THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBRA L. KING,
Grievant,

v. **Docket No. 2011-0527-DHHR**

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

DECISION

Grievant, Debra King, is employed by the Department of Health and Human Resources ("DHHR") Bureau for Children and Families ("BCF") as a Family Support Specialist. Grievant applied for a Supervisor I/Operating Supervisor position, and filed this grievance on October 9, 2010, after she was not selected for the position. As a remedy, Grievant seeks "[t]o be made whole, including selection for position."

A level one hearing was held on January 11, 2011, and the grievance was denied by decision dated January 28, 2011. A level two appeal was filed on January 31, 2011. The appeal to level three was filed on January 11, 2012, requesting that the matter be submitted on the level one record. By order entered March 2, 2012, Administrative Law Judge Jennifer L. Stollings-Parr[1] granted the request to submit the case on the record. Proposed Findings of Fact and Conclusions of Law were submitted by both parties on April 6, 2012. On that same date, Grievant also filed a Motion to Amend Record. A telephone conference was held on August 3, 2012, to clarify and amend the record. The record was amended to reflect that incorporated testimony was from the level one hearing in Darlene F. Smith v. West Virginia Department of Health

[1] This case was assigned to the undersigned Administrative Law Judge on July 5, 2012, for administrative purposes.

and Human Resources, Docket No. 2011-0567-DHHR and also clarified regarding confusing references to the applicants. The parties were granted leave to amend their Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision on August 31, 2012, after receipt of Amended Proposed Findings of Fact and Conclusions of Law from Respondent and no submission of Amended Proposed Findings of Fact and Conclusions of Law from Grievant.

Synopsis

Grievant applied for a posted supervisory position and was not selected for the position. She alleges the Respondent's decision to promote another candidate was arbitrary and capricious in that the interview committee ignored verifiable factors and placed inordinate weight on the interview in violation of the Respondent's policy. Grievant was unable to meet her burden of proof as Respondent's selection decision complied with the policy and is supported by substantial evidence and by a rational basis.

Accordingly, the 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, Debra L. King, is employed by the DHHR, BCF as a Family Support Specialist.

2. Three candidates, including Grievant, applied for a vacant supervisory position posted as Supervisor I/Operating Supervisor[2], a position that "performs full performance supervisory work overseeing the activities of subordinates."[3]

3. Grievant was not selected for the position, and both she and the other non-selected applicant grieved the decision.

4. Testimony regarding the methodology of the selection process was taken only in the other grievance and incorporated by reference in the instant grievance.[4]

5. Due to confidentiality concerns, Respondent redacted all identifying information, including the applicant name, from the application and selection materials provided to Grievant.[5]

6. Candidate 1 was the successful applicant. Candidate 3 is Grievant. Candidate 2 is the other unsuccessful applicant, who also grieved.[6]

7. Delbert Casto, Wood County Community Services Manager, Richard Westfall, Calhoun County Community Services Manager, and Tanny O'Connell, Regional Director made up the selection committee that interviewed the candidates and made the hiring decision.

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[2] Grievant's Exhibits # 1, 2, and 3.

[3] Grievant's Exhibit # 4.

[4] Level one hearing transcript at page 5.

[5] Darlene Smith v. DHHR/BCF 2011-0567-DHHR level one hearing transcript at page 7.

[6] Candidate 1, 2, and 3 information as numbered in the exhibits does not match the listing of the candidates on the OPS-13A Candidate Comparison Charts. It is clarified that Candidate 1 in the exhibits was Candidate 2 on the charts and that Candidate 2 in the exhibits was Candidate 1 in the charts.

8. The same three people interviewed all three candidates, asked the candidates the same questions, and rated each candidate separately.[7]

9. In interviewing the candidates, each committee member took notes for each question and then assigned a numerical rating to each answer. In addition, each committee member also completed the OPS-13, Applicant Interviewing Rating, which rated each candidate on seven factors: Oral Expression; Intelligence, Reasoning Process; Judgment, Objectivity; Tact, Sensitivity; Appearance; Poise, Confidence; and Leadership Potential. These two scores were combined for a total numerical score for the interview. Mr. Casto rated Candidate 1 a 78, Candidate 2 a 75, and Grievant a 54. Mr. Westfall rated Candidate 1 a 99, Candidate 2 an 81, and Grievant a 62. Ms. O'Connell rated Candidate 1 a 97, Candidate 2 an 85, and Grievant a 73.

