

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID SCOTT CLARK,
Grievant,

v.

Docket No. 2018-0759-DOR

OFFICES OF THE INSURANCE COMMISSIONER,
Respondent, and

TERESA LYNN BAKER
Intervenor.

DECISION

David Scott Clark, Grievant, filed this grievance against his employer the Workers' Compensation Office of Judges, currently a department within the West Virginia Offices of the Insurance Commissioner ("OIC"), Respondent. The original grievance was filed on November 22, 2017, and the grievance statement provides:

I applied for the posted position of Insurance Program Manager (#INS 170042). The successful applicant was promoted to the position over me and several other individuals who were substantially more qualified in the areas of experience, education, and tenure both with the Office of Judges and state government as a whole demonstrating clear favoritism due to a relationship outside of the work environment. The Chief Administrative Law Judge's action in selecting the individual was arbitrary and capricious, and the selection process was so flawed as to render it clearly wrong.

The relief sought states:

To be installed as the Insurance Program Manager as contemplated by Division of Personnel statute and procedural rules governing the factors to be considered in the hiring process, including education, experience, and seniority. In the alternative, I request the position be reposted and applicants re-interviewed with proper consideration to the aforementioned factors...

A conference was held at level one on November 30, 2017, and the grievance was denied at that level on December 15, 2017. Grievant appealed to level two on December 22, 2017, and a mediation session was held on March 6, 2018. Grievant appealed to level three on March 15, 2018. On April 6, 2018, Teresa Lynn Baker was granted Intervenor status. A level three hearing was held before the undersigned Administrative Law Judge on July 12, 2018, at the Grievance Board's Charleston office. Grievant appeared *pro se*.¹ Respondent appeared by Debbie Hughes, OIC Human Resources Director and was represented by legal counsel Cassandra L. Means, Assistant Attorney General. Intervenor appeared in person and was represented by legal counsel John E. Roush, Esquire, American Federation of Teachers-WV, AFL-CIO. Parties were provided an opportunity to submit written Proposed Findings of Fact and Conclusions of Law. This matter became mature for consideration on or about August 13, 2018, upon receipt of the last of the parties' proposed findings of fact and conclusions of law. All parties submitted fact/law proposals.

Synopsis

Grievant was one of numerous applicants for the sole Insurance Program Manager position at the OIC Office of Judges. This was a highly sought-after position with a relatively high paygrade in a work environment of limited advancement opportunities for non-attorneys. Grievant alleges that Respondent's selection of Intervenor for the

¹ "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

position was improper. Grievant avers he is a more qualified candidate. Grievant further asserts that Intervenor was selected due to favoritism and an arbitrary and capricious selection process. Grievant has considerable work experience in the workers' compensation industry and was a prime candidate for the position, but did not prove that Respondent's actions were unlawful and/or arbitrary or capricious. This Grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. The West Virginia Offices of the Insurance Commissioner ("OIC") regulates the insurance market in West Virginia. The Office of Judges ("OOJ"), a sub-division of the OIC, conducts hearings, receives and weighs evidence and arguments and then issues written decisions in appeals from initial claim management decisions.

2. The head administrator at the OOJ is Chief Administrative Law Judge Rebecca Roush. Kristin Halkias, Esquire, and Alan Drescher, Esquire, serve as Deputy Chief Administrative Law Judges. There are 47 employees at the OOJ. R Ex 8

3. David Scott Clark, Grievant, is employed by Respondent as a Supervisor 3 in the Workers' Compensation Office of Judges. He has been employed by the OOJ since 1997.

4. Teresa Lynn Baker, Intervenor, is employed by Respondent as an Insurance Program Manager in the Workers' Compensation Office of Judges, which is

the position at issue in the current grievance. Prior to receiving that position, Intervenor was employed as an Employment Programs Claims Deputy.

5. On August 10, 2017, Respondent posted a position for an Insurance Program Manager.² This position was vacant as the result of the retirement of a long-time employee, Patricia Fink, who had held the position. Patricia Fink retired in July 2017.

