THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WALTER G. JACKSON,

Grievant,

v. **Docket No. 2019-0817-DOC**

DIVISION OF FORESTRY,

Respondent,

and

DONALD KELLEY,

Intervenor.

DECISION

Grievant, Walter G. Jackson, filed a level one grievance against his employer, Respondent, Division of Forestry, dated January 24, 2019, challenging his non-selection for an Assistant State Forester position, and stating, in part, as follows:

> 1. [t]he person selected for position FOR190001 may not have met the experience qualifications listed for the position. Specifically, three (3) years' experience in a supervisory, administrative, or professional capacity. I also believe that my qualifications far exceed the person selected for the position. I contend the person selected was pre-determined prior to the creation and advertisement of the position which resulted in an unfair and inequitable evaluation of myself and any other applicants.
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> 2. I also contend the Assistant State Forester classification (#8562) was revised in order to create two new positions for which only 2 personnel in the DOF would appear to qualify and for the specific benefit for those two employees. The last revision in September 2018 includes technical training requirements and job titles that are not contained in any other Division of Forestry (DOF) approved position classifications. The modifications appear to have been written to intentionally dissuade other candidates from

applying and preclude other applicants that may have otherwise been qualified. . . .

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As relief sought, Grievant listed the following six enumerated paragraphs:

1. Division of Personnel review the application of the person appointed to the the (sic) advertised position FOR190001 to verify the experience requirements were met.

2. Division of Personnel review my application and the application of the person appointed to verify that the best candidate was selected and conduct an inquiry to verify the person appointed was done so without predetermined bias.

3. Division of Personnel review the advertised positions of FOR190001 and FOR190002 regarding the REQUIREMENTS section to determine whether the requirement stating "INVESTIGATORS MUST HAVE EXPERIENCE IN THE NATIONAL AND REGIONAL LAW ENFORCEMENT BLOODHOUND HANDLER CRETIFICATION" is a valid requirement as there is no job classification for INVESTIGATOR in the Division of Forestry.

4. Division of Personnel conduct an inquiry as to whether the quoted requirement in item 3 above was used to preclude or deny any other applicants from the position since only 2 employees have the specific "bloodhound" technical training and no job classification within the Division of Forestry requires such technical training. Also, no authorized Division of Forestry position classification lists bloodhound certification as an Essential Job Function or Knowledge, Skill, and Abilities.

5. Division of Personnel review the Assistant State Forester (#8562) position classification regarding item 2 in Statement of Grievance and conduct an inquiry as to whether the 9/13/18 modifications may have been made for the benefit of specific personnel.

6. Division of Personnel reevaluate the modifications to the Assistant State Forester (#8562) position classification specified in item 2. A. in the Statement of Grievance to determine whether the modifications are valid due to the reasons stated.

A level one hearing was conducted on February 8, 2019. The grievance was denied by decision issued on February 11, 2019. Grievant perfected his appeal to level two on March 20, 2019. A level two mediation was conducted on June 3, 2019. Grievant appealed to level three on June 21, 2019. A level three hearing was held on September 10, 2019, before the undersigned ALJ at the Grievance Board's Charleston, West Virginia, office, at which time Grievant appeared in person, *pro se*, and Respondent appeared, by counsel, Jane Charnock, Esquire, Assistant Attorney General, and by its representative, Sharon Summers.

Whereupon, Respondent orally moved to dismiss this grievance asserting that Grievant had not sought instatement into the position and had sought no relief that could be granted. Upon review of the statement of grievance, this ALJ noted that Grievant may not have sought instatement specifically, but that he has argued that the selection process was flawed, for which there is a remedy. This ALJ asked Grievant to clarify the relief he is seeking in this matter, and explained that the Grievance Board has no authority to order the Division of Personnel (DOP) to conduct inquiries and investigations, but explained that Grievant had the right to call someone from DOP to testify as a witness in his case. Further, this ALJ noted that neither party had asked that DOP be joined as a party to the action and that DOP does not appear to be an indispensable party. Grievant stated that he wished to join DOP as a party to this action, and explained that he had not received the documents he had requested from Respondent during informal discovery. Respondent, by counsel, also raised a concern that a possible Intervenor was not aware of the proceeding.

