THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SANDRA MORRAL,
Grievant,

v. **Docket No. 2017-2093-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Sandra Morral, filed this action against her employer, Division of Highways, on April 18, 2017, alleging gender discrimination. Grievant seeks to be made whole. This grievance was denied following a Level One hearing conducted on May 10, 2017, by decision dated June 1, 2017. A Level Two mediation session was conducted on August 28, 2017. Grievant perfected her appeal to Level Three on September 15, 2017. A Level Three evidentiary hearing was conducted before the undersigned on March 23, 2018, at the Randolph County Development Authority, Elkins, West Virginia. Grievant appeared in person and by her counsel, Erika Klie Kolenich, Klie Law Offices, PLLC. Respondent appeared by its counsel, Xueyan Palmer, Legal Division. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on May 16, 2018.

Synopsis

Grievant failed to meet her burden and demonstrate that Respondent's selection process was flawed. Grievant did not demonstrate that the decision in not selecting her for the position in question was unlawful or an action that was arbitrary and capricious. In

addition, Grievant failed to establish that she was the victim of discrimination.

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

Findings of Fact

1. Grievant is employed by Respondent as a Driver II in District 8. Grievant has been employed with Respondent since August 18, 1997.

2. This case originated from Respondent's posting, on December 19, 2016, for the position of Highway Equipment Specialist in District 8. Grievant applied for the position, but was informed by letter dated February 13, 2017, that she did not meet the required training and experience to be interviewed for the position.

3. After Grievant was denied an interview, she contacted Respondent's Human Resources Office to complain about not being interviewed. A determination was made on March 2, 2017, by Respondent's Employment and Benefits Manager, Matthew Ball, that Grievant should be interviewed since there was no specific area of assignment listed on the posting.

4. Grievant was interviewed for the position on March 7, 2017. The interview committee determined that Grievant did not meet the required relevant experience, knowledge, skills and abilities. Out of the nine people interviewed for the position, Grievant was the only applicant to fail to meet the requirements for experience, knowledge, skills and abilities. Grievant was informed by letter dated March 10, 2017, that she was not chosen for the position.

5. Respondent's Administrative Services Manager, Lorren DeMotto, explained that he selected the posting from an older posting and determined that it represented the type of skill needed for the position. Mr. DeMotto clarified that while the posting set out

equipment repair and equipment operation, the position actually only required equipment repair experience. The primary job being filled was that of operating the preventive maintenance program. This job required experience in addressing warranty needs of equipment and working with dealerships and equipment companies in servicing vehicles. Mr. DeMotto indicated that he initially reviewed the Grievant's application and found that she did not have the experience in the area of operating the preventive maintenance program.

6. Grievant's equipment repair experience involved helping put batteries in and replacing hydraulic cylinders. The application submitted by Grievant for the position showed that from October 2006 to the present, her job duties only involved the delivery of mail and equipment packages for Respondent. During the period of August 1997 to October 2006, Grievant's job duties included driving a dump truck, operating a roller for paving highways, and operating a rock rake, brush chipper, sweeper broom, concrete saw and chain saw. Grievant believes she was the victim of discrimination because her interview was not taken seriously and she was not given enough time to prepare.

7. Mr. DeMotto indicated that the job was offered to Richard Teter, but that he contacted the appropriate office and requested the hiring process be put on hold, because Grievant had to be interviewed. After Grievant was interviewed, Mr. Demotto contacted a member of the interview committee, James Rossi, and asked about the interview. Mr. Rossi expressed to Mr. DeMotto that Grievant was not qualified for the position.

8. James Rossi, Respondent's District 8 Engineer/Manager, explained that Mr. Teter was the most qualified person for the duties that the job required. Mr. Teter met the

need for someone with experience in equipment repair, purchasing, procurement and inventory control.

9. The record reflected that Grievant could not state what steps are taken to monitor the preventive maintenance program for Respondent's vehicles. Grievant was ranked last among the nine people interviewed for the position. Mr. Rossi explained that when Grievant showed up for the interview he informed her that the interview could take place on another day if she needed more time to prepare, but Grievant stated that she was ready.

