

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**DAWN ZIMMERLINK,
Grievant,**

v.

Docket No. 2016-0967-WVU

**WEST VIRGINIA UNIVERSITY,
Respondent.**

DECISION

Grievant, Dawn Zimerlink, employed by West Virginia University as an Operations Coordinator, filed this action on December 3, 2015, stating:

My current position at WVU is being eliminated and I am in the Career Transition Program. I applied for a Purchasing Agent position, Number 00941. Even though I was the most qualified applicant, I was not selected for the position.

For relief, Grievant seeks placement in the position, back pay with interest, and benefits to which she is entitled.

A Level One hearing was conducted on February 17, 2016. The grievance was denied by Chief Grievance Administrator Sue Keller by decision dated March 4, 2016. A Level Two mediation session was conducted on June 23, 2016. A Level Three evidentiary hearing was scheduled to be conducted before the undersigned on January 12, 2017. The parties requested that the case be submitted on the lower level record prior to this hearing, and this request was granted by the undersigned. Respondent appeared by its counsel, Samuel R. Spatafore, Assistant Attorney General. Grievant appeared by her representative, Jeremy Radabaugh, West Virginia Education Association. This matter

became mature for consideration upon receipt of the last of the parties' fact/law proposals on February 13, 2017.

Synopsis

Grievant is employed by West Virginia University as an Operations Coordinator for Facilities Management. Grievant argues that she was the most qualified applicant for a Purchasing Agent position based on her experience which requires that she complete duties similar to those of a Purchasing Agent. Grievant also asserts that consideration should be given to her seniority earned while working at West Virginia University. The determination of which applicant for a position will not be changed absent a showing that the decision was arbitrary and capricious. Grievant failed to demonstrate that her qualifications were superior to those of the successful applicant, or that there was a flaw in the selection process.

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

Findings of Fact

1. Grievant has been employed by West Virginia University for approximately twenty-four years and has held the position of Operations Coordinator for Facilities Management, a classified nonexempt position, since 2003.
2. The Operations Coordinator position held by Grievant was eliminated in December 2015.
3. Upon elimination of the position, Grievant was placed in the Career Transition Program. This program allowed Grievant to remain as an Operations Coordinator until she is provided another position.

4. Subsequent to being placed in the Career Transition Program, Grievant applied for a newly-created position of Purchasing Agent in the Business Services Offices.

5. An interview committee comprised of Robert Beck, Associate Director Procurement, Dana Salotti, Category Manager in Procurement and Frances Jones, Purchasing Agent Procurement, interviewed three applicants who met the minimum qualifications for the position. Each applicant was asked to respond to the same fifteen questions and were rated individually by the three interviewers on a scale from 0 (Not evident/Not acceptable) to 4 (Exceptional) for each response.

6. All three interview committee members indicated that Grievant had difficulty answering the interview questions and her responses were negative in tone.

7. At the conclusion of the interviews, the committee members combined their individual scores to determine the total number of points awarded each applicant.

8. Grievant received a total of eighty-six points, the lowest score of the three applicants.

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 Bd. 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 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. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter, supra*.¹ 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 that selection decisions are largely the prerogatives of management. While the individuals who are chosen should be qualified and able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. *Mihaliak v. Div. of Rehabilitation Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998); *Ashley v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-070 (June 2, 1995); *McClure v. W. Va. Workers' Compensation Fund*, Docket Nos. 89-WCF-208/209 (Aug. 7, 1989). An agency's decision as to who is the best qualified

¹W. VA. CODE § 18B-7-3(e)(3) provides that, "If more than one qualified, nonexempt classified employee applies, the best qualified nonexempt classified employee is awarded the position. In instances where the classified employees are equally qualified, the nonexempt classified employee with the greatest amount of continuous seniority at that institution is awarded the position."

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 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*.

Grievant argues she was the most qualified applicant based on her experience as an Operations Coordinator which requires that she complete duties similar to those of a Purchasing Agent. Grievant also asserts that consideration should have been given to her seniority earned while working at West Virginia University. Respondent argues that seniority is not a consideration when an employee holding a nonexempt position seeks an exempt position. In addition, the determination of the most qualified individual for the position was not arbitrary and capricious as established by the evidence that the committee members fairly evaluated the applicants.

WEST VIRGINIA CODE § 18B-7-3(e)(3) provides that seniority is the determining factor when multiple employees holding classified nonexempt positions are equally qualified for another nonexempt position. There is no such provision for the consideration of seniority when a classified nonexempt employee seeks a classified exempt position. Because the position of Purchasing Agent is an exempt position, seniority was not applicable in the instant case.

As noted above, the determination of which applicant is the most qualified for a position will not be disturbed absent a showing that the decision was arbitrary and capricious. The record demonstrated that all three members of the interview committee indicated that Grievant appeared to experience difficulty with her responses which ultimately were not as well stated as those of the other applicants. In addition, all members of the interview committee perceived Grievant's responses as being negative in tone. In any event, there is no dispute that all three applicants were evaluated using the identical means and methods. The record did not establish that Grievant's qualifications were

superior to those of the successful applicant, and did not establish a flaw in the selection process.

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 Bd. 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. 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. *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).

3. The Grievance Board recognizes that selection decisions are largely the prerogatives of management. While the individuals who are chosen should be qualified and able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. *Mihaliak v. Div. of Rehabilitation Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998); *Ashley v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-070 (June 2, 1995); *McClure v. W. Va. Workers' Compensation Fund*, Docket Nos.

89-WCF-208/209 (Aug. 7, 1989). 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. Grievant did not demonstrate by a preponderance of the evidence any flaws in the selection process, or that the selection decision was arbitrary and capricious.

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: March 17, 2017

Ronald L. Reece
Administrative Law Judge