maintenance Engineer for the DOH and is the Supervisor of Maintenance for District II. The SEC 2 that was to be hired would be working directly with him.

7. At the time of the events giving rise to this grievance, Claude Gore was employed in the DOH District II Maintenance Office as an Engineering Technician. His office was directly across the hall from Shelly Marcum's Office. Mr. Gore overheard part of a conversation between Mr. Armbrewster and Ms. Marcum that took place in Ms. Marcum's office after the SEC 2 position was posted and before the interviews were held. Mr. Armbrewster told Ms. Marcum “I don't want her for the job. She's nothing but trouble. George can't get her to do anything right.” Mr. Gore stated that “George” referred to George Colegrove, Grievant's supervisor. Mr. Gore also stated that Mr. Armbrewster hadto be referring to the Grievant because “George” only supervised one female and that was Ms. Murphy.

8. Gregory Surber is employed as a Maintenance Assistant at the DOH District II Maintenance Office. At some point prior to the interviews being conducted for the SEC 2 position, he ran into Claude Gore at a restaurant where they were both having lunch. Mr. Gore told Mr. Surber that Shelly Marcum was going to get the SEC 2 position.

9. Keith Chapman is the DOH District Manager for District II and is Mr. Armbrewster's supervisor. He had heard rumors that Mr. Armbrewster had preselected Shelly Marcum for the SEC 2 position. Mr. Chapman discussed the rumors with Mr. Armbrewster and Armbrewster denied making

any statements that indicated that Ms. Marcum was going to get the job.

10. As a result of the rumors, Keith Chapman decided to personally serve on the interview committee so that he could observe the hiring process for fairness. Since there were usually only two people on the interview committee, Mr. Chapman also felt he could cast the deciding vote if the other interviewers could not agree.

11. Three supervisors served as the committee that interviewed all six of the applicants who meet the minimum qualifications. The supervisors were Mr. Chapman, Mr. Armbrewster and Harold Jones, Administrative Services Manager for District II of the DOH.
All applicants filled out a six-page Application for Examination and were verbally asked the same set of questions by the interviewers. The interviewers made their determination as to who would be recommended for the job from this information.

12. Mr. Armbrewster and Mr. Jones believed that Shelly Marcum was the best candidate for the job. Mr. Chapman did not reveal his selection after the interviewsbecause the other interviewers picked the same applicant for the job. At the hearing Mr. Chapman revealed that he had selected Ms. Marcum as the best candidate as well. The reasons stated for selecting Shelly Marcum for the position were the following:

1 *

Willingness to perform duties beyond her job assignment;

2 *

A history of providing support to other organizations while fulfilling her duties;

3 *

Ability to pick up the majority of the duties for the SEC 2 position while continuing to do her own job;

4 *

Experience performing a variety of tasks supporting sub-units and other organizations;

5 *

Demonstrated exceptional flexibility and adaptability in functioning as an Office Assistant 3;

Discussion

The crux of Grievant's complaint is her belief that the successful applicant for the SEC 2 position was selected before the qualifications of the other applicants were considered. She contends that the preselection of the successful applicant before the selection process was complete invalidated the hiring.

The Grievance Board has recognized that 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 v. the Div. Of Rehab. Serv.,* Docket No. 93-RS-489 (July 29, 1994). 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 is so implausible that it cannot be ascribed to a difference of opinion. *SeeBedford 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).

The West Virginia Division of Personnel administrative rules address the hiring process for state employees is as follows:

(a) Examinations for appointment to a position in the classified service shall be conducted on an open competitive basis. Examinations shall be practical in nature, shall be constructed to reveal the capacity of the applicant for the particular position for which he or she is competing, and shall be rated objectively. 143 C.S.R. 1 § 6.1 (2007).

Obviously, if an agency would choose a successful applicant prior to considering and comparing the qualifications of all the applicants, the decision would not rely on the criteria intended to be considered by the Division of Personnel administrative rules. Consequently, the selection would be arbitrary and capricious. Therefore, if Grievant could prove that Shelly Marcum was predetermined to be the successful applicant and the qualifications of all the applicants were not fairly considered, she would prevail.

This grievance does not involve disciplinary action, therefore, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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 acontested 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).

