VIRGINIA JONES,

Grievant,

v. **Docket No. 98-PEDTA-110**

WEST VIRGINIA PARKWAYS ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

DECISION

Virginia Jones (Grievant) filed three separate grievances, as follows:

1. "Violation of parkways Policy I-I Hiring and promotion procedures", filed on July 16, 1997. Relief sought: "Give position to grievant."

2. "Violation of Parkways policy I-I Violation of WV Code 29-6A 'Retaliation'", filed on September 16, 1997. Relief sought: "Give Grievant position. Make whole in every way."

3. "I have received an unfair evaluation that does not reflect my job performance", filed on November 6, 1997. Relief sought: "Remove the unfair evaluation from my personnel [sic] and any other way be made whole."

After denials at the lower levels, these grievances were consolidated for a level three hearing held on March 13, 1998. The grievances were denied at that level in a written decision dated March 31, 1998. Grievant appealed to level four on April 9, 1998. A level four hearing was held in the Grievance Board's office in Beckley, West Virginia, on October 9, 1998, January 28, 1999, July 17, 2000, and February 5, 2001. At all levels, Grievant was represented by Boyd Lilly, Lynn Belcher, and Fred Elmore, and Respondent was represented by counsel, A. David Abrams, Jr. The parties' fact/law proposals were submitted by May 14, 2001. For administrative reasons, this grievance was reassigned to the undersigned administrative law judge for a final decision on June 6, 2001. The

following findings of fact are made from a preponderance of the credible evidence of record. (See footnote 1)

Findings of Fact

1. Grievant has been employed as part-time toll collector at Toll Barrier A near Ghent, West Virginia, for approximately 8 years.

2. On March 28, 1997, Responded posted job vacancies for four full-time toll collector positions.

3. Grievant and 28 other employees of Respondent ("Parkways") applied for the positions posted on March 28, 1997.

4. On April 30, 1997, the applicants were interviewed by a selection board consisting of four Parkways employees appointed by Lawrence Cousins, Parkways' Deputy General Manager.

5. The selection board members scored each applicant independently, utilizing a point system previously compiled. The maximum amount of possible points from each board member was 110, comprised of the following areas: toll collector performance, 40 points; longevity, 15 points; availability (for call-outs), 15 points; interview, response to questions, 5 points; interview, appearance, 5 points; communication skills, 10 points; leadership potential, 5 points; projects a positive image, 5 points; and supervisor's recommendation, 10 points. 6. Data was gathered by James Kelley, Director of Toll Operations, for use by the board members in compiling their scores for each applicant, including information in the areas of length of service, leave usage, hours worked, performance ratings, and availability for call-outs.

7. As a result of the April selection process, positions were awarded to Nora Greene, 397.5 points; Doris Pischner, 391.5 points; Toby Tolliver, 364.75 points; Allen Gore, 358.25; and Heather Maynard, 247.25.

8. Heather Maynard was selected for a position after Nora Greene declined.

9. Grievant ranked 15th of the 28 candidates before the April selection board.

10. Grievant's supervisor, Stephen Wyatt, wrote a letter of recommendation for her during the April selection process. He stated, in part, that Grievant did her job extremely well, had a good personality, and got along well with others. He also stated that her response to call-outs was as high as 72%, but that Grievant had requested not to be called for midnights and day shifts. (See footnote 2)

Finally, he stated that Grievant was off for 10 days on sick leave in July of 1996, and he did not know the reason.

11. Tyrone Gore, a member of the April selection board, construed Mr. Wyatt's comments in Grievant's recommendation letter to be negative, so he gave her a “0" out of 10 possible points in that scoring category. Another board member construed the letter as favorable, and gave Grievant a “10" for supervisor's recommendation.

12. Although Grievant's availability percentage was actually higher than that of some other candidates, board member Thelma Hickman lowered Grievant's score in thatcategory, due to Grievant's limitations on which shifts she would work.

13. In many instances, part-time toll collectors cannot select the shifts of their choosing, because toll booths are operated 24 hours a day and must be covered in the event of a regular employee's absence. When part-time collectors will not work particular shifts, it makes coverage difficult to maintain and imposes a burden on other employees.

