

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAULA M. CUNNINGHAM,
Grievant,

v.

Docket No. 2017-2002-DOT

DIVISION OF MOTOR VEHICLES
Respondent.

DECISION

Grievant, Paula M. Cunningham, is employed by Respondent, West Virginia Department of Motor Vehicles ("DMV"), as a Customer Service Representative in the Kanawha City Regional Office. Ms. Cunningham filed a grievance against Respondent on or about March 25, 2017, Docket No. 2017-2002-DOT, stating:

On 14 March 2017, I received a letter from a WV-DMV Coordinator advising that I was not selected for vacancy as office manager. I believe this decision was based on factors other than qualifications or merit.

The relief sought is:

Appointment as Manager to the Kanawha City Regional DMV; back pay benefits based on a series of violations of West Virginia Code section 29-6-1, et sq, Federal and Employment law and any appropriate remedies and measures.

Grievant filed an amended complaint on or about July 5, 2017, stating:

Please refer to original Level I Grievance Form; all substantive and procedural matters including lack of notice of intervenor's involvement; bias against grievant; rulings as more fully set out in the recording of the 13 June 17 Level I hearing.

The additional relief sought is:

As previously stated but augmented by additional back pay differential from December 1, 2015, adjusted leave time from June 1, 2015, discovery to allow for meaningful Level Two Mediation; a copy of Level I proceedings, right to supplement as discovery allows.

Prior to the Level I hearing, the successful applicant, Leslie Adkins, chose to be included as an Intervenor. A Level I hearing was held on June 13, 2017, wherein the relief sought by Grievant was denied. On September 15, 2017, Intervenor Leslie Adkins, stated that she wished to withdraw as an Intervenor. Accordingly, she was dismissed as a party to the grievance. A Level II mediation was held on September 19, 2017. This grievance was also held in abeyance for a period of time. A Level III hearing was subsequently held before the undersigned on January 16, 2018. Grievant appeared in person. Respondent was represented by Gretchen A. Murphy, Assistant Attorney General. At the conclusion of the Level III hearing, the parties agreed to submit a post-hearing argument. However, only Respondent submitted post-hearing argument on, which was received on March 19, 2018, upon which date this matter became mature for decision.

Synopsis

Grievant is a Customer Service Representative in the Kanawha County Office of the DMV. She timely applied for the Transportation Services Manager I ("TSM I") position in the Department of Motor Vehicles ("DMV"). Grievant alleges that the selection process was significantly flawed, so as to affect the outcome of the selection process, that she was more qualified than the candidate selected, and that Respondent discriminated against her in the hiring process. Respondent maintains that it legitimately considered personality traits, as well as the length of managerial experience of the candidates, both

of which reasonably qualified the other individual over Grievant. Grievant failed to prove any violations, unlawful conduct, or discrimination by Respondent and, likewise, failed to demonstrate that Respondent's selection was arbitrary or capricious.

The following facts are based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Ms. Cunningham, is presently a Customer Service Representative in the Kanawha County Office of the DMV and has been employed as such since June 1, 2015.

2. Ms. Cunningham timely applied for the Transportation Services Manager I ("TSM I"), i.e. an Office Manager, for the Kanawha County Office of the DMV.

3. For each applicant, an "Application Evaluation Record," was used, wherein candidates' applications were initially rated/based upon the same qualifications including education; relevant experience; knowledge, skills and abilities; interpersonal skills; flexibility and adaptability; and presentability. An "Applicant Interview Checklist" was also prepared.

4. Six applicants were determined to be qualified for the TSM I position, among them Grievant and the successful applicant, Ms. Leslie Adkins (former Intervenor in this grievance, and now a former employee).

5. On February 10, 2017, the six qualified applicants were all interviewed for the position.

6. Two DMV employees conducted the interviews of the job candidates, Mr. Cecil Loyd and Ms. Cheryl Shiflett, both of whom are Transportation Managers, II.

7. Mr. Loyd, a DMV Manager with 14 years of experience, has conducted hundreds of interviews throughout his career.

8. Ms. Shiflett has conducted hundreds of interviews over time, in her position with DMV and as a restaurant owner. In her position with DMV, Ms. Shiflett's responsibilities include dealing with employee problems, including hiring and firing.

9. The DMV maintained a standard procedure for interviewing applicants to ensure fairness and consistency in the interviewing and selection process. Respondent's interview materials included a series of 10 questions prepared in advance of the interviews ("questionnaire"). Respondent's questionnaire is used with all of the applicants as a means to ascertain their management abilities and, therefore, their suitability for the TSM I position. The DMV requires the applicants to answer all of the questions so that the evaluator has consistent information upon which to make a selection.

10. Grievant was difficult during the interview process in that she tried to "take over" the interview. For example, Grievant brought the Job Description for Posting No. DT170073 to the interview, gave it to Mr. Loyd at the beginning of the interview, and discussed it with them. Mr. Loyd did not maintain the job description in the interview and application materials. (Level III testimony - Mr. Loyd.)