The evidence shows that there was a significant amount of gossip in the office that Mr. Armbrewster had decided to give the job to Shelly Marcum. One of the office workers, Tami Crank, testified that colleagues had told her that they heard Mr. Armbrewster specifically say that Ms. Marcum was going to be hired. Unfortunately, Ms. Crank was unwilling to identify who had made these statements, when the statements were made and under what circumstances the person allegedly heard Armbrewster's utterances. While a certain amount of latitude will be given to testimony offered in administrative hearings, there is so little factual information in Ms. Crank's statements that they cannot be considered reliable. Therefore, they carry no weight as evidence. (See footnote 4)

The statement by Mr. Armbrewster, overheard by Mr. Gore, is certainly troubling. Although it indicates more bias against the Grievant than favoritism toward the successful applicant, it does indicate that Mr. Armbrewster was making verbal judgements about the candidates prior to the process for fairly comparing their qualifications. Without the intervention of Keith Chapman the interview process may have become tainted.

As the District II Manager, Mr. Chapman is the supervisor for Mr. Armbrewster. He has participated in close to one hundred interview and selection committees for DOH. Mr. Chapman heard the rumors regarding preselection of Shelly Marcum. He testified thatsuch rumors are common but he felt that it was important to discuss the situation with Mr. Armbrewster. Even though Mr. Armbrewster denied making any statements that Ms. Marcum was going to receive the position, Chapman felt it was important to take additional measures to make certain the process was conducted properly and was perceived to be fair.

Normally, there are only two supervisors assigned to an interview team. As the top manager, Mr.

Chapman does not usually participate in the process. In this instance, he decided to serve on the interview team personally, to ensure the fairness of the hiring process and to serve as a tie breaker if the other two supervisors could not agree upon a candidate. Mr. Armbrewster and Harold Jones asked all of the applicants the same set of questions related to the job and compared their responses as well as their experience. They came to the same conclusion regarding who should be recommended for the position. Mr. Chapman observed the process and independently made the same choice. The reasons given for the selection were reasonably related to the job duties and not based upon extraneous matters. The steps taken by Mr. Chapman to insure the integrity of the process overcame any bias Mr. Armbrewster may have shown prior to the interviews. Additionally, while there was undoubtedly substantial gossip regarding the alleged preselection of Ms. Marcum, there was no credible evidence presented that Mr. Armbrewster was actually committed to awarding the job to her. Based upon the evidence as a whole, the selection was not shown to be arbitrary or capricious and therefore the grievance must be denied.

Conclusions of Law

1 1 As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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 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). 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 v. the Div. Of Rehab. Serv.,* Docket No. 93-RS-489 (July 29, 1994).

3 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 is 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).

4 4 The rumors of preselection notwithstanding, the selection process for the SEC 2 position was conducted in an open and competitive way. It was constructed to reveal the capacity of each applicant for the particular position as required by Division of Personnel standards set out in 143 C.S.R.1 § 6.1 (2007).

5 5 Grievant failed to prove that the selection process for the SEC 2 position was biased, arbitrary or capricious.

Accordingly the grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. 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 of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATED: OCTOBER 23, 2008

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WILLIAM B. MCGINLEY

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 replaced by W. Va. Code § § 6C-2-1 to 6C-2-7 and W. Va. Code § § 6C-3-1 to 6C-3-6 (2007). Because this grievance has been transferred to the new procedure, it is being decided pursuant to the provisions of W. Va. Code § § 6C-2-1 to 6C-2-7 (2008).

Footnote: 2

This matter was reassigned to the undersigned Administrative Law Judge because Thomas J. Gillooly is no longer employed by the Public Employees Grievance Board.

Footnote: 3

Grievant Murphy states in her original grievance form that the alleged preselection of Ms. Marcum was discrimination. However, it is apparent throughout the record that Ms. Murphy's true contention is that the hiring process was arbitrary because the candidates were not judged based upon their credentials. Therefore, the undersigned does not treat this matter as a discrimination grievance simply because the term was used in the original grievance document.

Footnote: 4

The administrative law judge at the hearing explained to Ms. Crank that if she did not provide more factual information about the comments that others had relayed to her the testimony could not be given much consideration. Ms. Crank indicated that she understood, but she feared that if she revealed the identity of the individuals who spoke with her they would be subject to retaliation.