6. The Insurance Program Manager position is the equivalent of the Office Manager at the OOJ. The position oversees all non-legal work and is wide in scope, encompassing everything from answering substantive questions regarding workers' compensation processes, to training employees, to creating public presentations, to assisting the executive staff, to coordinating facility repairs.

7. OOJ administration was well aware that this position was highly coveted and proceeded with caution and frequently consulted with OIC Human Resources regarding the posting and interview process.

8. Debbie Hughes, OIC Human Resources Director, testified at the level three hearing.

9. Sixteen people, including Grievant, applied for the position and nine applicants were determined qualified by the OIC Human Resources Department. R Ex 1 The position required graduation from an accredited four-year college or university. However, certain experience could be substituted for the training requirement on a year-for-year basis.

² Copy of the posting provided as Grievant's Exhibit 6 and Respondent's Exhibit 1.

10. Application packets for the nine qualified applicants were provided by OIC Human Resources to OOJ administration. Thereafter, all nine qualified applicants were interviewed by a committee consisting of Chief ALJ Roush and Deputy Chief ALJ Halkias. Deputy Chief ALJ Drescher did not participate because he was on vacation.

11. Chief Judge Roush and Deputy Chief ALJ Kristin Halkias interviewed the candidates, utilizing pre-approved questions and rating the candidates on a scale of 1 to 4, based on five different criteria.

12. Each candidate was asked the same six questions that had been pre-approved by Debbie Hughes, OIC Human Resources Director. Specifically, all interviewees were asked the following:

- a. What is your understanding of the insurance manager role?
- b. What do you consider the key skills for this job?
- c. What experience do you have working in or with the workers' compensation system?
- d. Describe your ideal style of management and how you create the right team environment?
- e. What do you think your current supervisor would say makes you valuable to him/her in your current position?
- f. What has been your greatest achievement to date?

R Ex 2

13. Answers for each of the candidates were memorialized by both Chief ALJ Roush and Deputy Chief ALJ Halkias on uniform answer sheets. R Ex 4, 5, and 6

14. Candidates were scored in five general areas utilizing a uniform Interview Evaluation Form. The scoring areas included: 1) experience; 2) education/training; 3) job

knowledge; 4) presentation; and 5) work history. An evaluation scale of 1 to 4 was utilized with 1 being unsatisfactory and 4 being excellent. R Ex 3

15. At the conclusion of the interview process, Chief ALJ Roush and Deputy Chief ALJ Halkias determined the most qualified candidate was Samantha Chase, Insurance Program Manager in the OIC's Claim Services Department. Ms. Chase scored a 20 out of a possible 20. For reasons immaterial to the current grievance, Ms. Chase was unavailable for the position.³

16. The second highest-rated candidate, Teresa Lynn Baker, Intervenor, received a score of 18. Intervenor has been employed with the OOJ since December 1999, as an Employment Programs Claims Deputy since July 2002.

17. After candidate Chase proved unavailable, Intervenor was offered and accepted the position.

18. Intervenor scored 4 out 4 points in the experience, job knowledge, and work history categories. Intervenor scored 3 out of 4 points in the education/training and presentation categories. Judges Roush and Halkias noted on their scoring sheets that Baker is "very knowledgeable. She is very familiar with the processes and systems, and is extremely organized. In addition, if she is unfamiliar with something, she is very earnest and eager to learn new tasks. She has done a great job serving as our interim Insurance Program Manager..." R Ex 5

³ It is not clear whether she withdrew her application before or after being offered the position. It is indicated that there was an issue (complication) regarding whether the applicant would receive an increase in compensation or the move would be considered a lateral move with no salary increase.

19. Grievant scored 17 out of 20 points, which was a tie for third place with Nancy Workman, for the position at issue. Nancy Workman, Employment Program Manager I at the OOJ, testified that the level three hearing.

