

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**TERRY S. BRADLEY,
Grievant,**

v.

DOCKET NO. 2015-0867-MAPS

**DIVISION OF CORRECTIONS/PRUNTYTOWN
CORRECTIONAL CENTER,
Respondent.**

DECISION

Grievant, Terry S. Bradley, filed this grievance against his employer, the Division of Corrections/Pruntytown Correctional Center, on February 10, 2015, alleging that the selection process for a Correctional Officer VI position was flawed for several reasons. As relief, Grievant seeks, “[p]romotion to CO VI with the [e]ffective date being January 30, 2015 or pay-raise of 20%. Change of Promotion Policies. Discipline of those who do not keep with the ‘Core Values’ of Corrections.”¹

A hearing was held at level one on March 3, 2015, and a decision denying the grievance at that level was issued on March 27, 2015. Grievant appealed to level two on April 8, 2015, and a mediation session was held at level two on July 23, 2015. Grievant appealed to level three on August 10, 2015, and a level three hearing was held before the undersigned Administrative Law Judge on February 26, 2016. Grievant appeared *pro se*,

¹ The Grievance Board is without authority to require an employer to change its policies (*Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997)), or to order discipline of another employee (*McGee v. Division of Highways*, Docket No. 2015-0055-DOT (October 30, 2014)). Grievant also failed to present any evidence that he was entitled to a 20% pay raise.

and Respondent was represented by John H. Boothroyd, Assistant Attorney General. This matter became mature for decision on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law or written arguments, on March 28, 2016.

Synopsis

This grievance was filed when Grievant was not selected for a posted Correctional Officer VI position. Grievant made many allegations, but did not demonstrate a flaw in the selection process or that he should have been selected for the position.

The following Findings of Fact are made based on the evidence developed at levels one and three.

Findings of Fact

1. Grievant is employed by the Division of Corrections ("Corrections"), at the Pruntytown Correctional Center ("PCC") in Pruntytown, West Virginia, as a Correctional Officer II. He has been employed by Corrections for 19 years.

2. On December 15, 2014, PCC posted a Correctional Officer VI position. Grievant applied for the position, as did several other individuals, including Andrew Keener and Troy Keller, both of whom were also officers at PCC.

3. A three-member review committee (also referred to as the review board or interview committee) was appointed to interview the applicants and make a hiring recommendation. The three members of the review committee were Michael Livesay, Associate Warden of Security at PCC ("AWS"), and the Commissioner's representative and Academy representative, Captain Daniel Bailey and Dennis Peters. Several applicants

were interviewed for the position by the review committee on January 27, 2015, including Grievant and Mr. Keener.

4. Corrections' Policy Directive 132.00 states that the review committee "should consider and assess relevant factors for the posted position," such as "experience, education, functional knowledge of the posted position, and abilities to carry out the duties and functions of the position; b. intangible factors such as an applicant's attitude and work ethic; c. any other factors which the Interview Committee determines are relevant."

5. A Correctional Officer VI is a "shift or unit supervisor, chief correctional officer," or acts "in a related administrative capacity." "The officer plans, directs and reviews the work of subordinates to ensure the overall orderly function of a facility or a specialized unit." Level three Respondent's Exhibit Number 1.

6. The applicants were rated on a point system, as set forth in Corrections' Policy Directive 132.02, entitled Correctional Officer Selection Process, dated November 1, 2014, in the categories years of service, college education, score on the promotional test, supervisor recommendation, interview, interviewers' assessment, and written exercise.

7. At the end of the interview process, Mr. Keener had the highest number of points, 273.33, and the review committee unanimously recommended that Mr. Keener be placed in the posted position. This recommendation was accepted by Warden Debra Minnix. Mr. Keener was notified of his selection by letter dated January 30, 2015, with an effective start date of March 1, 2015.

8. AWS Livesay believed that Mr. Keener was the best candidate for the position, as he had the highest score at the conclusion of the selection process, and he

believed he had been a good supervisor, and possessed outstanding leadership ability based on AWS Livesay's experience with Mr. Keener.

9. During the selection process Mike Reger completed a score sheet as "reviewing manager" for both Grievant and Mr. Keener, rating them in several areas. This score was added to the interview and other scores in arriving at the total score for the applicants. Mr. Reger rated Grievant's leadership ability as average, and gave him a neutral promotion recommendation. Mr. Reger rated Mr. Keener's leadership ability as very good, and recommended him for promotion.

10. Mr. Keener had been counseled by his supervisor for inappropriate behavior, but these counseling sessions did not preclude him from being considered for promotion. Mr. Keener had also been late for work on more than multiple occasions. One of the areas scored during the selection process was dependability. Even had Mr. Keener received a score of zero in this area, he still would have received a higher point total than Grievant.

