WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID K. PARSONS,

Grievant,

v. **Docket No. 2011-1621-DOA**

GENERAL SERVICES DIVISION,

Respondent.

DECISION

Grievant, David K. Parsons, filed this grievance against his employer, Respondent, General Services Division, on or about May 6, 2011. Grievant's statement of grievance and attachment, states as follows:

> 1. In that the Director of the Division by his act or direction seeks to circumvent WV Code 29-6-10 section 2 and Administrative Rule 143 CSR 1 Page 5 section 2 by practicing hiring policies and actions which exclude grievant by intent and thru manipulation of the hiring process to obtain an outcome selection (candidate) desired by the Director not based on "merit principles and scientific methods" of selection as prescribed by Administrative Rule. (Posting GSD11008)
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> 2. In that the Director sought to exclude grievant from consideration by intent and pre-selection as a form of reprisal against the grievant for previous actions and or support provided to employees in separate grievances.

As relief, Grievant seeks the following:

> 1. That the hiring process for GSD 11008 has been tainted and that the "most qualified" applicant available was not selected, any selection therefore should be null and void.
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> 2. In that the hiring process did not follow the register ranking, said register will be voided and all applicants will be re-scored to a new register.

3. In that the hiring process did not clearly follow the intent of WV Code 29-6-10 to select based on "merit principles and scientific methods", clarification be provided as to the process to obtain the most qualified and that criteria such as "best fit", "most flexible" or other such vague subjective terms are indeed not scientific and as such are subject to personal bias and interpretation which may result in hiring practices or selections not in the best interest of the State of West Virginia.

4. In that grievant's reputation has been damaged and financial opportunity denied, grievant seeks compensation equal to 15% of salary, increased to current base effective this date and retroactive to the second posting date for this position (October 29, 2010)

Further, at the Level Three hearing in this matter, Grievant clarified his relief sought to include being placed into the position of Deputy Director of General Services.

By joint motion submitted on May 13, 2011, the parties moved to waive Levels One and Two of the grievance process and proceed directly to Level Three. Thereafter, this matter was scheduled for the Level Three hearing.

On October 17, 2011, Respondent filed four Motions to Quash seeking to quash the subpoenas for Susan Chapman, Christopher Klinger, Timothy Abraham, and Charlie Warner which had been requested by Grievant and issued by the undersigned. A telephonic hearing on these Motions to Quash was conducted on October 18, 2011. Attending this hearing were Respondent, by counsel, Stacy L. DeLong, Esquire, Assistant Attorney General, and Grievant by his Representative, Fred Tucker, WVSEU/UMWA. Upon hearing Respondent's arguments and the position of Grievant on each, the undersigned granted the four Motions to Quash.[1]

[1] At the telephonic hearing, each of the motions was addressed separately. Grievant's Representative was granted the opportunity to orally respond to Respondent's argument on each motion, and to otherwise argue why the motions to quash should be denied. However, Grievant's Representative stated only the words "no comment" in

A Level Three hearing was conducted by the undersigned administrative law judge on October 19, 2011, at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, and with his representative, Fred Tucker, WVSEU/UMWA. Respondent appeared by counsel, Stacy L. DeLong, Esquire, Assistant Attorney General. This decision became mature upon receipt of the last of the parties' proposed Findings and Fact and Conclusions of Law on November 22, 2011.

Synopsis

Grievant applied for the position of Deputy Director for the General Services Division, but was not selected for the position. Grievant alleged numerous flaws in the hiring process and that he was the most qualified candidate for the position. Grievant also alleged his non-selection was an act of reprisal. Respondent asserted that all applicable laws and rules were followed in the hiring process and that the most qualified candidate was selected for the position. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, David K. Parsons, is employed by Respondent as the Operations and Services Manager. In this position, one of Grievant's duties is to hire individuals for vacancies within his unit.

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response to Respondent's arguments on each motion. As Grievant's Representative failed to articulate any opposition to the Motions to Quash, the undersigned granted each motion, thereby quashing the four subpoenas that had been previously issued at Grievant's request.

2. On August 9, 2010, Respondent posted the position of Deputy Director, General Services, posting GSD 11002. The deadline to apply was listed as August 18, 2010. *See*, Grievant's Exhibit 2.

3. Grievant, among others, applied for this position pursuant to this posting. However, Respondent did not fill the position at that time.

4. Instead, Respondent reposted the position on October 29, 2010, as GSD 11008. The deadline to apply was listed as November 7, 2010. *See*, Grievant's Exhibit 1.

5. Although the two postings were for the same position, the postings were not identical. They differed in terms of the stated requirements for training and experience.

6. Numerous individuals, including Grievant, applied for the position posted October 29, 2010.[2]

7. The pool of applicants for the position was comprised of those who were already state government employees ("internal" applicants), and those who were not ("external" applicants).

