THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLES STEPHEN FORSYTHE,

Grievant,

v. **Docket No. 2009-0144-DOA**

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION/DIVISION OF PERSONNEL,

Respondent.

DECISION

Grievant Charles Stephen Forsythe is employed in the Employee Relations Section of the Division of Personnel ("DOP"). In the Spring of 2008, Grievant applied for the position of DOP Assistant Director for Employee Relations. This is an upper level management position classified as an Administrative Services Manager 3. Mr. Forsythe was not the successful applicant for the position and on August 12, 2008, he filed a grievance contesting his non-selection for the job. Grievant's statement of grievance states:

> Non-selection for ASM III position (Assistant Director for Employee Relations) posted March 12, 2008 (PER8DI02) violated the rules and regulations governing hiring, was arbitrary and capricious, was an abuse of discretion, was clearly wrong, and was substantially motivated by political considerations.
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> As relief Grievant seeks:
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> Instatement to the position, with retroactive pay, to the date of John Bowyer's appointment. Additional relief as the Administrative Law Judge may deem appropriate.

The grievance was denied following a level one hearing held on August 12, 2008, and an unsuccessful mediation was held on December 4, 2008. A level three hearing was held in the Charleston Office of the Public Employees Grievance Board on February 27, 2009. Grievant was present at the hearing and represented himself. Respondent was represented by Anthony D. Eates II, Assistant Attorney General. The parties agreed to submit Proposed Findings of Facts and Conclusions of Law on or before March 20, 2009. Both parties submitted their proposals and the grievance became mature for decision on that date.

Synopsis

This grievance was filed when John Bowyer was selected for the position of DOP Assistant Director for Employee Relations and Grievant was not. The interview procedure did not comply with the process recommended by DOP for filling public employment vacancies in important ways. In fact, the position was offered to one applicant before all candidates slated to be considered by the interview committee were actually interviewed. Grievant was able to demonstrate that the interview and hiring process was so flawed as to render it arbitrary and capricious. However, Grievant failed to prove that he was the most qualified candidate for the position out of all the applicants, including Mr. Bowyer. Therefore, it would not be appropriate to place Grievant in this position. The position must be posted again, and a new selection process must be undertaken by DOP.

The following Findings of Fact are based upon a thorough review of the entire record created in the grievance.

Findings of Fact

1. Grievant Charles Stephen Forsythe has been employed in the Employee Relations Section of DOP since 1989, when the Division was organized in its present form. He served in other employee relations positions prior to working at DOP.

2. Otis G. Cox commenced his duties as DOP Director on February 16, 2008.[1]

3. On the same day that Director Cox assumed his position, the DOP Assistant Director for Employee Relations resigned. That left three Assistant Director positions, out of a total of five, vacant.[2]

4. Shortly after becoming the Director, Mr. Cox began receiving numerous inquiries regarding the vacant Assistant Director positions. Specifically, on three separate days in late February, Mr. Cox met with three individuals who separately scheduled meetings with him to inquire about the vacancies. The individuals and days were as follows: February 25, 2008, Lisa Dalporto; February 26, John Bowyer; February 27, Steven Leach.

5. Each of the foregoing meetings lasted approximately one half hour and consisted of the individuals asking Director Cox about the positions, the hiring process and Cox's history and management philosophy. Each of these individuals was ultimately offered one of the Assistant Director positions during the hiring process, and two of them accepted the positions. Grievant's Ex. 6.

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[1] Otis Cox has recently accepted the position of the Director of the West Virginia Equal Employment Opportunity Office and is no longer the Director of the DOP. However, at all times relevant to this grievance, Mr. Cox was the DOP Director.

[2] The vacant positions were three Assistant Directors for the following sections: Staffing Services, Employee Compensation and Employee Relations.

6. The Assistant Director position for the Employee Relations Section was posted internally in the DOP on March 12, 2008, and announced publically on March 14, 2008. The closing date for the applications was March 31, 2008.

7. The job posting included the following statement regarding preferences:

> Preference may be given to applicants with undergraduate degrees in public or business administration, human resources management, or closely related field, and to applicants with administrative experience in public sector human resource management. A graduate degree in public or business administration, human resource management, or other closely related field is highly desirable.

