THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GAIL LYNNE MIHALIAK,
Grievant,

v. **DOCKET NO. 2010-1384-DEA**

DIVISION OF REHABILITATION SERVICES,
Respondent.

DECISION

Grievant, Gail Lynne Mihaliak, filed this grievance against her employer, the Division of Rehabilitation Services, on April 23, 2010, challenging the selection of another employee for the position of Area Administrator. The statement of grievance reads:

> I am the most qualified person for the position of Area Administrator and was not selected for the position. I feel that I was not selected because I am a woman. I have performed the job of Assistant Area Administrator for nearly 5 years. I have received good evaluations. I have almost 35 years of experience with this agency.

As relief, Grievant sought:

> I want to be put in the position of Area Administrator and the person selected for Area Administrator be put in my current position.

A conference was held at level one on May 3, 2010, and a decision denying the grievance at that level was issued on May 5, 2010. Grievant appealed to level two on May 20, 2010, and a mediation was held at level two on September 3, 2010. Grievant appealed to level three on September 16, 2010. A level three hearing was held before the undersigned Administrative Law Judge on May 18, 2011, in the Grievance Board's

Westover office. Grievant appeared *pro se*, and Respondent was represented by Katherine A. Campbell, Assistant Attorney General. This matter became mature for decision upon receipt of Respondent's Proposed Findings of Fact and Conclusions of Law, on June 23, 2011. Grievant declined to submit written proposals.

Synopsis

Grievant was not selected for the posted position of Area Administrator, and believes she should have been selected because she believes she has been doing the job, and running the office, for years. She concluded that she was not selected because she is female. Grievant presented little evidence comparing her qualifications to those of the successful applicant. She failed to demonstrate that the selection process was flawed or that the decision made was arbitrary and capricious. Further, she did not demonstrate that she was treated differently from any other applicant so as to prove a case of discrimination under the grievance procedure.

The following Findings of Fact are made based upon the evidence developed at level three.

Findings of Fact

1. Grievant is employed by the Division of Rehabilitation Services ("DRS") as Assistant Area Administrator for the Disability Determination Section ("DDS") in the Clarksburg, West Virginia Office. She has been employed by DRS for 35 years.

2. In January 2010, DRS posted a vacancy for the Area Administrator of the Clarksburg DDS Office. Grievant and three other people who were qualified applied for the

position. Three of the applicants were female, and all applicants but one were already employed by DRS. The only qualified male applicant was Earl Langley.

3. Toby McAllister, Director of the DDS, put together an interview team to interview all applicants for the posted Area Administrator position. Mr. McAllister was on the interview team, and he also asked James Quarles, DRS's Assistant Director of Administrative Services, and Tom Davis, DDS Area Administrator, to serve as members of the interview team, and both agreed to do so. Mr. McAllister has been employed by the DRS for 41 years, and has been employed in the DDS most of that period. Mr. Quarles has been employed by the DRS for 41 years, and was the Human Resources Director for 23 of those years. Mr. Davis was the supervisor of this position.

4. Mr. Davis developed a set of questions to ask the applicants, and Mr. Quarles and Mr. McAllister reviewed the questions. Mr. McAllister finalized the set of questions to be asked of the applicants.

5. All four applicants who were qualified for the position were interviewed by the three member interview team on the same day. All applicants were asked the same questions, although the answers given at times generated follow-up questions which were not on the list of questions developed prior to the interview.

6. The interview team members did not rate the answers given, nor did they rank the applicants.

7. The interview team members discussed the applicants after the interviews were completed. All three members of the interview team believed that Earl Langley was the best candidate for the position.

8. Mr. McAllister recommended to DRS Director Deborah Lovely that Mr. Langley be placed in the Area Administrator position. Ms. Lovely agreed with the recommendation, and Mr. Langley was placed in the position.

9. Mr. Langley had been employed by DRS in the DDS for some time. At the time he was selected for the subject position he was a Disability Hearings Officer, and prior to that he had been a Unit Supervisor. The record does not reflect how long Mr. Langley had been employed in the DDS, what, if any, other positions he had held, or what other experience or education he had.

