THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CHRISTA JANES,
Grievant,

v. **Docket No. 2010-1225-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES,
Respondent.

DECISION

Christa Janes, Grievant, filed this grievance against her employer on March 11, 2010, claiming she was wrongfully denied a promotion. Grievant requests a "10% pay increase that I would have received had I been promoted. I am also requesting that I be promoted to an equal position that I qualify for when one becomes available." This grievance was waived to level two by the Chief Administrator on March 18, 2010. A level two mediation session was conducted on August 2, 2010. Appeal to level three was perfected on August 12, 2010. A level three hearing was conducted before the undersigned Administrative Law Judge at the Grievance Board's Westover office on June 8, 2011. Grievant appeared in person and by her attorney, Thorn H. Thorn, Esquire. Respondent appeared by its counsel, Anne B. Ellison, Assistant Attorney General. This matter became mature for consideration upon receipt of the Respondent's proposed findings of fact and conclusions of law on July 15, 2011. Grievant did not file proposals.

Synopsis

Grievant was initially chosen to be awarded a supervisor's position with Respondent. Thereafter, she exhibited behavior which caused her supervisors concerns that she was not the best candidate for the position. Respondent then halted the approval process for

the Grievant's promotion. Grievant has failed to establish by a preponderance of the evidence that Respondent's selection decision was arbitrary and capricious or clearly wrong.

The following findings of fact are based upon the record of this grievance.

Findings of Fact

1. Grievant was employed as a Child Protective Services ("CPS") Worker for the Bureau for Children and Families ("BCF") in 2010.

2. In January 2010, BCF posted a CPS Supervisor position to be located in Marion County. Grievant applied and was interviewed for the position.

3. On February 5, 2010, BCF conducted interviews for the position through an interview panel consisting of Tanny O'Connell, the Regional Director for BCF's Region I and its Appointing Authority, Paula Taylor, Communities Services Manager ("CSM") for Monongalia and Marion Counties, and Bob Weidebusch.

4. The interview panel asked all of the applicants the same interview questions and scored their responses to those questions. The applicants were also scored on other categories including education, experiences and ability, leadership and growth potential, and any concerns or perceived limitations with the applicant.

5. Following the interviews, the panel met to discuss their conclusions regarding the candidates. Ms. O'Connell chose Michelle Michael as her top candidate and Grievant as her second candidate. Ms. Taylor and Mr. Weidebusch chose Grievant as their top candidate, and Michelle Michael as their second candidate.

6. Grievant's name was submitted to begin the approval process for the promotion.

7. A CPS worker is responsible for conducting investigations concerning allegations of child abuse. CPS workers are responsible to testify in cases initiated by their office, and to testify in companion criminal cases that are often initiated by the county's prosecuting attorney's office.

8. Sherrie Taylor, Grievant's Supervisor, asked Grievant on February 9, 2010, what was pending in her workload. Grievant informed Ms. Taylor that she had been subpoenaed to attend a hearing on a criminal case in Lewis County on February 16, 2010, but the prosecutor had called her on February 3, 2010, and informed her the hearing had been rescheduled for February 23, 2010. Grievant told Ms. Taylor that she was going to Las Vegas that week to get married and that she would not attend the hearing unless she received a subpoena. Grievant asked if the hearing could be moved, the prosecutor responded that the hearing could not be moved.

9. Grievant and the prosecutor had discussed the possibility of using another BCF employee, Ann McCumbers, to offer testimony at the hearing in her place. The prosecutor informed the Grievant that she would be responsible for locating Ms. McCumbers for a good address upon which to serve the subpoena.

10. Ms. Taylor then contacted BCF's attorney, Katherine Bond, regarding Grievant's obligations to attend the hearing in Lewis County in the event she did receive a new subpoena. Ms. Bond advised Ms. Taylor that if it was a criminal case, and if Grievant received a subpoena, she would have to attend the hearing.

11. After the phone conversation with Ms. Bond, Ms. Taylor told the Grievant that, if it was a criminal case, she would likely be receiving a subpoena and she would be required to attend.

12. Grievant became upset and indicated she was not going to attend the hearing, and was not going to accept a subpoena. Grievant indicated that she would rather pay a court fine than attend the hearing and that she did not believe it would jeopardize her job.

13. Sherrie Taylor informed Paula Taylor about what occurred, and that the outburst had taken place in the pool area of the office. Paula Taylor spoke to Grievant and encouraged her to contact the Judge in the case to see if she could get the hearing rescheduled. Paula Taylor told Grievant that her outburst in the pool area was inappropriate, especially since she wanted to become a supervisor.

14. Tanny O'Connell indicated that it was their office's expectation for Grievant to attend the hearing, whether she was served a subpoena or not, because she knew about the hearing date from the prosecutor.

15. On February 11, 2010, Grievant informed Sherrie Taylor that she would attend to hearing only if she was reimbursed for her expenses related to the Las Vegas trip. Paula Taylor informed Ms. O'Connell of Grievant's response concerning reimbursement for travel expenses. Ms. O'Connell was very concerned, and felt that Grievant's behavior was not indicative of a supervisor.

16. Ms. O'Connell advised Paula Taylor that they needed to reevaluate whether Grievant was the best candidate for the position. Paula Taylor then considered how Grievant's reactions to her supervisor's directives affected her evaluation. Paula Taylor indicated that after Grievant's outburst in the employee pool area, she had to consider how employees would respond to her as a supervisor after that unflattering behavior.

17. Paula Taylor went on to explain that she had additional concerns in that Grievant was not willing to follow directives and do what needs to be done as a supervisor, for example, the potential disciplining of her subordinates.

18. Paula Taylor came to the conclusion that she could no longer support Grievant as her top candidate for the position. She contacted Ms. O'Connell and advised her that they should stop the approval process from moving forward.

19. Ms. O'Connell then halted the approval process for the Grievant's promotion. On February 19, 2010, Paula Taylor contacted Grievant and informed her that she had not been selected for the CPS supervisor 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). In other words, "[t]he 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, a grievant must prove, by a preponderance of the evidence, that she 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 v. W. Va. Dep't of Health and 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 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)). “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).

Grievant has failed to prove by a preponderance of the evidence that Respondent's selection decision for the supervisor position was in any way unlawful, unreasonable, or arbitrary and capricious. The decision was guided by legitimate and permissible motives, and was based entirely upon whether the successful applicant was the best candidate for the job. Grievant's behavior regarding attendance at the February 23, 2010 hearing was inappropriate and understandably gave her direct supervisors, Tanny O'Connell and Paula Taylor, reason to believe that Grievant might have difficulty handling the demands of a supervisor's position. Her behavior indicated an unwillingness to follow a directive when it conflicted with her own personal plans. Paula Taylor questioned whether Grievant would be able to require employees to comply with her directives and issue discipline when she was unable to follow directives of her own supervisors. It is reasonable that this behavior cast doubt on the Grievant's ability to successfully perform the duties of the supervisor's position.

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. 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).

3. 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).

4. 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*.

5. Grievant has failed to establish by a preponderance of the evidence that Respondent's selection decision was 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: September 20, 2011

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Ronald L. Reece
Administrative Law Judge