As discovery had not been completed, and there were several matters needing to be addressed, this ALJ determined that a continuance was necessary. The ALJ ordered the matter continued, and ordered Respondent to submit the level one decision and transcript to the Grievance Board; that the parties engage in discovery; and that Respondent produce to Grievant the documents he had requested, subject to a protective Order prohibiting Grievant from disseminating, publishing online or otherwise, or circulating the documents provided to him in discovery. The ALJ informed the parties that she would further entertain motions, such as Respondent's motion to dismiss and Grievant's motion to join DOP, or others, but the same had to be made in writing to allow the opposing party the opportunity to respond. The parties raised no objections to the orders of the ALJ.

On September 13, 2019, Donald Kelley submitted a completed Intervention Form to the Grievance Board seeking to intervene in the action. There being no objection, Mr. Kelley was granted intervenor status by Order entered September 19, 2019. Respondent submitted the level one decision and transcript to the Grievance Board as ordered. Neither party filed any written motions following the September 10, 2019, hearing.

The level three hearing was rescheduled and reconvened on November 8, 2019. Again, Grievant appeared in person, *pro se*, and Respondent appeared by counsel, Jane Charnock, Esquire, Assistant Attorney General, and by its representative, Sharon Summers. Intervenor Donald Kelley appeared in person, *pro* se. At the commencement of the hearing, the parties confirmed that Respondent had complied with the discovery orders issued at the September 10, 2019, hearing. Grievant indicated that he had received the requested documents from Respondent and raised no other discovery

issues. The ALJ then reminded the parties that the documents produced in discovery remain subject to the protective order. Thereafter, the ALJ proceeded to hear the parties' presentation of evidence. This matter became mature for decision on December 16, 2019, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.[1] It is noted that Intervenor Kelley did not avail himself of the opportunity to submit proposed Findings of Fact and Conclusions of Law following the level three hearing.

Synopsis

Grievant was employed by Respondent as an Assistant State Forrester. Grievant applied for another Assistant State Forrester position that had been posted. Grievant was not selected for the position. Grievant argues that the person selected for the position was not qualified, that he was more qualified than the person selected, and that the selection was pre-determined. Respondent denies all of Grievant's claims. Grievant failed to prove his claims by a preponderance of the evidence. Accordingly, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

[1] Attached to Grievant's proposed Findings of Fact and Conclusions of Law received by the Grievance Board on January 16, 2020, were a number of documents. The record of this grievance closed at the conclusion of the level three hearing on November 8, 2019. To the extent these documents are being submitted as additional evidence and were not presented before the close of evidence at the level three hearing, they will not be considered in rendering this decision.

Findings of Fact

1. Grievant is employed by Respondent as an Assistant State Forester, and has held this position for approximately eight years. Grievant has been employed by Respondent for twenty-five years.

2. At the times relevant herein, Intervenor, Donald Kelley, was employed by Respondent as Forestry Investigator.[2]

3. On November 20, 2018, Respondent posted a vacancy for an Assistant State Forester position, numbered FOR190001.

4. Grievant and Intervenor were the only applicants for the Assistant State Forester position, FOR190001.

5. It is unknown whether interviews of the applicants for the position were conducted.

6. Intervenor was selected to fill the Assistant State Forester FOR190001 position vacancy rather than Grievant.

7. Neither party presented evidence as to when Intervenor was selected or when he began working in the position.

8. It is unknown who made the decision to select Intervenor to fill the vacancy or how that decision was made.

9. Grievant did not present as evidence in this matter his application for the position. Grievant also did not introduce evidence of his qualifications for the Assistant State Forester FOR190001 position. However, Grievant currently holds the Assistant

[2] *See*, Grievant's Exhibit 1, Application for Employment of Donald Kelley, stamped November 27, 2018.

State Forester classification, and testified that the vacant position would have been a lateral move for him, rather than a promotion.

10. Grievant did not submit a witness list as required by W. VA. CODE ST. R. § 156-1-6.5 (2018) despite notice of this requirement in the Notice of Hearing issued on September 25, 2019. Respondent submitted a list of potential witnesses pursuant to the rule.