8. The internal applicants applied for the position by submitting their applications directly to the office of David Oliverio, Director of General Services Division.

9. External applicants for the position were selected from those listed on the "Referred Candidates" list, otherwise known as the "competitive register," or "register," which was compiled by the Division of Personnel.

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[2] *See*, Grievant's Exhibit 3. As of December 2, 2010, DOP reported to Martha Phillips that it had received sixty-six applications for the position of Deputy Director.

10. The register is a listing of individuals who are certified by DOP as being qualified for a position. The individuals listed on the register, called "eligibles," are ranked by DOP in order of the results of their respective examinations, from highest score to lowest. When using a register, employers are required to make their selections from the top ten names on the list, plus anyone who has a ranking that is tied with the tenth person listed. The names of the individuals in each ranking are placed on the register in random order.[3]

11. Internal applicants are not listed or ranked on the register. However, an internal applicant may request DOP to place his or her name on the competitive register.[4]

12. Martha Phillips, Executive Assistant to David Oliverio, was instrumental in obtaining the register from DOP and contacting the individuals listed thereon to determine interest and to schedule interviews.

13. Not every applicant for the position of Deputy Director was granted an interview. Mr. Oliverio selected the candidates he wished to interview from the pool of internal applicants and from those listed on the register after reviewing the applications he had received.

14. Mr. Oliverio granted Grievant an interview.

15. Grievant was interviewed by David Oliverio on March 22, 2011. Also present during this interview was Martha Phillips, Executive Assistant to Mr. Oliverio. Ms. Phillips completed an "interview agenda" form for Grievant's interview, and her name is listed as an interviewer on the same. *See*, Grievant's Exhibit 7. However, Ms.

[3] *See*, testimony of Mike Campbell, Division of Personnel.
[4] *See*, testimony of Mike Campbell, Division of Personnel.

Phillips contends that she did not interview the candidates, and that she only "sat in" on all the interviews that Mr. Oliverio conducted.

16. There were four or five internal applicants for the position. Mr. Oliverio granted all the internal applicants interviews.[5] However, from the evidence presented, the total number of applicants is unknown, as is the total number of interviews conducted.

17. Mr. Oliverio did not use numerical scores in ranking the applicants he interviewed for the Deputy Director position.

18. After conducting the interviews of the candidates, Mr. Oliverio determined that Christopher Klingler was the best qualified applicant for the position. As such, Mr. Oliverio selected Mr. Klingler for the Deputy Director position.

19. Mr. Klingler was an external applicant whose name was listed on the register in the twenty-third spot. DOP had ranked Mr. Klingler as a "4." Mr. Klingler and ten other people on the register had the ranking of "4." *See*, Grievant's Exhibit 5.

20. Because two of the individuals listed in the top ten names on the register informed Ms. Phillips that they were not interested in the position, the next two people down on the list beyond the eleventh spot could be considered for the position. Bringing up the next two names on the register resulted in one individual who had been ranked a "3" and eleven individuals who had been ranked as a "4" being considered. Such is because all those who "tied" the rank of the second new addition to the pool are to be considered as well. *See*, Grievant's Exhibit 5.

[5] *See*, testimony of David Oliverio.

Discussion

As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89 DHS-72 (Nov. 29, 1990). "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 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 and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence supports both sides equally, the Grievant has not met his burden. *Id.*

Grievant argues that the selection process was flawed in various ways, and that Respondent violated provisions of the Administrative Rule of the West Virginia Division of Personnel ("DOP") and WEST VIRGINIA CODE § 29-6-10 when filling the position of Deputy Director. Specifically, Grievant argues that Director Oliverio failed to rank internal candidates, or "fit them in," with the external candidates listed on the register. Grievant also asserts that Mr. Oliverio improperly skipped people listed on the register, thereby denying individuals the opportunity to apply for the position. Grievant further argues that the successful candidate, Christopher Klingler, should not have been considered for the position because he was too far down on the register. Grievant contends that Mr. Oliverio failed to use merit principles and scientific methods of

selection in choosing the successful applicant for the position, and asserts that Mr. Oliverio had improperly pre-selected Mr. Klinger for the position. Lastly, Grievant argues that he was more qualified for the position of Deputy Director than the successful candidate and should have been selected for the position. Respondent, however, argues that Mr. Oliverio [and Ms. Phillips] followed all the appropriate rules, procedures, and laws in filling the Deputy Director position, and that the candidate selected, Christopher Klingler, was the most qualified candidate.