14. On July 16, 1997, Grievant filed a level one grievance after not receiving one of the positions posted in March, 1997.

15. In August of 1997, Parkways again posted vacancies for 9 toll collector positions.

16. A selection board was convened, consisting of five members appointed by the deputy general manager, and conducted interviews September 3 and 5, 1997. This board utilized the same interview process and scoring system as the April selection board, along with utilizing similar data compiled by Mr. Kelley. Two of these board members had not served on the April selection board.

17. Of the 25 candidates, Grievant ranked 16th after the September selection process was completed, with a total score of 417.15. In order to fill the nine positions, offers were made to the candidates with the 11 highest scores. Lisa Askew ranked first, scoring 498.25, but declined a position. Christina Lester also declined to accept one of the positions. The candidates who received positions were: Allen Gore, score 498; Kim Worrell, 459; Susan Arnold, 455; Jo Ann Sexton, 453.90; Tessie Lester, 453.40; Monica Trent, 448.50; Lucy McKinney, 438.15; Jeff Reynolds, 437.95; and Suzy Smith, 426.25.

18. During both the April and September selection processes, board members did not discuss their scores with one another. They returned their score sheets to Mr.Kelley once the process was completed and did not retain copies.

19. After the selection boards completed their interviews and scoring, the scores were tabulated by Carrie Roache, Director of Human Resources, who ranked the candidates from highest score to lowest. The tabulated scores were then reviewed by Mr. Cousins and approved by William Gavan, General Manager.

20. During the selection process, none of the members of the September selection board knew that Grievant had filed a grievance over the April selection board.

21. The scores compiled by the board members and tabulated by Ms. Roache were not altered in any fashion by any person.

22. Grievant's supervisor, Mr. Wyatt, prepared a performance evaluation for Grievant on April 30, 1996, which covered the period from May, 1995, through April 1996. Because she was off work due to an injury, Grievant did not receive the evaluation for review until late October, 1997.

23. Grievant's final evaluation score for the 1995-1996 year was 36, a satisfactory rating. Her score for the previous evaluation year was 44.6.

24. After Grievant filed a grievance over the evaluation, on November 6, 1997, Mr. Wyatt reviewed the evaluation and raised her scores in several areas, including knowledge, quality, accuracy, appearance and habits, orderliness, initiative, and alertness. These scores were raised because Mr. Wyatt had initially prepared the evaluation without having access to her evaluation from the previous year. The raised scores reflect areas where Grievant's performance had not changed from the prior year, so they were changed to reflect her previous rating. Her overall rating was raised to a 39.8.

25. Grievant's 1995-1996 evaluation was lower than the previous year's in theareas of judgment, courtesy, cooperation, reliability, perseverance, stability and attendance. These lower ratings resulted from the following incidents which occurred during the evaluation year:

> In October of 1995,Grievant was involved in a confrontation with a shift foreman, which resulted in Grievant becoming very emotional. She was unable to complete her shift, because she was so upset. The shift foreman was ultimately disciplined for having difficulty getting along with other employees.

> As a result of the same incident, Mr. Wyatt and Mr. Kelley attempted to meet with Grievant to discuss and resolve the problems with the foreman. Grievant again became emotionally upset and refused to meet with Mr. Wyatt and Mr. Kelley. After Msrs. Wyatt and Kelley went to retrieve her themselves and met with her, she was too upset to finish her shift. She left work without permission on this occasion.

Grievant became upset with a shift foreman who called her out to work, after she had asked the previous day if she would be needed and was told she would not be. She was called in to work because an employee was absent on short notice, which requires calling in part-time workers.

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. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employee has not met his burden of persuasion. Dixon v. W. Va. Div. of Corrections,Docket No. 98-CORR-243 (Aug. 24, 1998). See Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

The three events which are the subject of this grievance will be discussed separately.

