THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GRAYSON ROWE,
Grievant,

v. **DOCKET NO. 2008-0186-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent,

and

MARK RUPKE,
Intervenor.[1]

DECISION

Grievant, Grayson Rowe, filed a grievance against his employer, West Virginia University, on July 26, 2007, when he was not selected for a posted Landscape Worker Lead position. The statement of grievance reads, "Grayson was uniquely qualified for lead position applied for but not selected. Person selected had less experience and was a probationary employee." As relief, Grievant sought to be placed in the Lead position, and to be made "whole in every way including any and all backpay." A hearing was held at level one on August 13, 2007, and the grievance was denied at that level on August 29, 2007. Grievant appealed to level two on September 6, 2007, and a mediation session was held on March 28, 2008. An Order of Unsuccessful Mediation was entered on March 31, 2008, and Grievant appealed to level three on April 8, 2008. A level three hearing was

[1] Mr. Rupke was granted Intervenor status at the level three hearing.

held before the undersigned Administrative Law Judge on June 10, 2008, in the Grievance Board's Westover office. Grievant was represented by Diane C. Parker, Business Manager, LIUNA Public Employees' Local 814A, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision upon receipt of Respondent's Proposed Findings of Fact and Conclusions of Law, on July 28, 2008. Grievant declined to submit written proposals.

Synopsis

Grievant has been employed by West Virginia University as a Landscape Worker for 21 years, and is very capable in the performance of his duties. He applied for a Lead Landscape Worker position. He was qualified for the position, but he was not found to be the best qualified applicant. Grievant did not demonstrate any flaws in the selection process, or that the selection decision was arbitrary and capricious.

The following Findings of Fact are made based upon the evidence presented at levels one and three.

Findings of Fact

1. Grievant has been employed by Respondent, West Virginia University ("WVU"), as a Landscape Worker, for 21 years. Grievant has been a good employee, has developed some expertise in pruning, and is always willing to show new employees how to properly perform landscaping tasks.

2. On April 19, 2007, WVU posted a vacant Landscape Worker Lead position. The posting erroneously stated that a CDL was required. The posting was corrected to remove this requirement, and the job was reposted on May 8, 2007.

3. There were several applicants for the position, including Grievant and Mark Rupke.

4. Mr. Rupke began working for WVU full-time as a Landscape Worker in April 2007, as a probationary employee. He had previously been employed at WVU through Mountaineer Temps as a Custodian.

5. Probationary employees may apply for posted positions, but they cannot be referred by WVU's personnel office for an interview unless they obtain a waiver from a supervisor allowing them to be considered for the position. Bob Sine, Operations Manager, WVU Facilities Management, signed a waiver, allowing Mr. Rupke to be considered for the Lead position.

6. Mr. Sine and Bob Frame, Manager Roads and Grounds, WVU Facilities Management, interviewed the applicants on June 12, 2007. They asked each applicant the same questions. After the interviews, Mr. Sine and Mr. Frame discussed the applicants, and both agreed that Mr. Rupke was the best qualified for the position. They ranked the top three applicants, and Grievant was not among the top three. The second choice for the position was Troye Forquer, and the third choice was Tom Moser. Both Mr. Sine and Mr. Frame stated that it was not a close call in choosing Mr. Rupke for the position over Grievant.

7. Mr. Rupke had owned and operated a landscaping business. He brought a portfolio to the interview, with pictures of the landscaping projects he had worked on, and he discussed these projects during the interview. He provided detailed answers to the questions asked during the interview. With his answers, Mr. Rupke demonstrated that he

had a very good understanding of the issues which arise in landscaping, and that he had experience supervising a crew of workers.

8. Grievant did not provide detailed answers to the questions asked by Mr. Sine and Mr. Frame. He believed they should have been familiar with his work.

Discussion

Grievant has the burden of proving his grievance 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).

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, but did not place any evidence into the record to prove any of his assertions to be true. Grievant asserted that Mr. Sine conspired with the successful applicant to put him into the Lead position, that Mr. Rupke had lied about his employment history, and Respondent should have verified Mr. Rupke's prior employment. As to the latter assertion, Grievant's representative stated in her opening argument that "we" checked with a former employer, and Mr. Rupke was not the Superintendent at Pikewood Country Club, as he had listed on his employment application. He was in Maintenance. No witness was presented to support this assertion. Such statements, not given under oath, are not considered evidence in this proceeding. Further, the record does not support the original premise. Mr. Rupke's application does not state he was the Superintendent at Pikewood Country Club. The application lists Mr. Rupke's position as a Groundskeeper in the Maintenance Department. It lists Mr. Rupke's supervisor's title as Superintendent.

