THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BOBBY L. VICARS,
Grievant,

v. **Docket No. 2008-1645-BSC**

BLUEFIELD STATE COLLEGE,
Respondent,

and

DEBORAH J. HALSEY-HUNTER,
Intervenor.

DECISION

Grievant, Bobby L. Vicars, filed a grievance against his employer, Bluefield State College, on May 21, 2008, when he was not selected for the James H. Shott Endowed Chair in the School of Business. As relief, Grievant sought to be placed in the position as the most qualified applicant.

This grievance was denied on June 18, 2008, following a level one conference. The level two mediation session conducted September 10, 2008, was unsuccessful. Grievant appealed to level three of the grievance process on September 22, 2008. A level three hearing was conducted over the course of two days by the undersigned Administrative Law Judge on December 1, 2008, at the Grievance Board's Beckley office, and on June 3, 2009, at Bluefield State College. Grievant was represented by J. W. Feuchtenberger, Esquire. Respondent was represented by James "Jake" Wegman, Assistant Attorney General. Intervenor was represented by Mary Snelson, WVEA. The matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on July 20, 2009.

Synopsis

Grievant submitted an application for the James H. Shott Endowed Chair in the School of Business. Intervenor, Deborah J. Halsey-Hunter, also submitted an application for the position. Grievant and Ms. Halsey-Hunter were the only applicants for the Shott Chair. The competition for the Shott Chair in Business is a merit-based competition to be decided based on relative qualifications. The President is charged with making the appointment of the most highly qualified candidate after a required three level review and recommendation process. The evidence established that two of those three levels of review, the Department Chair and the Provost levels, did not take place or failed to follow the appropriate procedure as required by the selection policy. Grievant established that the selection process was flawed, and the selection decision was arbitrary and capricious. However, Grievant did not prove he is more qualified. As relief, Respondent is ordered to repeat the selection process for the position, following all applicable rules, policies and selection committee procedures, and after considering relative merit and qualifications of the candidates. This grievance is granted, in part, and denied, in part.

The following Findings of Fact are made based upon the record developed at level one and level three:

Findings of Fact

1. Grievant has been employed by Respondent, Bluefield State College ("BSC"), as a professor of business for some thirty plus years.

2. BSC is the recipient of an endowment to fund the James H. Shott Chair in the School of Business. First occupied in 2005, the James H. Shott Chair was designated

as a three-year appointment by Bluefield State College. The Shott Endowed Chair position includes a salary supplement and is recognized for a certain amount of prestige.

3. Grievant and Intervenor were the only applicants for the Shott Chair for the current selection. Dr. Don Smith, BSC Provost/Vice President for Academic Affairs, announced the opening to full-time faculty members in the School of Business by his memo of April 3, 2008. There were guidance materials made available to the applicants by Dr. Smith's memo.

4. Dr. Smith assembled the BSC Endowed Chair Committee to review the applications. Dr. Smith indicated that, while only tenured professors could serve on BSC's Promotion and Tenure Committee, for this Committee none were full professors, a majority were not tenured, and one was not a member of the faculty. The Committee, as characterized by Dr. Smith, was composed of "administrative/instructional folks."

5. The BSC Criteria & Procedure for Appointment to the "James H. Shott" Endowed Chair provides, in pertinent part, the following:

> General Criteria & Eligibility Requirements for the
> "James H. Shott" Endowed Chair
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> Criteria for appointments to endowed chairs must reflect the highest ideals for academic excellence and scholarly or creative achievement. While all appointments to are made by the Bluefield State College Endowed Chair Committee, procedures for recruitment must be consistent with the stipulations of the endowment and other administrative procedures established in the various academic units.
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> I. GENERAL CRITERIA FOR APPOINTMENTS
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> 1. Doctorate in field as accepted by the ACBSP (Association of Collegiate Business Schools and Programs)
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> 2. Tenured Full-Professor at BSC or current institution, or per that is eligible to be appointed to the rank of tenured professor

3. A demonstrated record of teaching excellence

4. A commitment to scholarly research demonstrated by publications in journals (preference given to refereed journals) and presentations