10. All three members of the selection committee rated the successful candidate as number one and Grievant as number three in interview scoring.[8]

11. Each committee member also completed an OPS-13A, Candidate Comparison Chart, and rated each candidate in five categories: Interview, Education, Past Experience and Demonstrated Ability, Leadership or Growth Potential, and Concerns with Limitations of Candidate. Each committee member ranked each candidate in each category, with the ultimate deciding score giving equal weight to each of the five categories.[9] All three committee members ranked the successful candidate

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[7] Darlene Smith v DHHR/BCF 2011-0567-DHHR level one hearing transcript.

[8] Grievant's Exhibits # 1, 2, and 3.

[9] Ms. O'Connell ranked her preference 3, 2, 1, which gave the winning candidate the most points rather than ranking her preference 1, 2, 3 thereby giving the winning candidate the least points.

as the preferred candidate and Grievant as the least preferred candidate overall. All three committee members also ranked each candidate in the exact same order in all five categories.

12. Grievant was ranked as the preferred candidate on Education and Experience, while the successful candidate was ranked the least preferred in those categories. The successful candidate was ranked as the preferred candidate on Interview, Leadership, and Concerns, while Grievant was the least preferred in those categories.

13. The deciding factor for DHHR in the hiring decision was supervision experience and overall leadership potential.

14. The successful candidate's application listed six years of supervision experience in one job and four years of supervision experience in another job. In addition, in her interview, she discussed how her previous supervision experience would be an asset.

15. Grievant's application lists no supervision experience. She did state that she had performed some back-up for the supervisor position, but was unable to translate that to actual supervision experience in the eyes of the interviewers.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *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 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 v. Div. of Rehab. Serv.,* Docket No. 93-RS-489 (July 29, 1994).

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 Resources*, Docket No. 93-HHR-322

(June 27, 1997); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

Grievant argues Respondent's selection was arbitrary and capricious in that the interview committee ignored verifiable factors and placed inordinate weight on the interview in violation of the Respondent's policy. The policy at issue is DHHR Policy Memorandum 2106, which states:

> When selecting one employee from among several applicants, demonstrated ability, work history, references, education and the interview should be considered. The ultimate selection decision should be based upon the interviewer's judgement [sic] as to which candidate would best do the job. Hiring decisions should be based on an individual's qualifications for the essential duties of the position.

Grievant has not demonstrated that Respondent has violated this policy or acted in an arbitrary and capricious manner in its selection decision.

The selection committee used the prescribed DHHR forms in completing its selection. The same three people interviewed all three candidates, asked the candidates the same questions, and rated each candidate separately. The policy's named considerations, with the exception of references, were all considered by the committee. Despite Grievant's assertions, her tenure, education, and experience were considered and given proper weight. All five of the categories on the Candidate Comparison Chart were given equal weight, and Respondent properly ranked Grievant as the preferred candidate on Education and Experience.

The selection committee complied with the policy's mandate that the ultimate selection be based on its judgment as to who "would best do the job" based on "the essential duties of the position." Grievant did not prove that Respondent acted in an

arbitrary or capricious fashion in ranking the successful candidate as the preferred candidate on Interview, Leadership, and Concerns. All of the committee members stated concerns with Grievant's ability to express herself in her interview. It is also noted that Grievant's level one testimony demonstrates Grievant's difficulty in expressing herself. Her answers were very short, she did not know her own classification, she could not recall if there were questions about her experience in the interview, and she stated that she "was very nervous" in the interview. In addition, the notes of the interview and the testimony of Mr. Casto demonstrate that Grievant performed poorly in answering questions relating to supervision. The ability to communicate is an important quality in a supervisor and it is rational for the committee members to rank Grievant as the least preferred candidate on Leadership and Concerns. While Grievant argues that the committee members failed to independently verify the successful candidate's stated supervisory experience, Grievant cites no law or policy that requires this, nor provided any evidence that the successful applicant did, indeed, lie about her supervisory experience. According to the application and the interview, the successful candidate had ten years of direct supervisory experience and thirty years of management experience, while Grievant had no supervisory experience listed in her application and was unable to translate her back-up experience into supervisory experience for the interviewers.

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. W. VA. CODE ST.

R. § 156-1-3 (2008); *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).

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). 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 v. Div. of Rehab. Serv.,* Docket No. 93-RS-489 (July 29, 1994).

3. 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 Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

4. Grievant was unable to meet her burden of proof as Respondent's selection decision complied with DHHR policy and is supported by substantial evidence and by a rational basis.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: October 12, 2012

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Billie Thacker Catlett
Administrative Law Judge