THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DENISE KISNER,
Grievant,

v. **DOCKET NO. 2011-0695-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Denise Kisner, filed a grievance against her employer, West Virginia University, on November 4, 2010, when she was not selected for a posted Manager 2 position. The statement of grievance reads, "The event which leads to the filing of this grievance is WVU's failure to hire me for the Manager position of the Chick [f]il A to be located in the Mountainlair. The job was posted, I timely applied and am qualified. The motivating factors in the decision to pass over me for this position violates state and federal employment discrimination laws." As relief, Grievant sought to be placed in the Manager position at issue. In her post-hearing written proposals at level three, Grievant requested only backpay, as the position had been reposted as an Assistant Director position while this grievance was pending, and Grievant did not apply for the position.

A hearing was held at level one on November 29, 2010, and the grievance was denied at that level on December 17, 2010. Grievant appealed to level two on December 30, 2010, and a mediation session was held on April 14, 2011. Grievant appealed to level three on April 28, 2011. A level three hearing was held before the undersigned Administrative Law Judge on August 5, 2011, in the Grievance Board's Westover office.

Grievant appeared *pro se*, and Respondent was represented by Kristi A. McWhirter, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law, on August 16, 2011.

Synopsis

Grievant has been employed by Respondent for 30 years, and is a Food Service Supervisor at Boreman Hall. She asserted she was not hired for a posted retail Food Service Manager II position because her salary, acquired through her many years of service at WVU, would have been higher than the successful applicant, and this would have cut into the profit of the retail operation. She asserted this was indirect age discrimination. Grievant did not prove discrimination, nor did she demonstrate a flaw in the selection process, or that the selection decision was arbitrary and capricious. Grievant's further assertion that WVU Policy required that she be placed in the position over an outside candidate was not applicable, because this was an exempt position, and the Policy applies to non-exempt positions.

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"), for 30 years, and is currently a Food Service Supervisor at Boreman Hall. Her salary is approximately $40,000.00 a year.

2. Sometime in 2010, WVU posted a vacant Food Service Manager II position, pay grade 18. This position would manage the new Chick-fil-A operation, a fast food restaurant, at the Mountainlair Food Court. This was a classified-exempt position.

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

4. The applicants were interviewed by Larry Koay, Assistant Director in charge of retail operations, David Amiano, Assistant Director of Dining Retail, David Master, Assistant Director of Dining Services, Jay Capron, and Jean Herman. All applicants were asked the same questions.

5. The interview team members each ranked the interviewees' responses to the interview questions on a form as: 1 (weak); 2 (average); 3 (strong); 4 (exceptional); or "Not evident in interview." On the forms that were placed into evidence,[1] Grievant's answers to several questions were ranked as weak, and none of her answers were ranked as exceptional. None of the answers given by the successful applicant were ranked as weak, and several of her answers were ranked as exceptional.

6. The applicants were also ranked by the interview team in the areas of education required, experience required, knowledge, skills and abilities required, and certification/licensure. Grievant received 7 points in these areas, while the successful applicant received 11 points. In the area of knowledge, skills and abilities, Grievant was assigned a rating of unacceptable, with the comments "no planning, developing, organizing and managing ability," while the successful applicant was assigned a rating of exceeds.

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[1] Not all the forms were placed into evidence.

7. The interview team was looking for someone with experience in retail operations.

8. Grievant's only experience in retail operations was acquired at a Dairy Mart. Her work experience at WVU has been in a dining hall, and she worked eight months at the Sports Café at the WVU Rec Center, which was a snack bar. Grievant has no experience in planning, developing and organizing retail operations. Grievant has no experience in preparing or working with a budget.

9. Grievant has been a supervisor for 5 years. She supervises 20 full-time employees and 40 students.

10. The successful applicant had worked as a manager for 26 years for Rax and Arby's fast food restaurants. The interview team members found her customer service attitude to be outstanding.

11. Grievant is a good worker, and has received good evaluations. While the interview team members recognized that Grievant has excellent customer service attitude, the successful applicant's demeanor came across during the interview as more friendly.

12. The successful applicant resigned after one week in the position. The job was reposted as an Assistant Director, an exempt position, in order to attract more qualified applicants with a higher salary. Grievant did not apply for the Assistant Director position.

Discussion

Grievant has the burden of proving her 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 that 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 argued she was the most qualified applicant based on her 30 years of experience at WVU, and asserted she was not hired because had she been hired, her higher salary, which she had acquired working at WVU for so many years, would have cut

into the bottom line of the Chick-fil-A operation. She asserted this was indirect age discrimination. Grievant also argued that WVU's Policy on Seniority for Classified Employees, WVU-HR-45, required that she be hired over an external candidate. While this Policy does indeed provide generally that "[q]ualified employees will be selected before external candidates," as Respondent pointed out, this Policy is applicable to non-exempt classified positions at WVU. The position at issue was an exempt position to which this Policy was not applicable.

As to Grievant's claim of age discrimination, WEST VIRGINIA CODE § 6C-2-2(d) defines discrimination, for purposes of the grievance procedure, 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." This definition encompasses all types of discrimination, including discrimination based on age. It is not necessary to analyze Grievant's claims under the West Virginia Human Rights Act, as such claims are subsumed by WEST VIRGINIA CODE § 6C-2-2(d). *Black v. Dep't of* Transp., Docket No. 99-DOH-362 (Jan. 21, 2000); *Clark v. Kanawha County Bd. of Educ.,* Docket No. 99-20-088 (Aug. 19, 1999). See *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995); *Hendricks v. W. Va. Dep't of Tax and Revenue*, Docket No. 96-T&R-215 (Sept. 24, 1996).

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'n, 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 presented no evidence that she was treated differently from any other applicant during the selection process, nor did she present any evidence of the age of the successful applicant. Grievant was asked the same questions during the interview as the other applicants, and was given the same opportunity to demonstrate her qualifications. As to Grievant's assertions that she would had have to be paid more than the successful applicant, while the interview team members believed this was true, no evidence was placed into the record as to how much money the successful applicant was offered. Mr. Koay made clear in his testimony that the most important issue was the qualifications of the candidates. He also pointed out that when the position was reposted as an Assistant Director, his argument was that WVU needed to be able to pay the successful applicant more money in order to attract qualified applicants.

While Grievant is a valued employee, the successful applicant had many years of the exact type of experience Respondent was seeking. Grievant did not demonstrate that her qualifications were superior to those of the successful applicant, or that there was a flaw in the selection process.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving her 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.

6. WVU's Policy on Seniority for Classified Employees, WVU-HR-45, which provides generally that "[q]ualified employees will be selected before external candidates," is applicable only to non-exempt classified positions at WVU. It was not applicable to the exempt position at issue.

7. WEST VIRGINIA CODE § 6C-2-2(d) defines discrimination, for purposes of the grievance procedure, 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." This definition encompasses all types of discrimination, including discrimination based on age. It is not necessary to analyze Grievant's claims under the West Virginia Human Rights Act, as such claims are subsumed by WEST VIRGINIA CODE § 6C-2-2(d). *Black v. Dep't of* Transp., Docket No. 99-DOH-362 (Jan. 21, 2000); *Clark v. Kanawha County Bd. of Educ.,* Docket No. 99-20-088 (Aug. 19, 1999). See *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995); *Hendricks v. W. Va. Dep't of Tax and Revenue*, Docket No. 96-T&R-215 (Sept. 24, 1996).

8. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

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

9. Grievant did not demonstrate she was discriminated against.

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: September 2, 2011