In support of his numerous arguments, Grievant cites WEST VIRGINIA CODE § 29-6-10 and the preamble to DOP's Administrative Rule, 143 C.S.R. 1 § 2. However, neither of these authorities states that internal applicants are to be "fit in" among the external applicants ranked on the register. Grievant testified that "fitting in" the internal applicants with the external applicants listed on the register is his practice when hiring, and that he was trained to do so. However, Grievant could point to no rule, policy, statute, or other appropriate authority to demonstrate that his practice was a requirement.[6] To the contrary, Respondent presented evidence that DOP policies and procedures do not require employers to fit internal applicants into the rankings on the register, and that internal candidates can request to have their names be added to the register if they wish.[7] Further, Grievant offered no evidence to support his allegations that Mr. Oliverio and/or Ms. Phillips improperly skipped over individuals on the register during the hiring process. Grievant called no one listed on the register to testify in

[6] The undersigned was provided no specific authority for this claim and none could be found.

[7] *See*, testimony of Mike Campbell, DOP Assistant Director of Staffing Services.

support of his allegations.[8] Grievant also offered no evidence to support his claim that Mr. Oliverio improperly pre-selected Mr. Klingler for the position of Deputy Director.

From the evidence presented, because two individuals listed on the register informed Ms. Phillips that they were not interested in applying for the Deputy Director position, the next two individuals beyond the eleventh spot on the register could be "pulled up" into the top ten listed on the register to be considered for the position. As such, the next person on the list, who was ranked as a "3," and the following individual, who was ranked as a "4," were pulled up into the top ten for consideration. Because there were ten people whose ranks were tied with that of the second additional person, those ten people were "pulled up" for consideration, as well. Mr. Klinger was among those ten. The inclusion of all the applicants whose score was tied with the tenth individual on the register is proper under the Administrative Rule. *See,* 143 C.S.R. 1 § 9.2. It is noted that within each ranking listed on the register, the names of the individuals are listed in random order. *See*, testimony of Mike Campbell, DOP.

Accordingly, Grievant has failed to prove by a preponderance of the evidence that Mr. Oliverio and/or Ms. Phillips violated the applicable laws, rules, and procedures in filling the Deputy Director position and that the selection process was otherwise flawed.

Grievant also asserts that he was more qualified than the successful candidate, and as such, he should have been selected for the Deputy Director position. In a selection case, the grievant must prove, by a preponderance of the evidence, that he

[8] At the Level Three hearing in this matter, Grievant argued that an individual listed higher on the register than Mr. Klingler was never contacted. However, Grievant did not call this individual to testify as a witness. Grievant argued that the individual would not come from out of state to testify. The undersigned noted at the hearing that if a request had been made, a telephonic appearance could likely have been arranged.

was the most qualified applicant for the position in question. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). Further, 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 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 Hospital v. Health and Human Serv.,* 789 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and 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 argues that he was the most qualified candidate for the position of Deputy Director. Grievant testified about his education, training, and experience. Grievant introduced into evidence his application for the position, as well as the notes of Mr. Oliverio and Ms. Phillips made during his interview. However, he presented no evidence concerning the qualifications of the successful candidate. Therefore, Grievant has failed to meet his burden of proving that he was the most qualified candidate for the position of Deputy Director. Further, although it is undisputed that Mr. Oliverio did not assign the applicants numerical scores following their interviews, Grievant failed to present sufficient evidence to meet his burden of proving that Mr. Oliverio's selection of Mr. Klingler was arbitrary, capricious, or clearly wrong.

WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

(1) That he engaged in protected activity (i.e., filing a grievance);

(2) That he was subsequently treated in an adverse manner by the employer or an agent;

(3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,

(4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). Further, the Grievance Board has recognized that "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998); *See Harrison v. W. Va. Bd. of Directors/Bluefield State College,* Docket No. 93-BOD-400 (Apr. 11, 1995).

Grievant failed to present any evidence to support his claim that his prior actions or his support of other employees in prior grievance actions was a factor in his non-

selection for the position of Deputy Director. Grievant presented nothing more than unsubstantiated allegations. Therefore, Grievant failed to meet his burden of proving that his non-selection was an act of reprisal.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89 DHS-72 (Nov. 29, 1990).

2. In a selection case, the grievant must prove, by a preponderance of the evidence, that he was the most qualified applicant for the position in question. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). Further, 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. 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)).

4. Grievant failed to meet his burden of proving by a preponderance of the evidence that he was the most qualified candidate for the position of Deputy Director.

5. Grievant has failed to meet his burden of proving by a preponderance of the evidence that the selection process for the position of Deputy Director was flawed. Further, Grievant has failed to demonstrate that the selection of Mr. Klinger for the position was arbitrary, capricious, or clearly wrong.

6. Reprisal is "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. VA. CODE § 6C-2-2(o).

7. To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity (i.e., filing a grievance);
>
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
>
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

8. Grievant has failed to prove by a preponderance of the evidence that his non-selection was an act of reprisal for previous actions and/or the support he provided to employees in separate grievance actions.

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: May 18, 2012.

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Carrie H. LeFevre
Administrative Law Judge