11. Grievant was ranked third out of the applicants interviewed by the review committee, with a total of 248.33 points. Had Mr. Keener not been chosen for the position, Grievant would not have been the second choice of the review committee for the position at issue.

12. At the time of the selection, Mr. Keener was employed by PCC as a Correctional Officer V, Lieutenant, and had been employed at PCC since at least 2013.

13. Mr. Keener had not submitted to or passed Corrections' physical agility test since around the time he began working at PCC, and was not told he needed to take the physical agility test at any time prior to his placement in the position at issue. Mr. Keener

took a physical agility test after he began working in the Correctional Officer VI position, and he passed this test.

14. Corrections' Policy Directive 132.02, entitled Correctional Officer Selection Process, dated November 1, 2014, states in Section V.D.3.d. states with regard to non-uniform personnel, that they must pass a physical agility test "subsequent to a job offer for the position."

15. Corrections' Policy Directive 148.01, entitled Physical Agility Testing for Correctional Officers, dated April 1, 2007, states in Section V.A. states, "[p]rior to an offer of employment, all Correctional Officer applicants must successfully complete a physical agility test." This Policy Directive states at Section B., "in order for a Correctional Officer to maintain himself/herself in an optimum position for any future Correctional Officer promotions, he/she shall successfully complete an **annual** physical agility test. Failure to successfully complete an annual physical agility test could have an impact on future Correctional Officer promotions." This Policy Directive further states at Section V.B.5. that "[a] Correctional Officer who is temporarily physically unable to participate in the physical agility test, as certified by a physician, may request a temporary deferment."

16. Applicant Troy Keller was not provided with hand-outs by anyone from the Police Academy to assist him with the testing or interview for the position at issue, nor did his supervisor coach him on how to answer the questions he would be asked during the interview.

Discussion

Grievant has the burden of proving his 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 he 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. *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).

Grievant's argument is that the selection process was flawed, making a number of unsubstantiated allegations. Grievant asserted that AWS Michael Livesay should not have been on the selection committee because he had ridden to work for some unidentified period of time with the successful applicant. He also asserted that emails he placed into

the record “show **unprofessional relationships** which create a conflict of interest,” that two of those on the Interview Board for the position at issue “had issues with me, for my prior whistleblowing of their frate[r]nization in after work activities, which they were commanded by Commissioner Rubenstein to cease but continued a short while later,” that AWS Livesay “didn’t know where the question’s came from” for the interview, that AWS Livesay did not “explain why he stated to myself and Bryson Cutright on a separate occasion that the Warden picks who gets the Captain position,” and that the successful applicant was not held accountable for being tardy or for “disregarding public safety pertaining to transporting inmates.” Grievant finally made general allegations of sexual harassment and favoritism, and asserted that the successful applicant could not, by policy, be placed in the position at issue because he had not successfully completed a physical agility test within the last year.

Many of Grievant’s allegations are without merit. These allegations will be briefly addressed. Grievant demonstrated that AWS Livesay carpooled with Mr. Keener for some period of time, but he did not demonstrate that this was anything more than a method for the two of them to save some money, which was AWS Livesay’s testimony, or that AWS Livesay had a relationship with Mr. Keener which affected his judgment. AWS Livesay testified that he had carpooled with other PCC employees too. Grievant pointed to no policy or procedure which concludes that once someone carpools with a co-worker it creates a conflict of interest in all subsequent matters, or that AWS Livesay in fact demonstrated any bias in his review of the applicants or attempted to influence the other members of the review committee. Even had AWS Livesay removed himself from the

process, the other two members of the review committee also believed the Mr. Keener was the best applicant for the position.

Grievant presented absolutely no evidence that any of the members of the review committee had any issues with him. The undersigned has no idea even which of the two members Grievant is referring to in his allegations. Further, Grievant had never raised the issue of whistleblowing prior to the submission of his post-hearing written argument, and as Respondent was not placed on notice that this was an issue that needed to be addressed, this argument was not timely raised.

As to the claim that AWS Livesay did not know where the interview questions came from, first, this is of no consequence to the adequacy of the selection process, and second, AWS Livesay testified that the Academy representative to the review committee normally brings the questions and he had no reason to doubt that this was what occurred in this instance; nor, did he have any reason to investigate whether this was the procedure which occurred here. Why would he?

As to the statement by AWS Livesay “that the Warden picks who gets the Captain position,” AWS Livesay testified that if these were indeed the words he had used, it was nothing more than a figure of speech. AWS Livesay testified that the review committee sends its recommendation to the Warden, and the Warden announces the review committee’s choice. Apparently, Grievant, however, viewed AWS Livesay’s off-hand comments literally. However, Warden Minnix did indicate that she did have the final say regarding who was awarded a position, but that she had never awarded a position to an applicant who was not recommended by the review committee, and believed that in this

case the applicant with the highest score at the conclusion of the selection process had been recommended and was awarded the position.