In support of the assertion that Mr. Sine conspired with Mr. Rupke, Grievant questioned the waiver signed by Mr. Sine, allowing Mr. Rupke, as a probationary employee, to be referred for the position, the fact that Mr. Rupke did not complete a new application, and Grievant's representative stated in her opening argument that Mr. Sine completed "part of the paperwork" for Mr. Rupke. No evidence was presented to

demonstrate that Mr. Sine completed any paperwork for Mr. Rupke. Grievant also did not demonstrate anything improper in the waiver signed by Mr. Sine, allowing Mr. Rupke to be referred by Personnel for consideration for the position, or in the failure to complete a new application. Amber Tennant, Senior Employee Relations Specialist at WVU, testified that the proper procedure was followed for the waiver, and that WVU employees are not required to complete a new application when they apply for another position at WVU, if they have an active application on file, as did Mr. Rupke. They are only required to complete a position interest form stating they are applying for a particular position. Grievant presented no evidence to contradict Ms. Tennant's testimony.

The only evidence presented by Grievant to support the assertion of conspiracy was testimony from Tom Moser, a Landscape Worker in Roads and Grounds, that Dave Kennedy, a former employee in Roads and Grounds, had told him that Mr. Rupke had told Mr. Kennedy he was in the process of being moved to Roads and Grounds as a Lead, and that this conversation occurred one month before the posting. This double hearsay testimony is not entitled to any weight.

Grievant pointed to the fact that the interview form for Mr. Rupke has written on it that he was the best qualified. Mr. Rupke was interviewed before Grievant, so Grievant questioned how Mr. Sine and Mr. Frame knew he was the best qualified before they even interviewed Grievant. Mr. Sine explained that he put the applicants' names and the time of the interview on the interview forms before the interview, took notes during the interview, and then after all the interviews were completed, he and Mr. Frame discussed all the applicants interviewed and completed the interview forms.

Grievant also argued he was discriminated against due to his medical condition, as evidenced by the fact that his interview form cites attendance issues. Grievant has needed to take leave due to his medical condition, although the record does not reflect how much leave he has taken. Grievant did not further articulate a legal argument in support his claim that Respondent could not consider Grievant's dependability. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant did not demonstrate he was discriminated against. Mr. Sine testified that the comment about Grievant's attendance was included on the interview form because dependability was critical with this position. Nonetheless, he stated that this was not a big factor in the decision. The main factor in the decision to choose Mr. Rupke was his superior leadership skills and abilities. Mr. Sine stated it was not improper for Grievant to miss work due to his medical condition, but he did recall at least one time when Grievant

had called in to take unscheduled leave in order to help someone move. The interview notes taken by Mr. Sine and Mr. Frame also indicate that Grievant had not had a reliable vehicle.

Finally, Grievant argued he was better qualified than Mr. Rupke, pointing to his 21 years in Roads and Grounds at WVU, and the fact that he had on several occasions instructed other employees on how to prune and plant flowers and shrubs, and what the crew would be doing that day. Grievant believed that he had, at times, acted as a lead worker, while Mr. Frame disputed this. Whether Grievant had, at times, acted as a lead worker, however, is of no significance. Even if Grievant has more lead type experience than Mr. Sine or Mr. Frame believed he had, Grievant failed to demonstrate that the decision to select Mr. Rupke, rather than him, was arbitrary and capricious. Further, and perhaps of more significance, Grievant was not the second, or even the third choice for this position. No evidence was presented regarding the qualifications of the second or third choice.

Mr. Sine and Mr. Frame conducted interviews of the applicants, and asked each applicant the same questions. They concluded that Mr. Rupke's landscaping knowledge and his leadership skills far exceeded Grievant's. Both said it was not a close call. Grievant did not demonstrate that he should have been selected for the position over the top three choices.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving his grievance 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. 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). This 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).

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. 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).

5. Grievant did not demonstrate any flaws in the selection process, or that the selection decision was arbitrary and capricious.

Accordingly, this 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: March 12, 2009