THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TEDDRA ARMEDIA CECIL,
Grievant,

v. **Docket No. 2010-1601-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WELCH COMMUNITY HOSPITAL,
Respondent.

DECISION

Grievant, Teddra Armedia Cecil, filed a grievance against Respondent on June 16, 2010, asserting that Respondent refused to interview her for a position at the Rural Health Clinic. As relief, Grievant seeks "to be allowed to interview for the clinic position and if successful[,] allowed to resign from my current position and be rehired or be transferred 'in-house' if noone else applied..."

A level one hearing was held on September 13, 2010. Grievant was represented by Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent was represented by Jennifer K. Akers, Assistant Attorney General. The grievance was denied at that level. A level two mediation was held on February 8, 2011. A level three hearing was scheduled for July 13, 2011; however, the parties agreed to waive the level three hearing and submit the appeal on the record developed at level one, along with proposed findings of fact and conclusions of law on or before August 29, 2011. This matter became mature for decision on August 30, 2011, upon final receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant asserts that she should have been allowed to interview for the vacant LPN position at the Rural Health Clinic. Grievant argues that she could have been transferred from her current LPN position to the vacant LPN position. Grievant asserts that because the vacant position was within the same class as her current position, Respondent was not prohibited from transferring her even though she was a probationary employee. Respondent argues that its actions were not arbitrary and capricious or in violation of a statute, policy or rule.

Although Respondent had the discretion to transfer Grievant within her classification, Respondent was not required to do so. Likewise, although Respondent had the discretion to interview an applicant that was neither a permanent employee nor on the register, it was not required to do so. Upon learning that Grievant could not be hired unless she was a permanent employee or on the register, Respondent decided not to interview her. Grievant has failed to prove that Respondent's actions were arbitrary and capricious or clearly wrong. Therefore, this grievance is denied.

Findings of Fact

1. Grievant is employed as a Licensed Practical Nurse for Respondent, Welch Community Hospital. Grievant began her employment for Respondent on April 3, 2010.

2. Classified employment begins when an individual is selected for a position from a competitive list, also known as a register, of eligible candidates for a vacancy in the classified service. Employees hired into classified service must satisfactorily complete a probationary work period before being granted permanent status.

3. Grievant was on the West Virginia Division of Personnel's register as a Licensed Practical Nurse (LPN). Upon appointment to her current position for Respondent, Grievant's name was removed from the register.

4. In May 2010, Respondent posted a position vacancy[1] for a Licensed Practical Nurse in its Rural Health Clinic. The application closing date for the vacancy posting was June 5, 2010. At all relevant times to this matter, Grievant was a probationary employee for Respondent.

5. After Grievant expressed interest in the position vacancy, James Young, Director of Human Resources for Respondent, contacted the West Virginia Division of Personnel (DOP) to determine whether Grievant, as a probationary employee, could be interviewed for the position.[2] DOP informed Mr. Young that Grievant could be interviewed but if she were the successful candidate, she would have to resign from her current position and be "originally appointed" again to the new position. Grievant would have to start her probationary period over from the beginning.

6. On June 1, 2010, Grievant submitted a letter[3] of interest requesting the opportunity to interview for the vacant position. Respondent scheduled an interview with Grievant.

7. Respondent received a list from DOP of available persons from the register. Upon learning that Grievant was not on the register, Respondent contacted DOP to

---

[1]Level one hearing, Grievant's Exhibit No. 2.

[2]*See* level one hearing, Grievant's Exhibit No. 1.

[3]Level one hearing, Grievant's Exhibit No. 3.

determine whether she could be interviewed for the vacant position. DOP informed Respondent that Grievant could be interviewed, however she could not be hired for the position unless she was a permanent employee or on the register.[4] At this time, Grievant was still a probationary employee and was not on the register.

8. Respondent cancelled the interview with Grievant.

9. On June 17, 2010, Grievant contacted DOP and requested to be reinstated to the register. Grievant did not notify Respondent of her reinstatement request.

10. Interviews for the vacant LPN position were held on June 24, 2010.

11. Respondent did not interview Grievant for the vacant position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W.Va. Public Employees Grievance Board 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).

_____The legal issue to be determined is whether Grievant had a right to be interviewed, and if Respondent was clearly wrong or acted in an arbitrary and capricious manner in

[4]*See* level one hearing, Respondent's Exhibit No. 1.

denying her an interview. The burden of proof is upon Grievant to prove her claim by a preponderance of the evidence.

The “arbitrary and capricious” standard of review is a deferential one which presumes an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996). “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 Res.,* 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." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and reasonable action and disregard of known facts.

_____Grievant asserts that she should have been allowed to interview for the vacant LPN position. Grievant argues that she could have been transferred from her current LPN position to the vacant LPN position. Grievant asserts that because the vacant position was within the same class as her current position, Respondent was not prohibited from

transferring her even though she was a probationary employee. Respondent argues that its actions were not arbitrary and capricious or clearly wrong.

_____DOP Administrative Rule 143 C.S.R. 1 § 10.4 prohibits the transfer of a probationary employee to a position in another class. Because Grievant was applying for a vacant position within the same class as her current position, Respondent could have transferred her. However, Respondent was not required to do so.

Unbeknownst to Grievant and Respondent, Grievant was removed from DOP's register when she was appointed to her current LPN position.[5] The DOP register includes the qualified applicants who have successfully tested and had their names placed on the State's register for a particular job classification. Respondent could have interviewed Grievant even though she was not on the register at that time.[6] It is not inconceivable that Grievant could have interviewed for the position, then applied to have her name on the register if she was the selected candidate.[7] Upon learning from DOP that Grievant would

---

[5]DOP Administrative Rule 143 C.S.R. 1 § 8.2(b) states:

> If an eligible receives a probationary or permanent appointment, the appointment constitutes for its duration, a waiver of his or her right to certification from any other register on which his or her name appears for a class of position, the salary of which is either equal to or lower than that salary covered by his or her appointment, unless at the time of the appointment he or she requests in writing that his or her name be retained for certification from the register or registers.

[6]It is unknown whether Respondent would have requested an updated LPN register list from DOP if Grievant had informed Respondent about her requested reinstatement. Unfortunately, Grievant failed to inform Respondent of this matter.

[7]Grievant did not present evidence indicating that she would have been the selected candidate if she had been allowed to interview for the position.

need to be a permanent employee or on the register in order to accept the position, Respondent canceled Grievant's interview. Respondent had the discretion to interview Grievant, but was not required to do so.

Grievant has failed to establish any applicable statute, policy or rule which requires that any particular individual must be interviewed. Although tactless, Respondent's decision to cancel Grievant's already scheduled interview because she was not on the register or a permanent employee, was not arbitrary and capricious or clearly wrong.

_____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 her grievance by a preponderance of the evidence. Procedural Rules of the W.Va. Public Employees Grievance Board 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).

2. "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).

_____3. The "arbitrary and capricious" standard of review is a deferential one which presumes an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).

4. "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 Res.,* Docket No. 93-HHR-322 (June 27, 1997).

5. Grievant has failed to establish any applicable statute, policy or rule which requires that any particular individual must be interviewed.

6. Respondent's decision to cancel Grievant's already scheduled interview because she was not on the register or a permanent employee, was not arbitrary and capricious or clearly wrong.

_____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).

Jennifer Lea Stollings-Parr
Administrative Law Judge

Date: September 20, 2011