THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LATOSHA GREENE,

Grievant,

v. **Docket No. 2015-1615-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/JACKIE WITHROW HOSPITAL,

Respondent.

DECISION

Grievant, LaTosha Greene, filed a grievance against her employer, Respondent, Department of Health and Human Resources-Jackie Withrow Hospital dated June 24, 2015, stating as follows: "[a]pplied for OA3 position, but never interviewed. Informed on June 16 that position had been filled."[1] As relief sought, Grievant seeks, "[t]o be made whole in every way including placement in position or a reposting for the position."

A level one hearing was conducted on July 5, 2016. The grievance was denied by decision dated July 26, 2016. Grievant perfected her appeal to level two on August 3, 2016. A level two mediation was conducted on October 4, 2016. Grievant appealed to level three on October 11, 2016. The level three hearing in this matter was scheduled to be held on February 27, 2017, in Beckley, West Virginia. However, in lieu of an evidentiary hearing, the parties agreed to submit this matter for a decision at level three based upon the record developed below. Grievant appeared by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent

[1] While Grievant stated that she applied for an OA III position, at level one it was discovered that the position for which she applied was actually an OA II position. *See*, Respondent's Exhibit 1, level one hearing.

appeared by counsel, Harry C. Bruner, Jr., Esquire, Assistant Attorney General. This matter became mature for decision on April 7, 2017, upon the receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant applied for an Office Assistant II position. Grievant was not granted an interview for the same, and someone else was selected to fill the position. Grievant asserts that Respondent's actions were improper, arbitrary and capricious, and that the selection process was flawed. Respondent denies Grievant's claims, and argues that it was not required to interview Grievant for the position because she did not meet the minimum qualifications for the position. Grievant failed to meet the burden of proving her 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 is employed by Respondent has a health service worker at Jackie Withrow Hospital. Grievant has been employed by Respondent for approximately four years.

2. Angela Booker is employed by Respondent as the CEO of Jackie Withrow Hospital. Serena Hamb is the Human Resources Director at Jackie Withrow Hospital. Saundra Swafford is employed as Ms. Hamb's assistant in the Human Resources Office.

3. On March 26, 2015, Respondent posted a vacancy for an Office Assistant II (OA2) position, posting JACK15034, with an application deadline of April 7, 2015. The posting listed the following as requirements for the position: "[t]raining: Graduation from

a standard high school or the equivalent. Experience: Two years of full-time or equivalent part-time paid experience in routine office work. Substitution: College hours, related business school, or vocational training may be substituted through an established formula for the required experience."[2]

4. Grievant applied for the Office Assistant II position on or about April 7, 2016, by submitting her completed application to Jackie Withrow Hospital's ("JWH") human resources office.[3] Upon receipt of the same in the human resources office, a reviewer, believed to be Saundra Swafford, noted on the application that Grievant held a word processing certificate.[4]

5. Upon review of Grievant's application, Saundra Swafford determined that Grievant lacked the minimum qualifications for the position. Grievant's application was not sent to the Division of Personnel ("DOP") for a decision on minimum qualifications.

6. Based upon the determination that Grievant lacked the minimum qualifications for the position, Grievant was not interviewed for the position. However, no one from the human resources office informed Grievant that she lacked the minimum qualifications, or that she would not be interviewed for the position. Upon information and belief, Respondent did not give Grievant a reason for not interviewing her until after this grievance action was filed.

7. Respondent did not send Grievant any type of written communication concerning her application for the position. For instance, Respondent did not inform

[2] *See*, Respondent's Exhibit 2, level one hearing, Office Assistant II posting.
[3] *See*, Respondent's Exhibit 1, level one hearing, Application.
[4] *See*, Respondent's Exhibit 1; testimony of Saundra Swafford at level one hearing.

Grievant of its receipt of her application, or that she would not be interviewed for the position. Further, Grievant was not informed when the position was filled.

Discussion

As this is not a disciplinary matter, Grievant bears 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). "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 & 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.*

In her statement of grievance, Grievant argues that she was improperly denied an interview for the position, and requests placement in the position or that it be reposted. In her proposed Findings of Fact and Conclusions of Law, Grievant asserts that Respondent violated its own policy, Policy Memorandum 2106, by "refusing Grievant the ability to apply for the contested position. The selection process for which Grievant applied was conducted in a manner that was procedurally flawed and arbitrary and capricious."[5] Respondent denies Grievant's claims, and argues that Grievant did not meet the minimum qualifications for the position; therefore, it was not required to interview

[5] *See*, Grievant's proposed Findings of Fact and Conclusions of Law.

her pursuant to the Administrative Rule. Respondent also urges the adoption of the rulings of the level one grievance evaluator.

At level one, the grievance evaluator noted that this grievance was presented in an unusual posture for a non-selection case in that Grievant was not interviewed for the position at issue. She further noted that the two issues to be decided in this matter are "whether Respondent was clearly wrong or acted in an arbitrary and capricious manner by not interviewing Grievant and whether Grievant had the right to be interviewed. . . ." The level one grievance evaluator found that Grievant had no absolute right to be granted an interview, and that Respondent's decision not to interview Grievant was reasonable and was not arbitrary and capricious, relying on certain provisions of the Administrative Rule, which is part of the West Virginia State Code of Regulations, and DHHR Policy Memorandum 2106. It is noted that, upon information and belief, DHHR Policy Memorandum 2106 is an internal DHHR policy, and it was not presented as an exhibit at level one.

