THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBRA BLAIR,
Grievant,

v. Docket No. 2016-1479-DVA

DEPARTMENT OF VETERANS ASSISTANCE,
Respondent.

DECISION

Grievant filed this action on March 30, 2016, challenging Respondent's decision not to extend her light duty work assignment answering phones under the Transitional Duty Policy. Grievant is also challenging her non-selection for a new evening Office Assistant 1 position. Grievant seeks to be placed in the Office Assistant 1 position or, in the alternative, have her light duty work extended. Grievant does not seek to be returned to her former position of Licensed Practical Nurse.

This grievance was denied at Level One following a hearing held on May 4, 2016. A Level Two mediation session was conducted on September 27, 2016. Grievant perfected her appeal to Level Three on October 14, 2016. A Level Three evidentiary hearing was conducted before the undersigned on February 10, 2017, at the Grievance Board's Westover office. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Mark S. Weiler, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on April 3, 2017.

Synopsis

Grievant was initially employed by Respondent as a Licensed Practical Nurse assigned to the Alzheimer's Unit. Grievant was subsequently injured by a resident on the Alzheimer's Unit. Due to her injuries, Grievant was placed on light duty as a receptionist. Grievant was thereafter informed that her transitional duty work answering phones was going to end. Grievant requested an extension of this assignment. Respondent did not extend Grievant's transitional duty work. During the same time period, Grievant applied for a newly created Office Assistant 1 position that was posted at the West Virginia Veterans Nursing Facility. Grievant was not selected for the position. The decision to not extend Grievant's light duty work was not demonstrated to be arbitrary and capricious. Grievant did not meet her burden of proof in demonstrating the selection process for the new Office Assistant 1 position was insufficient or fatally flawed. Finally, Grievant did not prove that the selection of the successful applicant for the position was an arbitrary and capricious decision.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant is employed by Respondent as a Licensed Practical Nurse at the West Virginia Veterans Nursing Facility in Clarksburg, West Virginia.

2. Sherri Reed is employed by Respondent as the West Virginia Veterans Nursing Facility's Assistant Administrator. As part of her Assistant Administrator duties, Ms. Reed oversees Human Resources, which includes job posting, interviews, hiring, and workers' compensation benefits.

3. On or about August 9, 2015, Grievant suffered a workplace injury while working as an LPN.

4. Grievant was off work for almost two months, receiving temporary total disability benefits. In October 2015, Grievant returned to work and was assigned light duty work answering phones under the West Virginia Veterans Nursing Facility's Transitional Duty Policy.

5. West Virginia Veterans Nursing Facility implemented the Transitional Duty Policy in 2013 to help the facility cope with rising workers' compensation insurance premiums, as well as to help injured employees return to their pre-injury position within a reasonable time period.

6. Under the Transitional Duty Policy, an employee is given short-term light duty work, if available, in an effort to help the employee gradually return to their pre-injury position. If there is no improvement in condition and the employee cannot return to her pre-injury employment, the temporary assignment will end and the employee will go back to receiving temporary total disability benefits while recovering from the injury. Grievant acknowledged that to be eligible for transitional duty work an employee must have the potential of returning to their pre-injury position.

7. At the time Grievant was assigned light duty telephone work, she had been given a 5 lb. lifting restriction by her medical provider. Grievant acknowledged that in the course of her LPN job duties, she regularly lifts more than 5 lbs.

8. In January 2016, Grievant was told her transitional duty work answering phones was going to end. Grievant had been in the program for more than 90 days.

Grievant requested an extension. At the time of her request, Grievant still was working under a 5lb lifting restriction. Grievant was unable to return to her pre-injury position.

9. West Virginia Veterans Nursing Facility did not extend Grievant's transitional duty work. Respondent concluded that Grievant was not able to carry out the essential functions of an LPN with or without reasonable accommodation. Grievant ultimately had surgery and applied for long-term disability.

10. During this same time period, Grievant applied for a newly created Office Assistant 1 position that was posted at the West Virginia Veterans Nursing Facility. Grievant, along with several in-house and outside candidates interviewed for the position.

11. The initiative to establish a new Office Assistant 1 position belonged to Assistant Administrator Sherri Reed. The process started in November 2015, when Ms. Reed sought approval from the Division of Personnel to post for such a position.

12. According to Ms. Reed, the new Office Assistant 1 would be stationed at the reception desk located on the 3rd Floor Administrative Level. Ms. Reed indicated that she was seeking to relieve the evening nurses from having to answer phones and greeting guests and visitors. The duties she envisioned for the evening Office Assistant 1 were to perform traditional reception work. Also, she wanted the shift to overlap to some extent with the daytime Office Assistant 2.

13. The new evening Office Assistant 1 would report directly to Ms. Reed. The evening Office Assistant 1 position was not the same position as the light duty telephone work assigned to employees under the Transitional Duty Policy.

14. Ms. Reed selected Linda Malcomb, Office Assistant 3, Support Services, to be part of the interview team. Ms. Reed selected Ms. Malcomb because of her interviewing and management experience.

15. Ms. Reed and Ms. Malcomb interviewed Grievant and other in-house candidates. They also interviewed outside candidates, including the individual who was hired, Karen Lewis. Ms. Malcomb indicated that Ms. Lewis stood out because of her experience, knowledge and pleasant personality. Grievant did not finish in the top two of the interviewed candidates for the position.