Grievant's Ex. 1 and 3.

8. The applicants were encouraged to apply for all of the Assistant Director positions and the DOP received a large number of applications for the positions.

9. A certified list of all the applicants meeting the minimum qualifications for the Assistant Director positions was given to Director Cox on May 1, 2008. Mr. Bowyer and Grievant, in addition to many others, were included in the certified list.

10. Director Cox felt he had a mandate to bring strong leadership to the DOP and was looking for applicants with extensive management experience and strong leadership skills to fill the Assistant Director positions.

11. Director Cox set up an interview committee to interview the applicants for the Assistant Director positions and make recommendations to him as to who were the best candidates.

12. Evelyn Davis, DOP Assistant Director for Organization and Human Resource Development, was placed in charge of the committee. The remaining committee members

were Michael Harmon from the Public Employees Insurance Agency and Tammie Means from the Office of Technology.

13. Not all team members participated in each interview. Varying members of the committee attended each interview as their schedules allowed. Only one team member, Evelyn Davis, attended all of the interviews. Where only one member of the committee was available for an interview, Director Cox participated in the interview in lieu of the other committee members. Ms. Davis was the only interview team member who participated in the interviews of John Bowyer and Grievant Forsythe. Since the other team members were unable to participate in those interviews, Director Cox conducted those two interviews with Ms. Davis.

14. Director Cox, with the assistance of Theresa Crouse,[3] developed the questions for the interviews and each candidate was asked the same list of questions. The questions were intended to explore the applicant's skill, knowledge and ability.

15. Each interviewer had a form with the standard questions on it and a space for comments regarding the applicant's responses. Additionally each interviewer had an Interviewer Work Sheet that listed the following categories:

1. Minimum Qualifications;
2. Necessary Knowledge, Skills and Ability;
3. Special Requirements;
4. Physical Demands.

There was a space between each category for the interviewer to make notes.

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[3] Theresa Crouse is the DOP Assistant Director for Employee Communications and has been assigned as the Interim Director of DOP following Director Cox's departure.

16. Following each interview, the members who participated met and discussed the candidate's responses and decided if the candidate was one they would recommend to the Director to be employed. No numeric value was assigned to each question and no scoring method was adopted to objectively compare the individual responses.[4] The discussion focused on three areas: management, leadership, and technical competence.

17. In mid-August, 2008, shortly after the level one hearing was held in this grievance, Director Cox discovered that the interview questions and work sheets completed by him and Ms. Davis, for Mr. Bowyer's interview, were missing from the Bowyer file. When not in use by Director Cox, the interview files were kept in a locked cabinet under the computer in the Director's Office. No other document was missing from any of the twenty-eight files for Assistant Director applicants in Director Cox's office.

18. Director Cox and Ms. Davis each recreated the interview forms to replace the ones that they originally completed on June 19, 2008 when Mr. Bowyer was interviewed. Ms. Davis recreated her forms from her memory of the interview.[5] Director Cox recreated his forms utilizing notes that he made contemporaneous to the interview.[6] Director Cox then destroyed the contemporaneous notes.

19. Steven Leach was interviewed for the Assistant Director position by Ms.

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[4] When asked specifically if a numeric value was applied to the questions Director Cox replied "Yes." However, there is no indication of a numeric value being applied to the questions on any of the work sheets and none of the witnesses discussed any scores when describing how the candidates were assessed. Other than this isolated response the record is completely devoid of any indication that the questions or responses were given a numerical value. It is apparent that Director Cox misunderstood this particular question.

[5] Respondent's Ex. 2

[6] Grievant's Ex. 13

Davis, Ms. Means and Mr. Harmon. After the interview the committee members agreed that Mr. Leach was an outstanding candidate and shared that information with Director Cox. At that time, only about half of the candidates had been interviewed.

20. After hearing this information, Director Cox called Steven Leach and offered him the position of DOP Assistant Director for Employee Relations. Mr. Leach considered the offer over a weekend and ultimately declined the position.