11. On October 29, 2019, Grievant requested that the Grievance Board issue a subpoena for Tina Payne. The same was issued on October 30, 2019. However, Grievant did not serve the subpoena on Ms. Payne.

12. Grievant testified at the level three hearing in his case-in-chief, but he called no other witnesses in support of his claim.[3]

13. Noting that it did not bear the burden of proof in this grievance, Respondent rested its case at the conclusion of Grievant's case-in-chief, calling no witnesses at the level three hearing.

14. Intervenor called no witnesses and presented no other evidence at the level three hearing.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable

[3] Citing Grievant's burden of proof in this non-disciplinary grievance, Respondent objected to Grievant calling as witnesses the individuals whom it had listed as potential witnesses on its witness list.

person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Grievant has made a number of arguments in this matter, which appear to have evolved during the grievance process. In his statement of grievance and during the level three hearing, Grievant appeared to argue that Respondent created the subject vacancy improperly in that the position description contained certain requirements that had never been used before and were only held by Intervenor and another employee. Grievant asserted that the vacancy was designed to favor Intervenor and the other employee. He also alleged that Intervenor was "pre-determined" the successful applicant. Additionally, Grievant argued that he is more qualified than Intervenor. However, in his proposed Findings of Fact and Conclusions of Law, Grievant largely argues that Intervenor is not qualified to hold the Assistant State Forrester position.

Grievant has never specifically asserted that he is seeking instatement into the position. In his statement of grievance, he asks solely for relief that the Grievance Board has no authority to grant, such as ordering the DOP to conduct inquiries into the filling of this position. However, given that the Supreme Court has repeatedly admonished the lower courts to uphold the legislative intent of simple, expeditious and fair grievance procedures, and to give such procedures flexible interpretation in order to carry out the legislative intent, this ALJ interpreted his grievance as alleging a flaw in the selection

process.[4] The grievance process is not "to be a procedural quagmire where the merits of the cases are forgotten." *Spahr*, 182 W. Va. at 730, 391 S.E.2d at 743. If a grievant meets the burden of proving that a selection process was flawed, the Grievance Board has the authority to order a position reposted, and the selection process repeated. Despite such being explained during the level three hearing, Grievant has not asked that the position be reposted and a new selection process be conducted. Grievant has only made clear that he does not think that Intervenor should have received the position at issue.

The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *See 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. *See Mihaliak v. Div. of Rehabilitation 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. *See Thibault v. Div. of Rehabilitation Serv.,* Docket No. 93-RS-489 (July 29, 1994). "Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that he should have been selected for the position, the position should be reposted and a new selection process undertaken."

[4] *See Duruttya v. Board of Educ*., 181 W.Va. 203, 382 S.E.2d 40 (1989) (finding a grievant had substantially complied with the grievance process although the grievance had been filed with the incorrect entity), *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990) (applying a flexible interpretation to find a grievance timely filed several months after the challenged grievable event), *Hale v. Mingo County Bd. of Educ.*, 199 W. Va. 387, 484 S.E.2d 640 (1997) (holding an intervenor may make affirmative claims for relief as well as asserting defensive claims).

Forsythe v. Div. of Personnel, Docket No. 2009-0144-DOA (May 20, 2009) (citing *Neely v. Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009).

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. *See 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 & Human Serv.,* 789 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 & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See 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 [the employer]." *Trimboli v. Dep't of Health & 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).

Grievant now holds an Assistant State Forester position. However, Grievant did not present his application for the position at issue, or any other evidence as to his qualifications, at the level three hearing. Grievant did not testify about his qualifications in detail. Accordingly, no comparison can be made between his qualifications and those of Intervenor. As for Grievant's arguments that Intervenor is not qualified for the Assistant State Forester position, he has relied solely on his interpretation of the information on Intervenor's application, classification specifications, and DOP's definitions of terms in its "Pay Plan Policy," and an informational page regarding "Class Specs" from the DOP website. Grievant did not call anyone from DOP to testify at the level three hearing in support of his arguments, nor did he call anyone from Respondent's human resources office. Grievant has also failed to prove by a preponderance of the evidence that he was more qualified than Intervenor or that Respondent's selection of Intervenor was arbitrary and capricious. Grievant did not introduce any evidence regarding the selection process, such as testimony from the person or persons who made the selection, or who were involved in making the decision to select Intervenor. For these reasons, Grievant has failed to prove by a preponderance of the evidence that Intervenor as not qualified for the position. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.,* Docket No. 93-BOD-400 (Apr. 11, 1995)). As such, this ALJ cannot conclude that the selection process was flawed.