11. He described some of the difficulty that the interviewers had difficulty conducting Grievance, saying that it was almost impossible to "get a word in edgewise," during the interview. Mr. Loyd stated Grievant was in her own "zone" in the interview. Due to Grievant's stream of conversation in her self-directed interview, she would not permit the interviewers to interject.

12. Grievant's interview took much longer than the typical interview, approximately an hour versus 30 minutes.¹

13. Because Mr. Loyd was unable to interrupt the flow of Grievant's conversation, the standard questionnaire for Grievant was incomplete in that only six of the 10 questions were answered. Therefore, Mr. Loyd filled in what answers he could, based upon Grievant's conversation during her interview.

14. Grievant was quite knowledgeable about the various functions performed at the DMV. However, Respondent was not necessarily concerned with whether the applicant for the position had full knowledge of all of the various functions performed at the Regional DMV Office.

15. Ms. Adkins, the individual finally selected for the position, answered all of the questions appropriately, had good answers and a calm demeanor. Ms. Adkins listened to the interview questions and the interviewers were able to fill out all of the "fields" on Ms. Adkins' interview sheets. (Level III testimony -Mr. Loyd.)

16. Ms. Adkins had more management experience than Grievant. Ms. Adkins had 222 months of supervisory experience, whereas Grievant had 137 months of supervisory experience.

17. Ms. Adkins had oversight responsibilities for the DMV during her two years in human resources at the West Virginia Department of Transportation ("DOT"), but Ms.

¹ Specifically, Mr. Loyd testified, "I tried to interject several times and could not speak over you. I could not get my questions in that I tried to ask you. So, I let you continue what you were saying until I was finally able to get in and I ended the interview because most interviews took 15 to 20 minutes and I do have a schedule ... You took upwards of almost an hour for your interview." Level I hearing transcript, p.63.

Adkins also had 25 years of management experience exclusive of her work for the State of West Virginia.²

18. The interviewers planned to allow approximately thirty minutes for each interview of the candidates for the Office Manager position. DMV procedure requires the interviewer is to ask all of the candidates the same questions and allow the same amount of time per interview for each applicant.³

19. Ms. Shiflett was of the opinion that Grievant did not present as personable, or as a person who could manage employees without being domineering. Given that the interviewers could not “administer” the interview appropriately, it was terminated.

20. Ms. Adkins was personable, gave Mr. Loyd and Ms. Shiflett the opportunity to conduct the interview, responded appropriately and gave answers to the questions presented. Ms. Adkins took direction and cues from the interviewers and had many years of management experience. (Level III testimony of Mr. Loyd and Ms. Shiflett.)

21. Mr. Loyd ranked Grievant at four out of the six candidates in the interview process and Ms. Shiflett ranked Grievant as six.

22. After all the interviews were completed, Mr. Loyd and Ms. Shiflett conferred together and agreed that the best qualified candidate was Ms. Adkins.

23. Ms. Monica Price, Human Resources Manager at DMV, processed the interview packets.

² She had management experience at businesses such as K-mart, Goodies and Fashion Bug.

³ Grievant came in and simply “took over the interview,” which did not allow the interviewers to ask the prepared questions. Ms. Shiflett characterized her interview with Grievant as the “worst” interview she had ever experienced. Ms. Shiflett was also concerned by Grievant's reference to the fact that she was a friend of Mr. Loyd's mother.

24. Grievant was repeatedly advised of the procedure to properly obtain her personnel and administrative files. All of the documents and information that Respondent used or relied upon during Grievant's interview and the successful candidate's interview were made a part of the record herein.

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 Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). A preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it." *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. Health and Human Res.*, Docket No 92-HHR-486 (May 17, 1993).

Grievant asserts that she was the most qualified candidate for the TSM I, Office Manager position, yet Respondent improperly selected another candidate over her. In a selection case, a grievant must prove, by a preponderance of the evidence, that [s]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). To obtain relief, Grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different. *Hopkins v. Monroe County Bd. of Educ.*, Docket No. 95-31-477 (Fed. 21, 1996).

Additionally, Respondent’s decision must be analyzed according to the arbitrary and capricious standard. 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. *Skeens 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 Grievant to be arbitrary and capricious or clearly wrong. *Thibault, supra*. 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 her judgment for that of [the employer].” *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Grievant contends the selection process was flawed because proper procedures were not followed during the course of the interview process. More specifically, Respondent did not obtain responses to 6 of 10 questions on the interview questionnaire. Grievant asserts that this constituted a procedural irregularity that invalidates the selection process. Indeed, without explanation, this procedural defect would appear to constitute a serious flaw in Respondent’s selection process. However, the credible testimony of Ms. Shiflett and Mr. Loyd, the two interviewers for the position, indicated that Grievant came into the interview with her own agenda, from which she could not be distracted and that she continued in a steady stream of conversation when the interviewers were trying to elicit answers to the pre-prepared questions. Finally, after a lengthy period of time, Ms. Shiflett and Mr. Loyd ended Grievant’s interview. Mr. Loyd credibly testified that he made a good-faith effort to answer some of the 10 questions based upon Grievant’s largely self-determined conversation during the interview.