April and September Selection Boards

Grievant has made several arguments regarding the alleged unfairness of the selection process. She contends that the scores were inconsistent, depending on the board member, and that scores were not calculated properly. Grievant also believes that the recommendation letter written for her by Mr. Wyatt in April was damaging, because it mentioned her call-out record and use of sick leave, which was not mentioned on some of Mr. Wyatt's recommendations for other employees. Finally, Grievant has argued that the selection of Heather Maynard for one of the four positions filled in May of 1997 was improper in several respects. With respect to the September selection board, Grievant believes that she did not receive a position, due to retaliation for filing her first grievance.

Parkways is a "classified-exempt" agency, and as such, is not subject to the rules established by the Division of Personnel which govern the selection procedures for most other state agencies. Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-546

(June 24, 1998). Even so, the standard of review of the selection process remains the same, so that Parkways' decision as to who is the most qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Id. See Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

The arbitrary and capricious standard of review of personnel decisions requires asearching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the agency. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. 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). If a grievant can demonstrate that the selection process was so significantly flawed that he might reasonably have been the successful applicant if the process had been conducted in a proper fashion, the employer will be required to compare the qualifications of the grievant to the successful applicant. Thibault, supra.

Parkways has adopted an administrative regulation which sets forth its procedure for selection. That regulation, Personnel Policy I-1, provides that it is

> the responsibility of a Selection Board to interview and select the candidate who is the most qualified for the position based upon merit, fitness and qualifications. If a choice is to be made between two or more applicants and all other factors are equal, consideration shall be given to the level of seniority of each of the respective applicants as a factor in determining which of the applicants will receive the board[']s recommendation. Selection Board results and recommendations will then be presented to the General Manager for final approval.

The evidence before the undersigned does not establish that the selection process, on either occasion, was arbitrary and capricious, nor has Grievant established that shewould have received any of the posted positions if the process had been conducted differently. While it is true that the ratings given by the board members tended to vary from person to person, there has been no demonstration that the scores were not arrived at fairly and independently. Proof of this fact is evident when comparing the ultimate results of the two selection boards, which had at least two different

members. Despite this, the rankings of the various candidates were very similar after both boards had tabulated their results. Grievant has also made much of the board members' difficulty in remembering how they arrived at some of their scores when they testified for this grievance. However, these individuals were being asked to recall their mental process in a decision which had occurred at least one, two, or even three years before, due to the length of the level four hearing in this matter. Also, the board members were required to turn over their score sheets immediately after their interviews, and they had not seen them since that time.

As to Mr. Wyatt's recommendation letter, it should be noted that Mr. Wyatt was not required to provide Grievant any recommendation at all, much less a favorable one. Moreover, the information contained in the letter he provided to the April selection board has not been proven to be anything other than factual, and the board members were free to construe it however they saw fit. Grievant has not proven that she was entitled to a better or different recommendation letter.

Grievant questioned board members extensively regarding how they arrived at their ratings for the candidates in the category of “toll collector performance,” a category for which an applicant could receive a maximum of 40 points. The only documentation contained in the record on this issue was a copy of the information provided to the board members, which showed each toll collector's performance as related to the percentage ofcash errors that occurred in proportion to the number of hours they worked each month of the year. Grievant's arguments in this area are difficult to understand, and the additional documentation which was discussed during the level four hearing on this subject was not formally admitted into evidence. It appears from the board members' testimony they honestly attempted to allocate a fair number of points to each candidate, based on the information provided. While Grievant contends that some of the board members did not understand how to properly allocate points in this category, and the outcome of the selection process could have been different, she has not demonstrated how.

Grievant has made several arguments in an attempt to prove that Heather Maynard should not have been the fifth person offered a position in the April selection process. Nevertheless, regardless of whether these allegations can be proven, Grievant was not the next candidate in line for a position, so this would not have altered the outcome of the selection process.

Grievant argued she did not receive a full-time position as a result of the second posting because Parkways was retaliating against her for filing the grievance over her failure to be selected for one of

the positions posted in March. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant alleging retaliation must first establish a prima facie case by demonstrating:

(1) that he engaged in activity protected by the statute;

(2) that his employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken against him bythe employer; and

(4) that the adverse action was the result of retaliatory motivation, or the action followed his protected activity within such a period of time that retaliatory motive can be inferred.