Grievant argues that Respondent improperly changed the Assistant State Forester classification specification to benefit Intervenor in the selection of the Assistant State

Forester position at issue. However, it is noted that the classification specification both Grievant and Respondent introduced at level three has an effective date of September 13, 2018. Grievant filed this grievance in January 2019, long after the change had been made to the classification specification, and Grievant has not claimed that his current position has been affected in any way by the change. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety." *Ball v. Dep't of Transp.*, Docket No. 96-DOH-141 (July 31, 1997); *Mickles v. Dep't of Envtl. Prot*., Docket No. 06-DEP-320 (Mar. 30, 2007), ***aff'd***, Fayette Cnty. Cir. Ct. Docket No. 07-AA-1 (Feb. 13. 2008). "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 06-RJA-147 (Sept. 29, 2006); *Miller v. Kanawha County Bd. of Educ*., Docket No. 05-20-252 (Sept. 28, 2005). The decision to seek to modify a classification specification through DOP is a management decision. It appears from the evidence presented that the DOP approved the changes to the Assistant State Forester classification specification as sought by Respondent.[5] Grievant has not claimed that the change impacted his current position, and he did not attempt to challenge the 2018 modification until now. Accordingly, Grievant has failed to meet his burden on this claim. Therefore, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

[5] *See*, Grievant's Exhibit 3, "Assistant State Forester 8562" classification specification; Respondent's Exhibit 2, DOP "Position Description Form" and "Assistant State Forester 8562" classification specification.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. The Supreme Court has repeatedly admonished the lower courts to uphold the legislative intent of simple, expeditious and fair grievance procedures, and to give such procedures flexible interpretation in order to carry out the legislative intent. *See Duruttya v. Board of Educ*., 181 W.Va. 203, 382 S.E.2d 40 (1989) (finding a grievant had substantially complied with the grievance process although the grievance had been filed with the incorrect entity), *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990) (applying a flexible interpretation to find a grievance timely filed several months after the challenged grievable event), *Hale v. Mingo County Bd. of Educ.*, 199 W. Va. 387, 484 S.E.2d 640 (1997) (holding an intervenor may make affirmative claims for relief as well as asserting defensive claims). The grievance process is not "to be a procedural quagmire where the merits of the cases are forgotten." *Spahr*, 182 W. Va. at 730, 391 S.E.2d at 743.

3. The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *See 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. *See Mihaliak v. Div. of Rehabilitation 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. *See Thibault v. Div. of Rehabilitation Serv.,* Docket No. 93-RS-489 (July 29, 1994).

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. *See 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)).

5. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See 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)).

6. "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 & 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).

7. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.,* Docket No. 93-BOD-400 (Apr. 11, 1995)).

8. “A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety.” *Ball v. Dep't of Transp.*, Docket No. 96-DOH-141 (July 31, 1997); *Mickles v. Dep’t of Envtl. Prot*., Docket No. 06-DEP-320 (Mar. 30, 2007), *aff’d*, Fayette Cnty. Cir. Ct. Docket No. 07-AA-1 (Feb. 13. 2008). “Management decisions are to be judged by the arbitrary and capricious standard.” *Adams v. Reg’l Jail & Corr. Facility Auth.*, Docket No. 06-RJA-147 (Sept. 29, 2006); *Miller v. Kanawha County Bd. of Educ*., Docket No. 05-20-252 (Sept. 28, 2005).

9. Grievant failed to prove his claims by a preponderance of the evidence.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: February __, 2020.

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Carrie H. LeFevre
Administrative Law Judge