21. After Steven Leach turned down the Assistant Director position, the remaining candidates who met the qualifications for the positions were interviewed, including Grievant and Bowyer.

22. On the interview worksheet for Grievant, Director Cox noted in the area of Minimum Qualifications: "19 years of experience in this position." In the area of Necessary Knowledge, Skills and Ability: Director Cox made four lines of notes and began with the word "Outstanding." In the area of Special Requirements: It was noted that Grievant had "outstanding experience." The final notation on the worksheet was "Good candidate." Respondent's Ex. 3.

23. On the interview worksheet recreated from the Bowyer interview, Director Cox made the following notations: Minimum Qualifications: "28 years of experience in the field"; Necessary Knowledge, Skills and Ability: "KSA's were outstanding"; Special Requirements: "Not discussed." At the end of the recreated interview sheet Director Cox noted, "This was an outstanding interview."

24. Immediately prior to taking the contested Assistant Director position, Mr. Bowyer had served as the Director of Administration for the West Virginia Division of Culture and History for approximately a year. Prior to that, he had been employed as the

Director of Human Relations at Putnam General Hospital for two years and an internal consultant on human relations for AMFM, Inc. for one year. The bulk of Bowyer's career (twenty-fours years) was spent as Human Relations Director for Charleston Newspapers.

25. Grievant has been working in the DOP Employee Relations Section for the last nineteen years and has extensive knowledge of the state's personnel system. Grievant has previously served in management positions related to employee relations but the specifics of those jobs were not placed in the record.

26. Both Director Cox and Evelyn Davis stated that Bowyer was selected because he had significant recent management experience and demonstrated strong leadership skills. Cox and Davis stated that Grievant had strong technical skills but lacked recent management experience and did not demonstrate leadership skills.

27. Director Cox noted that the posting gave preference for applicants with public sector human relations experience. He noted that Grievant was given credit for having the most public sector experience. However, Bowyer had some public sector experience and Cox felt Bowyer's management experience and leadership skills overcame any advantage Grievant had related to public sector experience.

Discussion

Grievant bears 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); *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). Where the evidence equally supports both sides, a party has not met the burden of proof. *Id.*

In a selection case, a grievant must prove, by a preponderance of the evidence, that he 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, supra*. 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)).

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 & 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 (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 [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

"Also, as the Grievance Board has held many times, when a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp*., Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen, supra*; *See Ball v. Dep't of Transp*., Docket No. 04-DOH-423 (May 9, 2005); *Freeland v. Dep't of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008)." *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009). *See generally, Jones v. Monroe County Bd. of Educ.,*190 W.Va. 646, 441 S.E.2d 367 (1994) (holding that in high government management positions an applicant's views on public issues may be taken into consideration to form a cohesive management team).

In the present case, the DOP Director determined that the essential qualities he was looking for in applicants for the Assistant Director positions were management experience and strong leadership skills. Director Cox indicated that when he was selected to be the new head of DOP, the Cabinet Secretary told him that the Division lacked leadership. Mr. Cox wanted to put together a new management team to correct that deficiency. While these are certainly appropriate goals and criteria for selecting top level managers for a state agency, it is odd that other qualifications were listed as preferential in the job posting if these were indeed the most important attributes for the successful applicant.

The DOP publishes a *Supervisory Resource Guide* ("Guide") that gives instruction and advice to state agencies in conducting interviews and filling vacancies.[7] Grievant's Ex. 14. At page 24, the Guide indicates that each question should be given a numerical value to allow interviewers to "independently score each question during the interview." The Guide also emphasizes that "the method used to rank or score candidates must be set up prior to the selection process."

The Director set up a procedure by which candidates would be interviewed by a specific panel and asked the same questions. The panel members involved in a particular interview then met and discussed each candidate's interview. However, no method was established for rating the candidate's responses against established expectations or the responses of other candidates. When asked if there was a system for rating the candidates, Director Cox indicated that their qualifications had been analyzed by DOP

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[7] The full title of the guide is *Selection Interviewing: Developing and Administering Structural Behavioral Interviews.* The Guide was produced by the DOP Staffing Services, Test Construction and Research Section in September 2004.