20. Grievant scored 3 out of 4 points in the experience, education/training, and work history categories. Grievant scored 4 out of 4 points in the job knowledge and presentation categories. Judges Roush and Halkias noted on their scoring sheets that Grievant "possesses considerable WC knowledge and experience. He worked very closely with the former Insurance Program Manager and should be familiar with most of the job responsibilities. The Insurance Program Manager position requires a level of detail specificity, which is not Mr. Clark's strength. Rather, he does a great job and is very well suited for his current position running the Hearings Unit and overseeing the Paralegals."

R Ex 5

21. Grievant has considerable work experience in the workers' compensation industry; however, Chief ALJ Roush and Deputy Chief ALJ Halkias were of the opinion that Grievant would require more supervision than they deemed desirable.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant alleges that the successful applicant for the Insurance Program Manager position was selected based upon "clear favoritism due to a relationship outside of the work environment." He asserted that "[t]he successful applicant was promoted to the position over me and several other individuals who were substantially more qualified in the areas of experience, education, and tenure both with the Office of Judges and state government as a whole." Grievant further alleged that the "action in selecting the individual was arbitrary and capricious, and the selection process was so flawed as to render it clearly wrong."

The prior Insurance Program Manager, Patricia Fink, and Grievant had been co-workers for years. Prior to retirement, Ms. Fink had enlisted the counsel of Grievant in preparing and completing her job description. Grievant has held nearly every non-attorney position and/or supervised or managed said positions at the Office of Judges.⁴

⁴ Grievant has served in various capacities, including an Office Assistant 2, Office Assistant 3, Employment Programs Claims Deputy, Hearings Examiner, District Claims Manager supervising Hearings Examiners and Claims Deputies, Employment Programs Manager I managing an entire unit of Hearings Examiners, Claims Deputies, and District Claims Managers, and Supervisor 3 supervising Paralegals, Office Assistants, Claims Deputies, and an Employment Programs Specialist, Senior. Grievant has been in a supervisory or management position at the Office of Judges since April 2002. Grievant has been employed as one of two Associate Directors of Operations since May 2005, working directly under the Insurance Program Manager position which is the subject of this grievance. See Grievant's fact/law proposal.

The idea that Intervenor somehow has more substantive legal knowledge based on recent employment as a Claims Deputy is difficult if not impossible for Grievant to accept. This is understandable. Nevertheless, in order to prevail in the current litigation, Grievant must show that there was a flaw in the selection system, the decision to hire Intervenor was arbitrary and capricious or that favoritism/discrimination was demonstrated.

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 his judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

The selection process in the fact pattern of this matter was not taken lightly. The Insurance Program Manager position is the equivalent of the Office Manager at the OOJ. The position was properly posted. Administration was well aware that this position was highly coveted and consulted frequently with Respondent's Human Resources personnel regarding filling the position. See L-3 testimony. The evidence presented demonstrates that the Human Resources Department reviewed the 16 applications received and determined that 9 were qualified. The 9 qualified applicants were then interviewed by a two-person interview committee that asked each candidate the same set of pre-approved questions. The selection panel scored each candidates' interview utilizing the same Interview Evaluation Form and scoring matrix. There was no evidence of deviation from the approved questions or the Interview Evaluation Form. The top scoring candidate was

not appointed to the position once it was determined that placing her into the position would be a lateral move. Respondent then offered the position to the second highest scoring candidate, which was the Intervenor.

Grievant questions the credibility and disagrees with the weight assigned to knowledge of substantive law and ability to perform the job. Grievant testified he performed nearly all functions performed by the Insurance Program Manager, both in conjunction with, and in the absence of the former position holder Ms. Fink. Grievant highlights his experience as both an adjudicator and as a manager (with nearly 20 years of combined management experience, including substantial experience as a manager at the Office of Judges), and questions how Intervenor received the same score for the education/training section. Grievant contends this serves to illustrate the selection in this case was clearly wrong.

Grievant has considerable work experience in the workers' compensation industry.