10. In her present position, Grievant supervises 5 Rehabilitation Service Associates and 12 contract employees who are medical consultants, and she has administrative duties. Grievant had been the Assistant to the Area Administrator for several years before he retired and his position was posted, and believes she has done the job for many years, and that it is she who runs the office. Grievant has always received good evaluations, but she did receive a verbal reprimand about two years ago.

11. Prior to serving in her present position, Grievant had worked for the DDS as a Quality Assurance Supervisor, Unit Supervisor, Disability Examiner 1, 2, and 3, and as an Examiner Trainee.

12. Mr. Quarles based his recommendation on Mr. Langley's qualifications, his strong resume, work experience, answers to the questions asked during the interview, and specifically his explanation as to how he would handle the day-to-day management of the office. Mr. Quarles found Mr. Langley to be way above all other applicants in his ability to efficiently run the office, and came away from the interview with the impression that Mr. Langley had more insight into the management of an office, the management of people,

and the handling of disciplinary problems than the other applicants. Mr. Langley discussed his ideas for handling different situations during the interview.

13. Mr. McAllister based his recommendation on his belief that Mr. Langley was the most suitable candidate for the position. He was impressed by Mr. Langley's answers to the questions asked during the interview, and his enthusiasm. He also felt Mr. Langley would be a better choice for the position because he had less familiarity with the people in the Clarksburg DDS Office than Grievant. Mr. McAllister had concluded from his experience with both Grievant and Mr. Langley that Mr. Langley deals with problems in a more fair and equitable manner than Grievant. Mr. McAllister acknowledged that Grievant does a good job, but felt that she is best suited for her current 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). A preponderance of the evidence is defined as evidence which is 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. *Leichliter v. W. Va. Dep't of Health and 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).

"Also, as the Grievance Board has held many times, when a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp*., Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen, supra*; *See Ball v. Dep't of Transp*., Docket No. 04-DOH-423 (May 9, 2005)." *Freeland v. Dep't of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008).

Grievant presented little evidence comparing her qualifications to those of the successful applicant. The only flaw alleged in the selection process was that she thought Mr. McAllister did not like her, and she believed Mr. Davis had treated her unfairly in the past. While Grievant may have been disappointed with the make-up of the interview team, neither Mr. McAllister nor Mr. Davis can be disqualified simply because one of the interviewees thinks they don't like her, or because they have had issues in the past. Mr. Davis was going to supervise this position and Mr. McAllister is the Director of this Section. The placement of these two individuals on the interview team does not constitute a flaw in the selection process.

Basically, Grievant believes she has been doing the job for years, and that she deserved to be placed in the job. She believes she is the best person for the job. No one disputes that Grievant was able to perform the duties of the job, and that she was well qualified for the position. Grievant, however, did not convince the members of the interview team that she was the best candidate for this particular position. Two of the three members of the interview team gave valid explanations for their choice, including Mr. Quarles, with whom Grievant had no problem. Grievant did not demonstrate that the selection process was flawed in any way, or that the decision to place Mr. Langley in the position was arbitrary and capricious.

As to Grievant's claim of 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 gender. 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. Grievant simply stated that she did not believe that when comparing the number of women employed by Respondent to the number in management positions, that women were not well represented in management. Grievant, however, chooses to ignore the fact that the Director of DRS is female, and that she made the selection decision in this case. Grievant did not demonstrate that she was the victim of discrimination.

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, 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. "Also, as the Grievance Board has held many times, when a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and

supervise subordinate employees. *Pullen v. Dep't of Transp*., Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen, supra*; *See Ball v. Dep't of Transp*., Docket No. 04-DOH-423 (May 9, 2005)." *Freeland v. Dep't of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008).

6. Grievant failed to demonstrate that the selection process was flawed, or that the selection decision was arbitrary and capricious.

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 gender. 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).

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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 that she was the victim of discrimination.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel 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: August 9, 2011