Grievant argues in her proposed Findings of Fact and Conclusions of Law that the selection process was flawed and arbitrary and capricious. It appears, however, that Grievant's chief complaint is that Respondent did not grant her an interview. "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.,* 789 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 & Human*

Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See 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 v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

The evidence presented demonstrated that Respondent did not grant Grievant an interview because its human resources office determined that Grievant did not meet the minimum qualifications for the position. "Minimum qualifications" is defined by the Administrative Rule as "[t]he least experience and/or training required by the Board for employment in a class of position and admission to an examination for that class of position." W.VA. CODE ST. R. § 143-1-3.53 (2016). Grievant applied for the position by submitting her written application on or about April 7, 2016.[6] The posting listed the following as "requirements" for the position: "[t]raining: Graduation from a standard high school or the equivalent. Experience: Two years of full-time or equivalent part-time paid experience in routine office work. Substitution: College hours, related business school,

[6] Grievant asserts in her last proposed Conclusion of Law that she was refused the ability to apply for the position; however, that is not accurate. She applied, but was not interviewed or considered for the position.

or vocational training may be substituted through an established formula for the required experience."[7] As indicated in her application, Grievant has received a high school diploma. Grievant listed no other education or training. However, human resources noted that Grievant had a word processing certificate. Grievant claimed no paid experience in routine office work. The only work history listed on the application is Grievant's current health service worker position at JWH.[8] Based upon Grievant's application, Respondent's human resources office determined that Grievant did not meet the minimum qualifications to hold the position. As such, Respondent did not interview Grievant or consider her for the same.

Pursuant to the Administrative Rule, "[t]he appointing authority shall give due consideration to those employees who apply and are eligible for the posted vacancy." W.VA. CODE ST. R. § 143-1-9.5(d) (2016). The evidence presented demonstrates that Respondent considered Grievant's application, but determined that she lacked the minimum qualifications for the job; therefore, she was ineligible to hold the position. Neither party presented authority suggesting that Respondent was required to interview Grievant even though she did not meet the minimum qualifications to hold the position. Further, the undersigned has found no provision of the Administrative Rule that would require Respondent to interview someone who did not meet the minimum qualifications for a posted position. Therefore, the undersigned cannot conclude that Respondent's decision not to interview Grievant was arbitrary and capricious, or otherwise improper. Further, the failure to grant Grievant an interview does not render the selection process

[7] *See*, Respondent's Exhibit 2, posting.
[8] *See*, Respondent's Exhibit 1, application, level one.

flawed because Grievant did not meet the minimum qualifications of the position. She was not qualified to hold the position for which she applied even if she had been selected.

It is noted that Grievant has not explicitly argued that she met the minimum qualifications of the position. However, Grievant appears to assert that Respondent erred in making that determination on its own without sending it to the Division of Personnel. At level one, Ms. Booker erroneously testified that the qualification determination was made by DOP in Charleston. However, that was corrected by the testimony of Ms. Hamb and Ms. Swafford. Ms. Swafford testified that she made the determination, and that such was routine procedure. Grievant presented no evidence to suggest that Respondent's human resources office was not permitted by rule, policy, or regulation to make the qualification determination on its own. Further, Grievant presented no evidence to suggest that Respondent was required to submit Grievant's application to DOP for the determination. Accordingly, Grievant failed to prove her claims by a preponderance of the evidence.

Lastly, Grievant asserts in her proposed Findings of Fact and Conclusions of Law that Respondent violated a provision of DHHR Policy Memorandum 2106 which states as follows: "[t]hose applicants who clearly do not meet the minimum qualifications for the positions should be so notified, thanked for their interest in employment with the Department and invited to apply for future positions for which they qualify. While it is unclear whether or not an applicant meets the minimum requirements, clarification may be obtained from the Division of Personnel, Staffing Services Section." It is undisputed that Respondent did not inform Grievant of its determination that she did not meet the minimum qualifications of the position. However, Policy Memorandum 2106 was not

presented at level one as an exhibit, and it has not otherwise been made a part of the record of this grievance. The undersigned has not been provided a copy of Policy Memorandum 2106 to review. Further, the provisions of the same noted in the level one decision are not the same ones referenced by Grievant in her proposals. Policy Memorandum 2106 is not a readily accessible public record, such as a statute, rule, or regulation. Upon information and belief, it is an internal DHHR policy memorandum. The undersigned cannot determine if the policy was violated if such was not presented as evidence. Accordingly, the Grievant has failed to prove her claims pertaining to DHHR Policy Memorandum 2106 by a preponderance of the evidence. Accordingly, this grievance is denied.

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 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). "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 & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

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.,* 789 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 Res.*, Docket No. 93-HHR-322 (June 27, 1997).

3. "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 v. Dep’t of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

4. Grievant failed to prove by a preponderance of the evidence that Respondent’s decision not to interview her for the Office Assistant II position was improper, or arbitrary and capricious. Further, Grievant failed to prove by a preponderance of the evidence her claims that the selection process was flawed. Grievant failed to prove her claims that Respondent violated DHHR Policy Memorandum 2106 by a preponderance of the evidence.

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: June 1, 2017.

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Carrie H. LeFevre
Administrative Law Judge