10. Steve Carr, Equipment Supervisor II for District 8, was a member of the interview committee for the position at issue. Mr. Carr indicated that the main duties of the position included monitoring the equipment management preventive maintenance system; warranty control, that is taking care of warranty recalls, manufacture recalls and technical bulletins. Mr. Carr explained that Mr. Teter was chosen for the position because he had thirteen years of experience in automotive services, with certification in repair. Mr. Teter had worked at a Chevrolet dealership as a service manager who supervised mechanics and worked with warranty repairs and documentation for recalls. Mr. Carr indicated that Grievant was not selected because she had no mechanical experience or certification in mechanic training, and during the interview she could not answer basic questions regarding the duties of the position.

11. Randy Cunningham, retired Equipment Supervisor for District 7, was one of the three members of the interview committee for the position. Mr. Cunningham was asked to be a member of the committee because he supervised a highway equipment specialist and had knowledge of what the job required. Mr. Cunningham indicated that the position

required experience with computers, equipment repair, and the preventive maintenance program. Mr. Cunningham stated that Grievant was not selected for the position because she was not qualified, and that Mr. Teter was selected because he was the most qualified.

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 Board 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).

Grievant applied for the Highway Equipment Specialist position in District 8 and was not chosen for the position. Grievant argues that Respondent failed to give proper consideration to her interview. Grievant also argues that she demonstrated by a preponderance of the evidence that she was the victim of discrimination. Respondent counters that it properly followed procedures on filling the position and that because Grievant was not the best suited candidate for the position she was not selected.

Unsuccessful applicants, such as Grievant, who grieve their non-selection for a posted position bear the burden of proving, by a preponderance of the evidence, that the employer "violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).

As previously noted, it is well established that the Grievance Board's job is not to engage in the selection process but rather to conduct a "review of the legal sufficiency of the selection process." *Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). In conducting such review, the Grievance Board has consistently held that "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." *Jordan*, *supra*.

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. 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*.

The record of this case does not support a finding that Grievant met her burden of establishing that the selection process was flawed. The only evidence presented at Level Three to suggest that the selection process was flawed was Grievant's testimony that she did not have enough time to prepare. However, the record established that Grievant was specifically asked if she wanted to have the interview on a different date and she declined the offer to postpone the interview. Grievant also attempted to show that the selection process was flawed because the person chosen for the position did not have experience

in equipment operation. Respondent introduced evidence to demonstrate that the actual job duties for the position required equipment repair experience, not equipment operation, and that the person chosen was the most qualified out of the nine applicants for the job. In addition, Grievant failed to establish that she was the most qualified candidate. The record established that Grievant was the least qualified applicant. It is undisputed that Grievant did not have the necessary equipment repair experience and could not correctly answer basic questions about the job duties.

Grievant also alleged that she was the victim of discrimination. For the purpose of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. Va. CODE § 6C-2-2(d). In order to establish 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'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).

The record of this case reflects that Grievant failed to establish a claim of discrimination. Although Grievant alleged unlawful discrimination, Grievant did not provide

evidence that there was unlawful discrimination in the selection process.[1] Grievant stated that she felt as though her interview was not taken seriously. This argument, which was refuted by the evidence, did not establish unlawful discrimination. Respondent presented evidence demonstrating that it halted the hiring process to provide Grievant with an interview, even though her application showed that she did not have the required experience in equipment repair. This action would seem to demonstrate that the Respondent took Grievant's application seriously.

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 Board 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. 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. Grievant did not meet her burden of proving the selection process was insufficient or fatally flawed.

[1]"The simple non-selection for a position does not amount to discrimination as used in the grievance process." *Pullen v. Div. of Highways*, Docket No. 06-DOH-352 (Dec. 15, 2006).

4. Grievant failed to prove that the selection of Mr. Teter for the position was an arbitrary and capricious decision.

5. In order to establish 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'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).

6. Grievant failed to establish a claim of discrimination.

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 6, 2018

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Ronald L. Reece
Administrative Law Judge