Staffing Services. The analysis by Staffing Services is only for the purpose of certifying a group of applicants that meet the minimum qualifications. The structured interview rating process then provides a method for finding the most qualified candidate among those who meet the minimum standard.

Since there was no standard scoring method for measuring the applicant's responses, the committee members had to rely upon their impressions of the various responses during the interview. This might not be a problem if all of the interviewers participated in each interview and were thereby able to form an impression of each candidate's responses. Unfortunately, the interviews were conducted only by those members whose schedules allowed them to attend. If the interviewer did not attend, he or she had no input into the discussion. In fact, only one member of the committee interviewed all of the applicants.[8] This certainly could not lead to a uniform method of evaluating the candidates for the positions.

The Guide is not policy. Neither DOP nor any other state agency, is required to follow the procedures set forth therein. But the Guide was developed by DOP to provide supervisors with research based, best practices for making defendable personnel decisions in a manner intended to ensure that the most qualified candidate is selected for the position. Certainly by their own standards, this process failed to be conducted in accordance with those best practices.

At page twenty-five, the Guide stresses the importance of document retention to support a selection decision. The Guide states that records pertaining to employment

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[8] Assistant Director Davis was the only member to attend all the interviews.

applications and job interviews should be retained by the agency for a minimum of two years. The purpose for the document retention is to provide evidence that the selection process was conducted in a fair manner utilizing the established criteria. In other words, that the process was not arbitrary or capricious. Enigmatically, the documents related to the successful applicant's interview were discovered missing shortly after this grievance was filed. These work sheets were arguably the most important documents in the process because they presumably provided comments, contemporaneous to the interview, as to why that candidate was found to be a better choice than all the others. The loss of these documents was exacerbated by the Director's decision to destroy his notes from the interview after recreating his work sheets. The destruction of those notes eliminated the last remaining contemporaneous document that was available to assess the decision to hire Mr. Bowyer.

Most problematic to the integrity of the process is the fact that Steven Leach was offered the position of Assistant Director for Employee relations before roughly half of the qualified candidates were interviewed. No system for selecting a candidate for a position can be based upon their comparable strengths and qualifications when the successful applicant is chosen before the remaining applicants are evaluated. The interview committee was given a list of applicants who met the minimum qualifications for the position. The only method identified for choosing among those applicants was their interviews. The choice of a successful applicant before all the candidates were given an interview could not be based upon the criteria established for the selection. The totality and severity of the flaws in the selection process render it arbitrary and capricious.

Grievant presented scant evidence regarding his own qualifications.[9] The only facts that were clear were that Grievant has been employed in the DOP Employee Relations Section since 1989 and has strong technical knowledge of the state personnel system. There was evidence that Grievant had prior management experience but the specifics of that experience were not revealed. Grievant failed to demonstrate that he was more qualified for the contested position than the successful applicant.

In his original request for relief, Grievant requested to be placed in the contested position with back pay. Since Grievant did not prove that he was the most qualified applicant, that relief is not appropriate. The Grievant also requested any additional relief that would be appropriate. Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that he should have been selected for the position, the position should be reposted and a new selection process undertaken. *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009). Consequently, the position of Assistant Director for Employee Relations must be reposted by the DOP and a new selection process undertaken.

Conclusions of Law

1. Grievant bears 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); *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).

[9] Grievant did not place his application into evidence nor did he present specific testimony directly related to his experience and education.

2. In a selection case, a grievant must prove, by a preponderance of the evidence, that he 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, supra*. 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. 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).

4. 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)). 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).

5. “[W]hen a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp.*,

Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen, supra*; *See Ball v. Dep't of Transp*., Docket No. 04-DOH-423 (May 9, 2005); *Freeland v. Dep't of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008)." *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009).

6. Grievant proved that the selection was arbitrary and capricious, but he did not prove that he was the most qualified candidate.

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART**. Respondent is **ORDERED** to repost the position of DOP Assistant Director for the Employment Relations Section within thirty days of receipt of this decision, and select the most qualified applicant for the position.

Any party or the Division of Personnel 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).

DATE: May 20, 2009

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE