THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DONALD H. BURACKER,
Grievant,

v. **DOCKET NO. 2017-1153-SU**

SHEPHERD UNIVERSITY,
Respondent.

DECISION

Grievant, Donald H. Buracker, filed a grievance against his employer, Shepherd University, on November 1, 2016. The statement of grievance reads, "John McAvoy and Alan Perdue filled a position for Police Investigator I without interview or any form of consideration of the Grievant in violation of Chapter 18B of WV Code." As relief, Grievant sought: "1. Letter of apology from Chief McAvoy acknowledging he didn't follow State Code in filling the said position (1st of 2 positions).[1] 2. Corrective action plan by University to ensure proper procedure[s] are followed in all future police hires. 3. Commitment letter from Shepherd University not to discriminate/retaliate taking grievance action to resolve problem."[2] In his level three appeal, Grievant omitted from his requested relief the

[1] "[R]elief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the Grievance Board." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993). Thus, relief such as a public apology is not available from this Grievance Board. *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (Mar. 9, 2004); *Hall v. W. Va. Div. of Corr.*, Docket No. 89-CORR-687 (Oct. 19, 1990). "The Grievance Board has also held, 'a letter stating that actions of certain employees were inappropriate is in the nature of a request for an apology, which is not available from this Grievance Board.' *Emrick, supra*." *Lawrence v. Bluefield State College*, Docket No. 2008-0666-BSC (June 19, 2008).

[2] In these second and third relief requests, "Grievant is essentially asking the Grievance Board to tell Respondent to follow the law. The Grievance Board is not the proper forum for such

commitment letter request, and added, "One dollar in damages."[3] At the level three hearing, Grievant amended the relief requested to include backpay from the time the position at issue was filled until the time Grievant was offered a different posted Campus Police Investigator I position in late October 2016.

A hearing was held at level one on December 8, 2016, and the grievance was denied at that level on December 13, 2016. Grievant appealed to level two on March 6, 2017, and a mediation session was held on July 27, 2017. Grievant appealed to level three on August 11, 2017. A level three hearing was held before the undersigned Administrative Law Judge on March 6, 2018, in the Grievance Board's Westover office.

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an Order, which would have no force and effect and be meaningless. The Grievance Board has no enforcement powers, and telling Respondent to follow the law is something it is already required to do." *Joy v. Jefferson County Bd. of Educ.,* Docket No. 2016-1687-JefED (May 16, 2017).

> Injunctive relief is an extraordinary remedy, particularly in administrative proceedings. *Appalachian Power Co. v. W. Va. Public Service Commission*, 296 S.E.2d 887 (W. Va. 1982). In the few cases in which cease and desist orders have been issued at Level IV, it was established that the employer had engaged in a pattern of harassment, discrimination or other egregious conduct, and that it was likely that the conduct would continue. *See, Helvey v. W. Va. Workers' Compensation Fund*, Docket No. 91-WCF-034 (Mar. 30, 1992); *White v. Monongalia County Bd. of Educ.,* Docket No. 93-30-371 (Mar. 30, 1994).

Baker v. Bd. of Dir./Concord College, Docket No. 97-BOD-265 (Oct. 8, 1997).

[3] The Grievance Board has never awarded punitive or tort-like damages in making an employee whole, and Grievant has not demonstrated that his case calls for an exception.

> *W. Va. Code* § 29-6A-5(b) allows for the provision of "fair and equitable" relief which has been interpreted by the Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering. *Spangler v. Cabell County Bd. of Educ.,* Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

Miker v. W. Va. Univ., Docket No. 06-HE-133 (July 18, 2006).

Grievant was represented at the level one hearing by Nancy Dalby, Esquire, and at the level three hearing by Christian J. Riddell, Esquire, Stedman & Riddell, and Respondent was represented by K. Alan Perdue, General Counsel, at the level one hearing, and by Dawn E. George, Assistant Attorney General, at the level three hearing. This matter became mature for decision on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law, on April 17, 2018.

Synopsis

Grievant has been employed by Respondent for 28 years as a part-time security or police officer, and his classification for several years has been Campus Police Investigator I. Grievant applied for a posted full-time Campus Police Investigator I position, but was not considered for the position because he did not hold an Associate's Degree, as was set forth in the posting as a minimum requirement. Several months after this posting, a second Campus Police Investigator I position was posted, for which Grievant did not apply. During this time period, there was a change in the person having oversight of the Public Safety Department, and after speaking with Grievant about Grievant's disappointment in not being considered for this first posted position, the new person offered Grievant the second posted position, if he would apply. Grievant did not apply, nor did he indicate that he would accept this offer. Grievant argued Respondent acted in an arbitrary and capricious manner in its application of the Associate's Degree requirement. Respondent had chosen to consider experience in lieu of the educational requirement in other instances when no applicants with an Associate's Degree applied, or were willing to accept an offer of employment. In this instance, Grievant was already in the very same classified position as a part-time employee. It is inherently unreasonable to consider Grievant not minimally

qualified for the position when he is already working in the classification. Grievant should have been offered the posted full-time position.

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

Findings of Fact

1. Grievant has been employed by Respondent, Shepherd University ("SU"), in the Public Safety Department, for 28 years as a part-time security or police officer. His classification for a number of years has been Campus Police Investigator I.

2. Respondent posted a full-time Campus Police Investigator I position, to be employed in the Public Safety Department, on June 16, 2016. The posting stated that an Associate's Degree was a minimum qualification for the position.

3. K. Alan Perdue, General Counsel for SU, was the executive level officer at SU responsible for Public Safety Department operations at the time the position at issue was posted. About 10 years ago, Mr. Perdue and the Chief of the Department at that time, Scott Beckner, decided that an Associate's Degree would be a minimum requirement for the Campus Police Investigator I positions. They were looking for individuals to fill these positions who were capable of writing better investigative reports, and were better versed in technology issues.

4. Grievant applied for the posted full-time position in July 2016. Grievant does not have an Associate's Degree or a more advanced degree, and was not considered minimally qualified for the position. In addition to his employment at SU, Grievant also had been employed as a Sergeant, Lieutenant, and Chief of the Harpers Ferry Police

Department from 1991 to 2011, and he completed the 1991 West Virginia Police Training Academy.

5. Pat Smith was also a part-time Campus Police Investigator I, and she had a Bachelor's Degree. Ms. Smith applied for the posted Campus Police Investigator I position, and she was offered the position as she was the only internal applicant who met the minimum qualifications for the position. Ms. Smith was not interviewed, as it is the practice at SU that interviews are not conducted if there are qualified internal applicants for a posted position, nor are non-employee applicants considered. Ms. Smith did not accept the position because the salary offered did not meet her requirements.

6. Grievant had more seniority than Ms. Smith, but was not offered the position because he did not hold an Associate's Degree. There were no other internal applicants for the position.

7. There were one or more non-employee applicants for the Campus Police Investigator I position at issue who had acquired Associate's Degrees. The qualified applicants were interviewed by the three Sergeants employed by Respondent in the Department of Public Safety. The Sergeants recommended to Chief John McAvoy that a Mr. Ray be hired to fill the position. Mr. Ray has an Associate's Degree, and had been working as a police officer in Virginia. Mr. Ray was offered the position and accepted the position in early October 2016, and began his employment with SU sometime in November 2016.

8. SU has in place a policy which allows supervisors the discretion to consider an applicant's experience in lieu of minimum education requirements, and to substitute the

experience for education if they choose to do so. Chief McAvoy did not choose to consider Grievant's many years of experience as a substitute for an Associate's Degree.

9. SU hired R.J. James as a Campus Police Investigator I sometime prior to January 2016. Mr. James had previously been employed by SU in this same position, but had resigned. Mr. James did not have as Associate's Degree or more advanced degree, but his prior experience in the position and his experience as a K-9 Officer was substituted for the Associate's Degree requirement.

10. SU hired Matt Harper as a Campus Police Investigator I in approximately January 2016. Mr. Harper did not have an Associate's Degree, or more advanced degree, but there were no applicants for the posted position who had an Associate's Degree who were willing to accept the position. Mr. Harper's experience was substituted for the degree requirement.

11. Sometime between August and October 2016, oversight of the Public Safety Department was moved from Mr. Perdue to SU Vice-President for Administration James Vigil. Grievant contacted Mr. Vigil around October 26, 2016, after he learned that Mr. Ray had been hired, expressing his displeasure with not being selected for the position at issue, and indicating that he would file a grievance. At this time, a second full-time Campus Police Investigator I position had been posted. Mr. Vigil advised Grievant in writing the next day, that, if he applied for the newly posted position, he would accept Grievant's experience as a substitute for the educational requirement of an Associate's Degree. Grievant did not apply for the newly posted position, and he was not placed in the position.

12. At the level one hearing Grievant was offered a full-time Campus Police Investigator I position at SU, at the same hourly rate of pay as he was being paid as a part-

time employee. Grievant stated that he did not wish to accept the position at the offered rate of pay at that time.

Discussion

Grievant has the burden of proving her 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). "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 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.*

Grievant's burden is to demonstrate that Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Surbaugh v. Dep't of Health and Human Serv.*, Docket No. 97-HHR-235 (Sept. 29, 1997). If a grievant can demonstrate the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion, this Board can require the employer to review the qualifications of the grievant versus the successful applicant. *Thibault, supra; Jones v. Bd. of Trustees/W. Va. Univ.*, Docket No. 90-BOT-283 (Mar. 28, 1991).

"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 argued Respondent acted in an arbitrary and capricious manner by failing to substitute his many years of experience in law enforcement for the educational requirement.[4] Respondent argued that it was not required to substitute the experience for education, and even though supervisors have the discretion to do so. Respondent acknowledged that it had allowed the substitution of experience for education in the past, but only when there were no applicants with the minimum educational requirements willing to accept the position.

While Respondent is correct that the decision whether to substitute experience for education is discretionary, this discretion cannot be exercised in an arbitrary and capricious manner. Sometimes it is difficult to determine whether an action is arbitrary and capricious. This is not one of those instances. Respondent's decision in this case was unreasonable, implausible, and in complete disregard of the facts. Grievant was employed in the very same classification for which he applied, as a part-time employee. If he was minimally qualified to be a part-time employee in this classification, then he was minimally qualified to be a full-time employee. As the only employee applicant other than Ms. Smith, under

[4] Grievant argued at the level three hearing that Grievant was discriminated against because of his age. The undersigned pointed out that the Grievance Board has ruled that age discrimination is not considered by the Grievance Board, except under the definition of discrimination in the grievance procedure. Grievant did not pursue this argument in his post-hearing written argument, and it is deemed abandoned.

the policies applied by Respondent, Grievant should have been offered the posted position.

Respondent pointed out, however, that when offered the second posted position on two occasions, Grievant did not accept the position, which Respondent believed was proof that Grievant did not really want the position, and that he was pursuing this grievance simply to make a point rather than looking for any real relief, as Grievant has a full-time job with a different employer making substantially more than Respondent generally pays Campus Police Investigator I's. While this may be true, it is speculation. Certainly, Respondent's offer seems to have been made in an effort to avoid a grievance the first time, and to settle the grievance the second time. Grievant was not required to accept this second position which was posted later in time rather than pursuing the first position and this grievance.

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, 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). This 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).

3. 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 demonstrated that Respondent acted in an arbitrary and capricious in its refusal to substitute his experience for the educational requirement, and that as the only remaining internal applicant, he should have been offered the position at issue.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to offer Grievant the full-time Campus Police Investigator I position, fully explaining the salary and benefits available to him. Respondent is further **ORDERED** to pay Grievant backpay from the date Mr. Ray was offered the position at issue in October 2016, to the date Grievant was offered the second posted position, in writing, by Mr. Vigil in late October 2016, in the amount of the difference between 40 hours per week and the actual number of hours Grievant worked as a part-time employee during that time, at the same rate of pay as Grievant earned as a part-time employee, plus any benefits to which he would have been

entitled as a full-time employee, for which compensation is possible. As Grievant did not request any interest, none will be awarded.

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).

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BRENDA L. GOULD
Deputy Chief Administrative Law Judge

Date: April 30, 2018