As to the allegation that the successful applicant was not held accountable for being tardy or for “disregarding public safety pertaining to transporting inmates,” if Mr. Keener’s supervisors have chosen to allow him to report to work late and have not indicated on his evaluations or in any disciplinary actions that he is undependable, so long as Grievant has not been treated differently, then it is of no relevance to this grievance. However, even had Mr. Keener received a rating of zero during the selection process in the area of dependability, his score would still have been higher than Grievant’s. The allegation related to the unsafe transport of inmates is based solely on an incident report prepared by Grievant, dated January 29, 2015, after the interviews had been completed, which states that an inmate was transported from the hospital to PCC “with one Officer who was not given a firearm.” Although it was insinuated, no testimony was offered that this incident had anything to do with Mr. Keener, nor was there any evidence regarding whether an investigation was conducted to confirm that this actually occurred and that a policy violation was found. This incident report is nothing more than an unsupported allegation of Grievant’s perception of the situation, which is an apt description of many of Grievant’s allegations.

Grievant also asserted that unidentified applicants had been coached and been given study guides to help prepare them for the interview and/or test questions, however, no evidence was presented to support this allegation. Based on Grievant’s questioning of Mr. Keller, it appears that Grievant believes it was Mr. Keller who was coached. Mr. Keller

flatly denied that he had been coached or received any “hand-outs” to assist him in the interview process.

Finally, as to the emails Grievant asserts “show **unprofessional relationships** which create a conflict of interest,” Grievant did not explain the basis of his allegations, but simply placed into evidence a number of emails. Grievant’s Exhibit 11 contains a number of emails between Debra Minnix and James Day, three emails between Mr. Keener and Mr. Day dated January 31, 2015, after Mr. Keener was selected, which relate to problems with an employee whose name has been redacted, one from Mr. Day to Mr. Keller with the subject heading “test” and no text, and one is from Mr. Day to Mr. Livesay, and is the only one which has any connection at all to Grievant and relates only to whether an incident report completed by Grievant was properly completed and the overtime Grievant worked. Grievant’s Exhibit 8 contains 21 pages of emails, most of which are between Mr. Keener and Michael K. Martin, Deputy Warden, a few between Warden Minnix and Mr. Keener, one from Susan Bell to Warden Minnix, Lance Yardley, and the members of the review committee indicating that an applicant would not be attending the interview, and one from Mr. Keener dated February 28, 2015, well after the selection had been made relating to reports filed by Grievant. Grievant did not indicate how any of these emails created a conflict of interest which is relevant to the issues of this grievance, and the undersigned’s review of these emails did not disclose any such conflict. As to the allegations of unprofessional relationships disclosed by the emails, only two of the emails bear any relationship whatsoever to Grievant. There is no evidence that Grievant was affected in any way by any of the other emails, and it is not his job nor mine to determine whether the emails sent by the various employees at PCC to one another are professional, absent

some impact on Grievant and the selection process at issue. While the emails between Mr. Keener and Warden Minnix indicate a level of familiarity between the two, they do not establish that the two had engaged in any type of inappropriate relationship, or that Warden Minnix had a relationship with Mr. Keener which would rise to the level of a conflict of interest.

As to the claim of sexual harassment, Grievant presented no evidence that he had been subject to any type of harassment or improper behavior. Grievant also made a claim of favoritism. For purposes of the grievance procedure, favoritism is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h). In order to establish a 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’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 did not explain his claim of favoritism, although it could be related to the unsubstantiated claim that one or more applicants received coaching to assist them in acquiring the posted position. All the applicants were asked the same questions by the same interviewers, and each

applicant was rated using the same factors. Grievant did not demonstrate that there was any favoritism prior to or during in the selection process, or that the selection process was flawed in any way.

Grievant did demonstrate that Mr. Keener had not taken a physical agility test for over a year. Policy Directive 148.01 states that officers “shall” successfully complete this test annually. It does not say that the failure to test annually will preclude an officer from being promoted, however. It says that this could impact promotions. Respondent certainly should have been making sure that all its employees were complying with this requirement, and Mr. Keener as a supervisor should have been making sure he met all requirements. However, Mr. Keener did, in fact, pass this test when it was brought to his attention that he needed to take it, and the Policy Directive does not state that the failure to have submitted to the test on an annual basis rendered Mr. Keener unqualified for the position. Grievant did not demonstrate that this omission represented a flaw in the selection process. Moreover, Grievant did not demonstrate that he should have been placed in the position at issue.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving his 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 he 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. *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 Grievant was not the most qualified applicant for the position at issue, or the second most qualified applicant, was based on relevant factors, and was not arbitrary or capricious, or clearly wrong.

6. Grievant failed to demonstrate a flaw in the selection process.

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 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: May 3, 2016