WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TAMI GAYLE CRANK,
Grievant,

v. **Docket No. 2010-0222-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Grievant,Tami Gayle Crank, filed this grievance against her employer, the West Virginia Department of Transportation/Division of Highways ("DOH"), Respondent, on August 19, 2009, protesting the selection of another candidate for the position of Secretary 2 in Respondent's District 2 ("D2") Bridge Department. A relevant portion of the statement of grievance provides:

> I was not the successful applicant for the D/2 Bridge Department, Secretarial 2 position. The decision was based on a violation code of ethics and disregard of seniority/work experience. The selection was also flawed by outside interest. The decision to hire the successful applicant was arbitrary and capricious.

Relief Sought:

> Instatement to the D/2 Bridge Department, Secretarial 2 position, with retroactive pay to the date of Lisa Johnson's appointment. Second alternative would to be given the 15 percent salary increase retroactive to the date of Lisa Johnson's appointment.

A conference was held at level one on September 2, 2009, and the grievance was denied at that level on September 24, 2009. Grievant appealed to level two on October 8, 2009, and a mediation session was held on February 8, 2010. Grievant appealed to level three on February 18, 2010. Subsequent to a series of continuances, a level three hearing was held before the undersigned Administrative Law Judge on November 3, 2010, in the

Grievance Board's Charleston office. Grievant appeared in person and by her representative, Molly Bevins. Respondent was represented by Barbara Baxter, Esquire, DOH Legal Division.

This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about December 6, 2010. Both parties submitted fact/law proposals.

Synopsis

This grievance was filed after Grievant was not selected for the position of Secretary 2 with the Bridge Department of the Division of Highways, Respondent. Grievant was classified as an Accounting Technician 3 with the Accounting Department of Respondent. Subsequent to the interview process, an employee other than Grievant was deemed more qualified for the posted position. Grievant has not established by a preponderance of the evidence that Respondent's selection was improper or a case of favoritism pursuant to applicable grievance procedure. Grievant failed to demonstrate that the selection decision made was arbitrary, capricious or clearly wrong. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. At the time of filing the instant grievance, Grievant was employed with Respondent as an Accounting Technician IV. Grievant has been employed by DOH for approximately 20 years.

2. Respondent posted an opening for the position of Secretary 2 with the District 2 Bridge Department (Posting #641).

3. Grievant was one of the eight individuals who applied for the position.

4. A brief overview of the general function of the position was to work at the full performance level, with limited supervision, providing clerical and administrative support to District 2 Bridge Department employees, exercising discretion and independent judgment. Resp. Ex. 2.

5. Interviews for the position were conducted. The interview committee included Steven Runyon, D2 Bridge Engineer, and Jonathan Clark, Highway Engineering Associate in the D2 Bridge Department. Mr. Runyon would be working with the individual ultimately chosen for the position.

6. The selection committee determined Lisa Johnson to be the most qualified applicant for the posted position and selected her as the successful candidate. Ms. Johnson commenced employment with Respondent, in October of 2005, as an Office Assistant II.

7. The interviewers had some knowledge of the work of both the Grievant and the successful applicant prior to their respective interviews because they had both performed limited work for the District 2 Bridge Department.

8. Lisa Johnson, the successful applicant, actually filled in for the Bridge Department Secretary following her retirement, splitting her time between performing work for the D2 Bridge Department and working for the D2 Right of Way Department until her selection as the Secretary 2 for the Bridge Department. Grievant had also performed some tasks for the Bridge Department as part of her work for the Accounting Division, as requested by Mr. Runyon.

9. The paperwork that the interviewers completed following the interviews has a comment section. In that space, the interviewers agreed to add the comment that Grievant would "rely heavily on the supervisor for direction and customer service responses." The interviewers noted that Ms. Johnson would "work well independently."

10. Mr. Runyon spends a lot of his work time working out "in the field." His experience with Ms. Johnson established that she worked in the D2 Bridge Department independently and with little need for supervision. Mr. Runyon believed that Grievant would need greater supervision and direction based on his experience working with her and her answers to questions during the interview. Mr. Runyon gave Grievant a lower rating on interpersonal skills than Ms. Johnson.

11. Interviewer Runyon opined that Ms. Johnson's work for the Bridge Department was excellent and he recommended her as the best qualified candidate for the position.

12. Interviewer, Jonathan Clark, was also familiar with the work that Lisa Johnson had been doing for the District 2 Bridge Department. Mr. Clark testified that Ms. Johnson's work for the Bridge Department was above average.

13. Interviewers Runyon and Clark ranked the applicants, and Grievant was NOT one of the top three candidates for the position. There were at least three other applicants more qualified and better suited than Grievant for the posted position.

14. Barbara King, District 2 Comptroller, testified that it has been her experience that Grievant can be disruptive when she does not get a job for which Grievant has applied. Ms. King has communicated with Grievant about this in an unofficial capacity.

15. The handling of purchase card processing and travel expense charges is only a small part of the total Secretary 2 job duties.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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, 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 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).

It is Grievant's proposition that Respondent unlawfully deprived her of the position by not equitably assessing pertinent information and relevant factors. Grievant argues that her skills, knowledge and relevant experience demonstrate that she is the best candidate. Respondent disagrees. Grievant has failed to established that the Respondent's selection of the successful applicant was arbitrary and/or capricious. Candidates are generally evaluated in six categories: 1) education, 2) relevant experience, 3) possesses knowledge, skills, and abilities, 4) interpersonal skills, 5) flexibility/adaptability, and 6) presentability.

