THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DANIEL FROST,
Grievant,

v. **Docket No. 07-HE-349R2**

BLUEFIELD STATE COLLEGE,
Respondent,

and

DIANA GIBSON,
Intervenor.

DECISION ON REMAND

This matter comes before the undersigned Administrative Law Judge upon remand from the Circuit Court of Mercer County, by Order entered January 13, 2010, which orders that, "the decision of the West Virginia Public Employees Grievance Board is hereby **REVERSED** and **REMANDED** for an adjudication on the merits of Frost's grievance."

In the instant grievance, level one was bypassed by Grievant. Subsequently, a level two conference was conducted. The grievance was denied at level two. Grievant appealed to level three. The grievance was denied at level three. Grievant appealed to level four, and Respondent maintained Grievant lacked standing to pursue this grievance. The Decision subject to remand in this grievance, issued by the undersigned, ruled that Grievant lacked standing because he did not offer any direct evidence that he was qualified for the Director of the Physical Plant's position which he seeks to have advertised.

Grievant appealed the level four decision to the Circuit Court of Mercer County, and the remand followed.[1] In reversing, the Mercer County Circuit Court held that "[a]lthough the Grievance Board ALJ declined to partake in what he referred to as 'an interesting intellectual exercise in the realm of higher education,' a decision made possible by his conclusion of 'no standing,' the Court concludes that the ALJ correctly coined the issue with his *Decision on Remand*, as follows:

> This set of facts presents the undersigned with something of a balancing test. Whether the scales tip on the side of ordering [that] the position be posted pursuant to policy, or do the scales tip in favor of the side which would support a finding that this is a discretionary decision for which this Board has no authority to substitute its judgment."

In compliance with the Order of the Circuit Court of Mercer County, the undersigned reconsiders the final decision in the grievance based upon the merits of the case. The undersigned requested the parties notify the Grievance Board if, in light of the remand, they desired to present any additional evidence to address the merits of the grievance. All parties have responded that they desire to have the matter decided upon the record developed at the lower levels, and at the level four hearing conducted on January 31, 2008. This case became mature for decision on remand upon receipt of the last of the

---

[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. References in this decision are to the former statutes, which continue to control the proceedings in this case.

parties' responses indicating no desire to conduct any further level four proceedings on May 19, 2010.

Synopsis

In March of 2007, Clyde Harrison, Director of the Physical Plant at Bluefield State College, retired from that position. Instead of advertising the position as a vacancy, the college continued to employ Mr. Harrison as Acting Director of the Physical Plant under a contractual arrangement in an effort to save money. On the days that Mr. Harrison is not present on campus, the Physical Plant is directed by Administrative Assistant, Senior, Ms. Diana Gibson. Grievant seeks the advertising of the position of Director of the Physical Plant. The undersigned finds that Respondent did not advertise the vacancy in violation of its own policy; in addition, Respondent's policy provides for the advertisement of part-time positions due to funding limitations. This result allows for internal non-exempt classified employees the opportunity to apply for the position. This grievance is granted as it relates to Grievant's request for the advertising of the position vacancy.

The undersigned, having carefully reviewed the record of the grievance, makes the following findings of facts relevant to the merits of the matter.

Findings of Fact

1. Grievant is employed at Bluefield State College ("BSC") as a Counselor 2, Pay Grade 17.

2. Grievant expressed to BSC an interest in the position of Director of the Physical Plant, upon the retirement of the Director, Clyde Harrison.

3. Mr. Harrison retired from BSC on March 1, 2007. At that time, Intervenor Diana Gibson held the position of Administrative Assistant, Senior, Pay Grade 17, in the Physical Plant at BSC. Ms. Gibson had previously served in the Physical Plant as Administrative Assistant, Pay Grade 15.

4. Instead of posting the position as a vacancy, BSC employed Mr. Harrison to continue in his role, but at a reduced rate of pay and at a reduced number of hours. This contractual arrangement between Mr. Harrison and BSC has saved the institution more than $32,000.00 a year.

5. BSC Board of Governors Policy No. 24 grants the President of BSC wide latitude in making personnel decisions, such as the contractual employment of Mr. Harrison.

6. The duties for the position of the Director of the Physical Plant include directing the administration of the physical plant maintenance and operations; directing the repair of facilities; directing an effective maintenance program; directing physical resources allocated to the physical plant; participating with the vice president and architects in developing long and short range capital improvements and building improvement programs; responsibility for fire safety and health code compliance; directing programs to reduce energy cost and consumption.

7. On the days that Mr. Harrison is not present on campus, the Physical Plant is directed by Intervenor Gibson. She has been fulfilling many of the Physical Plant Director's duties since assuming her current position, some ten years ago.

8. Grievant seeks the posting of the position of Director of the Physical Plant.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim 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).

Through the somewhat tortured past of this grievance, thanks in large part to the undersigned, this case has been reduced to the straightforward issue of whether or not the position in question should have been advertised. Respondent's policy on this issue states that "[a]ll full-time and part-time regular vacancies will be solicited through advertising . . . All positions must be advertised for a minimum of ten business days. Applications will be screened after the last advertisement has been posted for ten business days. Grant funded or soft money positions or those of a fixed duration will be posted indicating that the position is contingent upon the availability of continuance of funding. Classified, non-exempt positions will be advertised internally prior to any paid external advertisement and posted for ten business days prior to any external advertisements are placed." Bluefield State College Board of Governors Policy No. 42, Section 2.1, 2.3.1(c).

Respondent failed to advertise the position as a vacancy and instead employed Mr. Harrison to continue in his role he occupied prior to retirement, but at a reduced rate of pay

and at a reduced number of hours. This decision by Respondent conflicts with a basic obligation of Respondent's policy on job advertising. "Each institution shall develop a policy for posting of classified positions both internally and externally in order to provide employees adequate time to make application for the positions." 133 C.S.R. 39 § 8.1. *Brumfield v. Higher Policy Comm'n/Marshall University*, Docket No. 02-HEPC-180 (Oct. 22, 2002).

Respondent counters that, notwithstanding the above policy, the determination of whether or not the Director's position should be posted is a management decision over which this Board has no authority to substitute its judgment. Management decisions are judged by this Board by the arbitrary and capricious standard.

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). 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).

While the Respondent may have continued the employment of Mr. Harrison in an effort to save money, when reading the above description of an arbitrary and capricious action, what occurred here falls squarely within this description. The decision to ignore the clear policy requirement to advertise a vacant position is contrary to the evidence, so implausible that it cannot be ascribed to a difference of view, in disregard of the facts and circumstances, and unreasonable.

Grievant established by a preponderance of the evidence a violation of policy requiring that vacancies be advertised. In addition, Grievant clarified at level four that all he was asking for was that the job be advertised. Based upon the record of this grievance, he is entitled to that relief.

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 claim 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).

2. Respondent, pursuant to statutory mandate, developed a policy for posting of classified positions both internally and externally in order to provide employees adequate time to make application for positions. *See* 133 C.S.R. 39 § 8.1.

3. 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).

4. Grievant has proven by a preponderance of the evidence that Respondent failed to follow its policy that all full-time and part-time regular vacancies will be solicited through advertising, and this decision was arbitrary and capricious.

For the foregoing reasons, this grievance is **GRANTED** as it relates to Grievant's request that the position in question be advertised. Respondent is ordered to post the position of the Director of the Physical Plant with the appropriate contingency language concerning funding for the position.

Any party 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 (See

footnote 1). 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 27, 2010

_____
Ronald L. Reece
Administrative Law Judge