5. Evidence of professional contributions, designations, certifications, appointments, etc., consistent with that expected of an endowed chair

6. A commitment to institutional service, demonstrated by a pattern of continuous service on both division and college-wide committees

7. A demonstrated record of exemplary community involvement/public service, or to current institution and the community in which the person currently resides

8. A minimum of 10 years of aggregate college-level teaching experience and/or professional business experience, with due consideration given for additional years of service

9. Evidence the professor has worked to improve the quality of the learning experiences available to students

10. Commitment to coordinate grant submissions for the benefit of the BSC Division of Business

III. PROCEDURE FOR APPLYING FOR ENDOWED CHAIR

1. The Provost shall solicit and receive applications of candidates for the new endowed chair. All applications channels (e.g., department chair following appropriate faculty consultation) and each academic officer should attach a confidential recommendation to each applicant's portfolio.

2. Each applicant's portfolio must include the following:
   a. a statement delineating how the applicant meets the criteria for appointment
   b. a current curriculum vitae
   c. a bibliography of the applicant's scholarly presentations, performances, and/or exhibitions
   d. a listing of the applicant's scholarly presentations, performances, and/or exhibitions

e. a listing of the applicant's professional, public, and College service activities
f. a record of the applicant's teaching effectiveness

3. Statements or endorsements from faculty or other sources may be included in the portfolio if desired. The department chair will ensure each portfolio is complete prior to forwarding it to the BSC Endowed Chair Committee and Provost.

4. The BSC Endowed Chair Committee will review all applications, make an evaluation, and forward these materials to the President.

5. The Provost will also make an additional evaluation and forward their [sic] materials to the President.

6. The department chair did not attach a confidential recommendation to each applicant's portfolio. In addition, the department chair did ensure each portfolio was completed prior to forwarding it to the BSC Endowed Chair Committee and Provost.

7. Dr. Smith acknowledged that, as the Provost, he failed to make an additional evaluation and forward his materials to the President. Dr. Smith felt comfortable with the Committee evaluation, which he did not view as correct or incorrect, but represented what he felt was the process being served.

8. Individual Committee members Dr. Betsy Steenken and Daniel Frost showed unfamiliarity with the application evaluation process. Dr. Steenken and Mr. Frost admitted to being under time constraints. Mr. Frost could not recall receiving the evaluation criteria for reviewing the applications. Dr. Steenken placed her principal stress on the application letters, finding Dr. Halsey-Hunter's application letter to be much stronger than Grievant's. Dr. Steenken and Mr. Frost acknowledged that no meeting of the Committee took place, and the record is lacking to establish that the Committee made any comparison of the applications with the relevant criteria.

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. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

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 that selection decisions are largely the prerogatives of management. While the individuals who are chosen should be qualified and able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. *Skeens-Mihaliak v. Div. of Rehabilitation Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998); *Ashley v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-070

(June 2, 1995); *McClure v. W. Va. Workers' Compensation Fund,* Docket Nos. 89-WCF-208/209 (Aug. 7, 1989). 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.*

Grievant's burden is to demonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Surbaugh v. Dep't of Health and Human Serv.*, Docket No. 97-HHR-235 (Sept. 29, 1997). If a grievant can demonstrate the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion, this Board can require the employer to review the qualifications of the grievant versus the successful applicant. *Thibault, supra; Jones v. Bd. of Trustees/W. Va. Univ.*, Docket No. 90-BOT-283 (Mar. 28, 1991).

"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 Resources*, 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." *Id.* (*citing Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)). "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 a board of education. *See generally, Harrison v. Ginsberg,* [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra.*

Grievant asserted there were improprieties in the selection process, and placed into evidence at least three instances to prove his assertions to be true. Grievant argued that BSC did not follow the established procedures for appointment to the endowed chair position. The "Criteria & Procedures for Appointment" indicates that "[t]he President will make the appointment to the endowed chair. The President's decision regarding all appointments is final." The policy establishing the position, application requirements, and selection criteria show that the President can only appoint the most highly qualified candidate after a required three tier review and recommendation process. Grievant has demonstrated that the department chair did not ensure that each portfolio was complete prior to forwarding it to the BSC Endowed Chair Committee and Provost Smith. In addition, the department chair did not attach a confidential recommendation to each applicant's portfolio. It should be noted this flaw affected both candidates equally, as the department chair failed to provide a confidential recommendation for either applicant. Admittedly this is a minor flaw in following the established procedure, but is only the beginning of the analysis.

A more fundamental flaw in the selection process was the failure of Provost Smith to make an additional evaluation and forward his material to the President. Provost Smith

acknowledged that he failed to adhere to this level of review in the selection process. Grievant made a compelling argument, if not an altogether convincing one, at level three that called into question the successful applicant's qualifications under the first criterion for appointment concerning the requirement of possessing a doctorate in field as accepted by the Association of Collegiate Business Schools and Programs. While the record was not fully developed on this issue, and the undersigned need not go into the maze of assertions that the parties squabbled over at level three, it does demonstrate the importance of the requirement that Provost Smith make an additional review of the applications.[1] One would anticipate that this is the very set of circumstances that would merit review by the Provost to confirm that the applicant did, in fact, possess the necessary qualifications. In any event, that level of review is mandated by the policy for selecting the endowed appointment and it is undisputed that it did not occur.

This flaw is compounded by the acknowledgment of two of the Committee members that no meaningful review of the applications occurred at the Committee level. Individual Committee members Dr. Betsy Steenken and Daniel Frost showed unfamiliarity with the application evaluation process during questioning at level three. Dr. Steenken and Mr. Frost admitted to being under time constraints. Mr. Frost could not recall receiving the

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[1]The limited record on the issue of whether or not the successful applicant was doctorally qualified was cast in some doubt because of conflicting information from the Association of Collegiate Business Schools and Programs. One document from March 3, 1999, indicated that the successful applicant was doctorally qualified in Business Communications, Computer Applications and Secretarial Science; however, a more recent communication from the Director of Accreditation for the Association of Collegiate Business Schools and Programs appears to call into question the previous accreditation. The record was not developed on this contention and, therefore, any analysis under the accreditation formula would be meaningless (even assuming the undersigned would be able to perform such an exercise).

evaluation criteria for reviewing the applications. Dr. Steenken placed her principal stress on the application letters, finding Dr. Halsey-Hunter's application letter to be much stronger than Grievant's. Dr. Steenken and Mr. Frost acknowledged that no meeting of the Committee took place, and the record is lacking to establish that the Committee made any comparison of the applications with the relevant criteria. Overall, Grievant has proven there were significant flaws in the selection process that demonstrate he might reasonably have been the successful applicant if the process had been conducted in a proper fashion.[2]

The undersigned concludes that the Provost's failure to conduct an additional evaluation of the applicant's qualifications and forward his recommendations to the President was a clear violation of the appointment policy that rendered the final decision arbitrary and capricious.

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 grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

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[2]It should be noted that, at level one, BSC President Dr. Walker acknowledged that "all agree that the selection procedures for the John H. Shott Endowed Chair in Business could be improved . . ." Level One Decision June 18, 2008.

2. 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).

3. Grievant's burden is to demonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Surbaugh v. Dep't of Health and Human Serv.*, Docket No. 97-HHR-235 (Sept. 29, 1997). If a grievant can demonstrate the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion, this Board can require the employer to review the qualifications of the grievant versus the successful applicant. *Thibault, supra; Jones v. Bd. of Trustees/W. Va. Univ.*, Docket No. 90-BOT-283 (Mar. 28, 1991).

4. Grievant has met his burden of proving significant flaws in the selection process that rendered the final decision arbitrary and capricious.

5. Grievant has not met his burden of proving he was the most qualified applicant for the position.

Accordingly, this grievance is **GRANTED**, **IN PART**, and **DENIED**, **IN PART**. Respondent is **ORDERED** to repeat the selection process for this position following all applicable policy requirements, and after considering relative merit and qualifications of the candidates.

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 (eff. July 7, 2008).

Date: September 9, 2009

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Ronald L. Reece
Administrative Law Judge