It is understandable that Grievant highlights her years of experience with Highways and, in particular, her experience in handling purchasing card transactions and travel expense forms. In challenging the validity of Respondent's determination, Grievant alludes Respondent consciously endeavored to circumvent her candidacy for the position.[1] This contention is not persuasive in the facts of this case. Further, the issue of seniority is not new to selection cases.

WEST VIRGINIA CODE § 29-6-10(4) requires an employer to consider seniority in selection decisions "if some or all of the eligible employees have substantially equal or similar qualifications[.]" In other words, seniority is a "tie breaker," not a primary consideration. In this case, the eligibility or qualifications of the candidates, as determined

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[1] Grievant highlights WEST VIRGINIA CODE § 29-6-10(4) and notes provisions regarding seniority. In challenging the validity of Respondent's determination, Grievant alleges that Respondent circumvented the application of seniority as a factor in making its selection determination. **This contention is not factually accurate** nor is seniority a definitive factor of this grievance. In the facts of this case, the contention is not persuasive and will not be discussed further.

by Respondent's Administrative personnel, were not so similar that seniority was the definitive factor. An employer may determine that a less senior applicant is more deserving of a particular benefit, e.g., most qualified. Grievant's seniority with Respondent is an element, but not the definitive factor.

It is not established that the necessary circumstances are present in this matter to mandate that Grievant's seniority with the agency is the determining factor for selecting the successful applicant. Respondent is not required to consider the seniority of the applicants as the decisive factor in making every selection decision. In this case, the qualifications of the candidates were not so similar that seniority needed to be used as anything other than evidence of past experience.

The interviewers testified that the qualifications and experience of applicants were reviewed. Mr. Runyon explained that although work with purchasing card transactions and travel expense forms is a part of the position, the Secretary II position also involves other duties, not necessarily limited to typing, filing, and handling phone inquiries with minimal supervision. It was the interviewers' opinion that the successful applicant was better qualified than Grievant to perform the Secretary II position duties when it is viewed in totality. It was represented that Respondent selected Ms. Johnson for the position because her knowledge, skills and abilities and her interpersonal skills made her the best qualified applicant for the position. Rationale for this opinion was provided and persuasive.

Applicants were provided an opportunity to interview and establish their individual credentials. Interviews were conducted similarly, and each applicant was given the same chance to identify their job skills and experience through their applications. The successful applicant had already been working half-time for the Bridge Department on a temporary

basis. This was not nefarious. Ms. Johnson had been asked to work half of her work time for the Bridge Department and the other half in her previous job for the Right of Way Division. Grievant had completed work for the Bridge Department, but had not worked as a temporary Secretary for the Bridge Department.[2] In this case, by all objective and subjective criteria, Ms. Johnson was the best candidate for the position. The selection of Ms. Johnson cannot be viewed as clearly wrong or an arbitrary or capricious action. Further, it is noted that Grievant was not viewed as the second in line for selection. Mr. Runyon and Mr. Clark ranked the applicants and Grievant was NOT one of the top three candidates for the position.

Additionally, Grievant claimed that the decision to select Ms. Johnson was "flawed by outside interest." This contention should be reviewed pursuant to the law prohibiting favoritism in selection decisions. "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities." *W.Va. Code* §6C-2-2(h). In order to establish either a discrimination or favoritism 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);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

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[2] Grievant had also decided not to continue helping complete work for the Bridge Department.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant has not met her burden of proving that the selection was flawed by outside interest or favoritism. She has not proven that she was unlawfully treated differently from the successful applicant or any of the other applicants. Grievant may truly believe she was not given a fair opportunity, however, she has not established this as fact. Grievant has not established unreasonable conduct by Respondent's agents. The successful candidate had been working temporarily in the Bridge Department, completing many duties of the Secretary II position. The record establishes that Ms. Johnson was able to perform the Secretary II duties that she had been assigned and that her work for the Bridge Department was excellent. While Grievant did demonstrate experience working with a couple of aspects of Secretary II work for the Bridge Department, she did not share other qualifications with Ms. Johnson. Grievant is not similarly situated to Ms. Johnson. With respect to the procedure followed in interviewing, considering and selecting the chosen candidate, both were treated the same way.

In review of Grievant's qualifications, interview scores and employment history with Respondent, it cannot be said that the Respondent's selection of applicant Johnson was without due consideration, or in disregard of pertinent facts and circumstances of the job responsibilities. In this case, the interview/selection panel explained their reasoning in determining that applicant Johnson was more qualified than Grievant, and the undersigned does not find abuse of the ample discretion afforded Respondent regarding this decision.

Grievant has not proven there was a flaw in the selection process which necessitates the reversal of Respondent's discretion. Selection decisions are largely the prerogative of management. Grievant has failed to meet her burden of proof and establish the selection process was arbitrary and capricious or DOH's choice of the successful applicant was an abuse of discretion.

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, 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). 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). 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. 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).

5. Respondent's determination that the selected candidate was the best qualified applicant for the position at issue was based upon relevant factors, and was not arbitrary or capricious, or clearly wrong.

6. Grievant failed to demonstrate an unlawful flaw in the selection process.

7. In order to establish either a discrimination or favoritism 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., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

8. Grievant did not meet the burden of proving she was the victim of favoritism.

9. Grievant did not demonstrate that there was any discrimination in the selection process.

10. Grievant has failed to establish that the selection of the successful applicant for the posted Secretary 2 position was improper, 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 (2008).

Date: October 7, 2011

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Landon R. Brown
Administrative Law Judge