At hearing, DMV interviewers provided specific observations about Grievant’s conversation and conduct during her interview that legitimized Respondent’s concerns regarding Grievant’s ability to manage people effectively. Therefore, the undersigned finds it more likely than not that, regardless of the answers Grievant may have provided to the 10 questions, Grievant’s interactions with Respondent during her interview would have prevented Respondent from selecting her for the management position. It is not considered arbitrary or capricious to consider personality traits. 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); *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). Based upon the foregoing, the evidence does not demonstrate that but for the flaw in the interview process, Grievant would have obtained the position. Rather, the evidence shows that Respondent rationally determined that Ms. Adkins' ability to be attentive and responsive, as demonstrated during her interview, made her better-suited for the Office Manager position than Grievant.

Grievant further inferred that her knowledge of DMV functions and procedures, as well as her prior managerial work experience, contributed to make her better qualified than the selected candidate. The undersigned will first address the relevance of Grievant's depth of knowledge of the DMV as it relates to the validity of the selection. Grievant is clearly intelligent, likely detail-oriented and surely capable of performing well in any number of positions in various work places.⁴ Moreover, she seemed to have successfully educated herself about the many functions performed at the Regional DMV Office, attesting to her motivation. Grievant may have believed this knowledge of the DMV made her more qualified for the management position than the individual selected. However, Respondent indicated that it was not necessarily concerned with whether the applicant came to the position with such full knowledge, but whether he/she would make

⁴ In fact, her performance evaluations in the position she held when she interviewed for Office Manager were good.

a good manager. Therefore, even assuming Grievant's knowledge of the DMV was greater than the selected candidate's, Respondent provided a rational basis for choosing the selected candidate over Grievant.

As stated above, Grievant also raised the issue of the quality of the successful candidate's prior work and managerial experience - implying that the selected candidate's past work experience would not equip her very well for the TSM I position. Grievant apparently believes that, even though her management experience might not be as lengthy as the successful candidate's management experience, she is better equipped for the TSM I position due to the nature and quality of her past management experience. Respondent maintains that it justifiably selected Ms. Adkins because her work record demonstrated much more time in management positions than Grievant's record showed. However, even assuming Grievant established that she has "superior" management experience over the successful candidate, Respondent was reasonably satisfied, based upon the selected candidate's employment background, that she had adequate management experience for the position. *See, Thibault, Id.*

Grievant further alleged bias, or discrimination, in her amended grievance. Discrimination is defined at W. Va. Code § 6C-2-2(d). All types of discrimination are considered under this definition. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove that:

- (a) he or she has been treated differently from one or more similarly-situated employee(s);
- (b) the different treatment is not related to the actual job responsibilities of the employees; and
- (c) the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). Grievant implied that Mr. Loyd did not wish to hire her because she had known him since he was a teenager and because she was a friend of his mother's. However, the evidence did not support that Mr. Loyd favored the selected job candidate over Grievant, or that Respondent treated Grievant differently than any other similarly-situated employee.

Based upon the foregoing, in making its selection for the TSM I position, Respondent properly considered the comparative length of managerial experience of the candidates, and the selected candidate had more. Further, the evidence indicates that Respondent justifiably determined, based upon the interview process and credentials submitted, that Ms. Adkins was naturally inclined to relate well to others, and to subordinates in particular, making her the best candidate for the position.

In conclusion, Grievant has failed to establish that the selection process was so "flawed" that the outcome would have been different, but for the flaw or error. Respondent's questionnaire could not be fully completed in the interview, but this fact necessarily caused Respondent to appropriately, "consider factors such as the pertinent personality traits and abilities" of the respective candidates. *Pullen, supra*. As such, Grievant failed to demonstrate that she was the overall best candidate for the position or that her non-selection was the product of unlawful, discriminatory, unreasonable, or arbitrary and capricious acts of Respondent.

The following conclusions of law are appropriate in this manner:

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 Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). A preponderance “is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it.” *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. Health and Human Res.*, Docket No 92-HHR-486 (May 17, 1993).

2. In a selection case, a grievant must prove, by a preponderance of the evidence, that [s]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 v. W.Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3. The grievance procedure is not intended to be a “super-interview” but rather, allows a review of the sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994). An agency’s decision as to who is the best qualified applicant will be upheld unless shown by Grievant to be arbitrary and capricious or clearly wrong. *Thibault, supra*.

4. 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. *Skeens v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998).

5. 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 486 (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 her 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).

6. “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).

7. Grievant failed to demonstrate a significant flaw in the selection process.

8. 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).

9. Grievant did not demonstrate that there was unlawful discrimination in the selection process.

10. Grievant failed to establish that Respondent's selection of the successful applicant for the Office Manager position was improper, unreasonable, arbitrary and capricious, or clearly wrong.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: May 1, 2018

Susan L. Basile
Administrative Law Judge