16. Ms. Reed concluded that Ms. Lewis was the best candidate for the position. She felt Ms. Lewis had better customer service experience, particularly taking into consideration her front desk experience at WVU Hospital, where she served as the central point of contact for new patient arrivals, greeting visitors, answering phone calls and performing other administrative duties.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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 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).

In January 2016, Grievant requested an extension of her Transitional Duty Policy temporary work assignment answering phones. Grievant was denied an extension. The record is undisputed that Grievant had been working under the Transitional Duty Policy for more than 90 days. At the time of the decision, Grievant did not have the potential to return to her pre-injury LPN position due to her 5 lb. lifting restriction. In the present case, the decision to not extend Grievant's light duty work assignment answering phones was consistent with Respondent's policy. Grievant did not establish that Respondent's actions were arbitrary and capricious.[1]

Turning to Grievant's challenge to her non-selection for the new evening Office Assistant 1 position, unsuccessful applicants, such as Grievant, who grieve their

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[1]"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 Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the 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*.

non-selection for a posted position bear the burden of proving, by a preponderance of the evidence, that the employer "violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).

As previously noted, it is well-established that the Grievance Board's job is not to engage in the selection process but rather to conduct a "review of the legal sufficiency of the selection process." *Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). In conducting such review, the Grievance Board has consistently held that "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." *Jordan*, *supra*.

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. 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)).

Grievant applied for the new evening Office Assistant 1 position at the West Virginia Veterans Nursing Facility and was not selected. Grievant does not assert that she is more

qualified or that she has more experience than the successful applicant. In addition, Grievant does not allege retaliation or favoritism.

The record established that in November 2015, the West Virginia Veterans Nursing Facility Assistant Administrator sought to create a new evening Office Assistant 1 position. The Division of Personnel approved the request. Ms. Reed was seeking to relieve the evening nurses from having to answer phones and greet visitors. She was seeking to have someone perform traditional front office work and she wanted someone who could work with the daytime Office Assistant 2 and help her with her duties. Ms. Reed wanted someone with customer service and communication skills. The criteria established by Ms. Reed for the position was reasonable.

The record established that Ms. Reed and Ms. Malcomb interviewed Grievant and Ms. Karen Lewis, as well as several other candidates. Ms. Lewis ranked the highest. Ms. Reed and Ms. Malcomb concluded that Ms. Lewis was the best fit for the position. Ms. Lewis' front desk experience at WVU Hospital was a highlight. Ms. Reed's selection of Ms. Lewis was based on lawful, reasonable factors and considerations. There is no evidence that the selection of Ms. Lewis was arbitrary and capricious.

Finally, there is no statute, rule or regulation or Division of Personnel policy that would automatically give the new Office Assistant 1 position to Grievant. The Division of Personnel's Workers' Compensation Reinstatement Policy states, in pertinent part, the following:

> It shall be a discriminatory practice for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment, upon demand for such reinstatement, provided that

> the position is available and the employee is not disabled from performing the duties of the position.[2]

The Division of Personnel Workers' Compensation Reinstatement Policy goes on to provide:

> If the former or pre-injury position is not available, the employee shall be reinstated to another comparable position with duties the employee is capable of performing.[3]

In the instant case, Grievant is not seeking to be reinstated to her pre-injury LPN position. In fact, Grievant was not denied reinstatement to her pre-injury position. The above section of the Division of Personnel Policy addresses a situation where an employees returns from a workplace injury and her job is no longer available to her. When these circumstances occur, the employee is to be placed in a comparable position, if available.

A "comparable position" is defined as a position which is comparable in wages, working conditions, and, to the extent reasonable practicable, duties to the position held at the time of the injury. (*Id.*). The undisputed record of this case indicated that Grievant's former position was still available to her. Therefore, West Virginia Veterans Nursing Facility was not under any requirement to give her a comparable available position. The record is also undisputed that Grievant was not seeking to placed in her pre-injury LPN position, or a comparable positon.

It is also clear that an Office Assistant 1 position is not similar to a LPN position in wages, working conditions, and duties. The undersigned recognizes that Grievant could

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[2]Division of Personnel Workers' Compensation Policy, Section III (E) (2).

[3]Division of Personnel Workers' Compensation Policy, Section III (E) (2)(a).

have requested reasonable accommodation in her LPN position, but she did not. Grievant did not provide any information to indicate that she can perform the essential LPN job functions with or without accommodation. The record of this case does not provide the undersigned with a finding that Respondent acted in an arbitrary and capricious fashion, or that the selection process for the new Office Assistant 1 position was insufficient or fatally flawed.

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. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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. "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 Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the 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*.

3. It is well-established that the Grievance Board's job is not to engage in the selection process but rather to conduct a "review of the legal sufficiency of the selection process." *Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). In conducting such review, the Grievance Board has consistently held that "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." *Jordan*, *supra*.

4. 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. 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)).

5. Respondent demonstrated that it followed its policy under the West Virginia Veterans Nursing Facility Transitional Duty Policy when it denied Grievant's request to

extend her light duty work assignment. Grievant did not prove by a preponderance of the evidence that Respondent acted in an arbitrary and capricious manner.

6. Grievant did not meet her burden of proving the selection process for the new Office Assistant 1 position was insufficient or fatally flawed. Grievant failed to prove that the selection of the successful applicant for the position was an arbitrary and capricious decision. Grievant did not prove the misapplication of any statute, policy, rule or regulation 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 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: May 1, 2017

Ronald L. Reece
Administrative Law Judge