R Ex 4 Grievant has experience as a supervisor, the undersigned finds this to be true and relevant, however, this alone is not dispositive of the instant selection issue. The Interview Evaluation Forms demonstrate that both Grievant and Intervenor scored 3 out of 4 points on the education/training category. Both Grievant and Intervenor, have considerable on-the-job training during their tenures with the OOJ; however, their education/training scores do not appear to be arbitrary or capricious. Grievant did not demonstrate that any member of the interview committee did not fairly evaluate the applicants. Grievant has not established a recognized flaw in the selection so implausible it cannot be ascribed to a difference in view.

Further, Chief ALJ Roush testified that Grievant had some shortcomings that made

it problematic to place him into an executive management position. Deputy Chief ALJ Halkias testified that Grievant often makes quick decisions without as much thoughtful consideration as she believes is warranted. She further testified that there were shared concerns that Grievant's instructions are not clear and can be inconsistent. Chief ALJ Roush testified that the OOJ needed the successful candidate to have considerable substantive knowledge and be someone who could work with minimal supervision. Deputy Chief ALJ Halkias testified that there was a perceived possibility that Grievant would require additional Executive Office supervision beyond what would be needed for Intervenor. This Grievance Board has held many times, when a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp.*, Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen, supra*; *See Ball v. Dep't of Transp.*, Docket No. 04-DOH-423 (May 9, 2005). *Freeland v. Dep't of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008).

In reviewing an agency action to determine whether it is arbitrary and capricious, consideration should be given to whether the agency relied on prohibited factors, entirely ignored important aspects of the issue to be decided, explained its decision contrary to the available evidence, or whether the decision is so implausible it cannot be ascribed to a difference in view. *See Bedford County Memorial Hosp. v. Health & Human Serv.*, 769 F.2d 1017, 1022 (4th Cir. 1985); *Woolridge v. Dep't of Transp.*, Docket No. 2008-0416-DOT (Jan. 23, 2009).

This Grievance Board is authorized by statute to provide relief to employees for discrimination and favoritism as those terms are defined in W. VA. CODE § 6C-2-2. “Favoritism” is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee” unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or 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., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005); *Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant has inferred a shameful scheme to install the Intervenor into the Insurance Program Manager position. Grievant highlights that Chief Administrative Law Judge Rebecca Roush and Intervenor have an amicable relationship⁵ which does not in-and-of itself establish unlawful collusion. There is no credible evidence of favoritism. Further, if the “fix was in” for Intervenor, Grievant’s theory, does not provide a satisfactory explanation for why Respondent first tried to secure the services of Samantha Chase. The initial selection of Ms. Chase tends to undermine the theory that the selection process

⁵ Co-workers have lunch together, some more often than others. An assertion that Chief ALJ Roush’s having lunch with a co-worker constitutes favoritism is unavailing.

was unduly tilted toward Intervenor. Grievant failed to establish a *prima facie* case of favoritism.⁶

Grievant did not prove by a preponderance of the evidence that Respondent's action violated statutory provisions, were arbitrary and capricious, or were marred by favoritism.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. Because the subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. The burden of proof in a non-disciplinary matters rests with the Grievant to establish by a preponderance of the evidence the elements of his case. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018).

2. In a selection case, a grievant must prove, by a preponderance of the evidence, that he is 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).

⁶ In addition to independent analysis of the issue, the undersigned is aware that, subsequent to the filing of this matter, Grievant concedes he has no specific or verifiable proof of favoritism. See L3 hearing testimony and Grievant's fact/law proposal.

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 his 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. Also, as the Grievance Board has held many times, when a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp.*, Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen, supra*; *See Ball v. Dep't of Transp.*, Docket No. 04-DOH-423 (May 9, 2005); *Freeland v. Dep't of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008).

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

7. In order to establish either a discrimination or 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., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

8. Grievant did not establish a favoritism claim.

9. Grievant did not demonstrate that any member of the interview committee did not fairly evaluate the applicants.

10. Grievant did not prove by a preponderance of the evidence that Respondent's action violated statutory provisions, were arbitrary and capricious, or were marred by favoritism.

11. Grievant failed to demonstrate that the selection decision was unlawful, unreasonable, or 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 (2018).

Date: September 21, 2018

Landon R. Brown
Deputy Chief Administrative Law Judge