Dunford, supra. Once a prima facie case of retaliation is established, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. If the employer successfully rebuts the presumption, the employee may offer evidence to demonstrate the reasons given by the employer were merely a pretext. Id.

It is clear from the evidence that retaliation played no part in Grievant not being selected. The applicants were ranked based upon the scores assigned to them individually by the members of the selection board, and Grievant rated about the same in relation to the other applicants both times. Moreover, there is no evidence that the selection board members knew about the first grievance during the selection process, nor is there any evidence that anyone tried to influence the score of any member of the board.

Performance Evaluation

An employee grieving his evaluation must establish by a preponderance of the evidence that his evaluation is wrong because his evaluator abused his discretion in rating the grievant, Messenger v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-388 (Apr. 7, 1993); Wiley v. W. Va. Workers' Compensation Fund, Docket No. WCF-89-015 (July 31, 1989); or the performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Maxey v. W. Va. Dep't of Health & Human Serv., Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); Hurst v. W. Va. Dep't of Transp., Docket No. 91-DOH-326 (Feb.

27, 1992). It has already been established that, at level one of the grievance process, Mr. Wyatt changed Grievant's ratings in numerous categories to accurately reflect her performance as related to the previous year's ratings, which he was not actually required to do. As to the other ratings, Mr. Wyatt thoroughly explained his reasoning for the lower ratings, based upon the incidents which were discussed. Although Grievant does not believe she should have been penalized with regard to the confrontation with the shift foreman, because the foreman was behaving badly, it is Grievant's response to the situation which is reflected on her evaluation. Grievant's refusal to meet with her supervisors, leaving work without permission, and complaints about being called in to work (inherent in the nature of her job) justified lower scores in areas such as judgment, stability, cooperation, etc. Grievant has failed to establish that her 95-96 performance evaluation was the result of an abuse of her supervisor's discretion.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. An agency's decision as to who is the most qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Id. See Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

3. Grievant has failed to prove she was more qualified than any of the successful applicants, that Parkways' decision was arbitrary and capricious or clearlywrong, or that there was any significant flaw in the selection process which would have altered the outcome of either selection board.

4. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

5. A grievant alleging retaliation must first establish a prima facie case by demonstrating:

(1) that he engaged in activity protected by the statute;

(2) that his employer was aware of the protected activity;

> (3) that, thereafter, an adverse employment action was taken against him by the employer; and
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> (4) that the adverse action was the result of retaliatory motivation, or the action followed his protected activity within such a period of time that retaliatory motive can be inferred.

Dunford, supra. Once a prima facie case of retaliation is established, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action.

6. Grievant has not proven that she was retaliated against by Respondent for filing a grievance.

7. An employee grieving his evaluation must establish by a preponderance of the evidence that his evaluation is wrong because his evaluator abused his discretion in rating the grievant, Messenger v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-388 (Apr. 7, 1993); Wiley v. W. Va. Workers' Compensation Fund, Docket No. WCF-89-015 (July 31, 1989); or the performance evaluation was the result of somemisinterpretation or misapplication of established policies or rules governing the evaluation process. Maxey v. W. Va. Dep't of Health & Human Serv., Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); Hurst v. W. Va. Dep't of Transp., Docket No. 91-DOH-326 (Feb. 27, 1992).

6. Grievant has failed to prove that her evaluation for the 1995-1996 evaluation year resulted from an abuse of discretion or violated any applicable rules or policies.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State EmployeesGrievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 29, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The undersigned has reviewed, in detail, all evidence submitted at levels three and four, including the level four transcript (4 volumes, 418 total pages), 23 level four exhibits, and the level three transcript. It should be noted that several exhibits were marked and discussed during the level four hearing, but were never moved into evidence. In addition, at several times during the hearings, documents were discussed and witnesses were questioned extensively on their contents, but they were neither marked nor admitted.

Footnote: 2

Parkways operates on three shifts: day, evening, and midnight.