DIANA KINCAID,

Grievant,

v. **Docket No. 04-PEDTA-179**

WEST VIRGINIA PARKWAYS ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

Grievant, Diana Kincaid, filed this grievance about her non-selection for a full-time Toll Collector position against her employer the West Virginia Parkways Economic Development and Tourism Authority ("PEDTA"), on or about May 17, 2002. Grievant's Statement of Grievance states, "Parkways Authority management and the State of WV have violated applicable statues, policies, rules, regulations and practices by unjustly denying my promotion to full time status."

The relief sought was, "[t]hat I be promptly classified as Full time Toll Collector, and made whole in every way and that the unfair, outdated, Parkways part time policies and procedures be changed to reflect state policy/law and all discriminatory practices and favoritism be eliminated." At Level II, Director of Tolls Jim Kelly asked for a more definite statement of grievance, and Grievant placed an attachment to her grievance. This attachment stated Grievant was not treated with good faith, PEDTA did not have documentation to support her scores, and she was "extremely disadvantaged" in the promotional process because PEDTA did not enforce uniformity.

This grievance was denied at all lower levels and appealed to Level IV on May 12, 2004. A Level IV hearing was held on August 18, 2004, in the Grievance Board's BeckleyOffice. This grievance became mature for decision on September 27, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant asserts she was incorrectly denied a full-time Toll Collector position. (See footnote 2) Respondent asserts all applicable rules, regulations, and policies concerning selection were followed. Respondent also notes Grievant, at the time of the selection and currently, is unable to work full-time and is allowed by her physician to work only three days a week, thus, she could not fulfill the duties of a full-time position. Although not specifically pled, the parties at Level III also viewed this grievance as one alleging favoritism, and it will be examined in that light at Level IV as well.

Procedural History

This grievance was continued numerous times at the request of Grievant at Level III. Because of the delay in holding the hearing, and the fact the members of this Selection Board had participated in many other selection boards in the intervening years, witnesses were at times unclear about details of this specific selection board. Witnesses testified totheir normal selection process, how they usually ranked employees, and they were confident they followed this process in this case, and there were no irregularities. (See footnote 3)

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

Findings of Fact

1. Grievant is employed as a part-time Toll Collector. On or about February 11, 2002, Grievant started working only three shifts a week pursuant to a doctor's order.

2. All part-time Toll Collectors are guaranteed to work three shifts a week, but they are subject to call out for a greater number of hours. Many part-time Toll Collectors work more than their three scheduled shifts a week, and some occasionally work enough hours to receive overtime. Because of Grievant's medical status, Grievant is not called out. (See footnote 4)

3. PEDTA also employs temporary Toll Collectors. These employees are not assured of any number of shifts a week and fill-in as needed.

4. In April 2002, PEDTA posted eleven full-time Toll Collector positions. Grievant applied

and was interviewed by the Selection Board on May 1, 2002. This posting stated, "[w]orkweek is a 40-hour week performed in 5 . 8-hour days; shift work, holidays weekends, alternating days off, subject to be on call." Grt. No. 4 at Level IV.

5. Grievant was ranked 16 out of 17 applicants and did not receive any of the full-time positions. 6. PEDTA is a classified-exempt agency, and as such does not follow the Division of Personnel rules and regulations, but has developed its own policy on employment/selection procedures. Resp. No. 4 at Level III, Personnel Policy I-1.

7. This Policy was followed in the selection process that is the subject of this grievance. The Selection Board was chosen in the manner described in this Policy, and the members were provided data about each applicant on spreadsheets. The Selection Board is to "select candidate[s] who [are] the most qualified for the position[s] based on merit, fitness and qualifications." Resp. No. 4 at Level III.

8. In the information provided to the May 1, 2002 Selection Board, Grievant did not have any data listed about her call outs, but there was a notation on the spreadsheet stating, "(Note: currently requesting 3-day week)." The Selection Board members who testified at Levels III and IV did not find this notation to be an irregularity given Grievant's request to work only three days a week, but they could not remember any specifics because this Selection Board met more than two years ago, and there have been many intervening Selection Boards. **(See footnote 5)** **Additionally, the Selection Board witnesses stated that if they had a concern at the time they would have asked then Director Kelly, and he would have explained the situation. Several witnesses stated they understood the reason this information was blank was because Grievant was not called out because of her request to work only three days a week. 9. One selected applicant was a full-time employee currently on medical leave.** **(See footnote 6)** **10. There is no policy that requires PEDTA to hold a position for a part-time employee who is not able to work full-time.**

11. During the time this grievance has been pending, Grievant attempted to work four days a week and did for a while, but is now is back to working only three days a week, pursuant to her doctor's order.

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); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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). "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. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

I. Credibility

An issue that must be addressed is credibility, as Grievant alleged wrongdoing by many employees, indicated they were less than truthful, and seemed to indicate there wasa conspiracy to prevent her from receiving a full-time position. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. **(See footnote 7)** **See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.**

Grievant asserts the testimony of the members of the Selection Board and other witnesses is not credible. The undersigned Administrative Law Judge does not agree with Grievant's

assessment. The undersigned Administrative Law Judge found no problem with the demeanor of these witnesses or their capacity to perceive and communicate. Noevidence of bias, interest, motive or dishonesty or untruthfulness was presented. The testimony of the Selection Board members was consistent with each other, consistent internally, consistent with prior testimony, and plausible. The fact they could not remember specifics after so long a time is understandable, especially when they have served on other boards in the intervening period. Many stated they would have remembered if there had been a problem with the data presented. Accordingly, the information given by the Selection Board members is considered valid. Additionally, although Grievant disagreed with the statements of other witnesses, there was little evidence presented to demonstrate this testimony was incorrect.

As for Grievant's testimony, it is clear she believes she has been unfairly treated by PEDTA. It is also clear Grievant has an interest and/or bias in the outcome of this case, and she has a tendency to personalize events, and placed her own interpretation on these occurrences. As previously stated by this Grievance Board, "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." Chin v. Dep't of Treasury, 44 M.S.P.R. 201 (1990). See Loundman-Clay v. Higher Educ. Policy Comm'n, Docket No. 02-HEPC-013 (Aug. 29, 2002).

Additionally, Grievant did not present evidence to support her beliefs. As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/BluefieldState College, Docket No. 93-BOD-400 (Apr. 11, 1995); Messinger v. Dep't of Highways, Docket No. 04-DOH-081 (July 31, 2004).

II. Merits

In a selection case, 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 Rehab. Serv., Docket No. 93-RS-489 (July 29, 1994). This Grievance Board recognizes selection decisions are largely the prerogative of management. While the individuals who are chosen should be qualified and able to perform the duties of their new position, absent the

presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. Skeens-Mihaliak v. Div. of Rehab. Serv., Docket No. 98-RS-126 (Aug. 3, 1998); Ashley v. W. Va. Dep't of Health and Human Res., Docket No. 94-HHR-070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket Nos. 89-WCF-208/209 (Aug. 7, 1989). An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault, supra.

Grievant's burden is to demonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. Surbaugh v. Dep't of Health and Human Serv., Docket No. 97-HHR-235 (Sept. 29, 1997). If the grievant can demonstrate the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion, the Grievance Board can require the employer to review the qualifications of the grievant versus the successful applicant. Thibault, supra; Jones v. Bd. of Trustees/W. Va. Univ., Docket No. 90-BOT-283 (Mar. 28, 1991). While a searching inquiry into the facts is required to determine if an action is 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. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). 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., No. 29066 (W. Va. 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 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. 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 a board ofeducation. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

A. Qualifications for the position

The key issue to address is Grievant's inability to perform the duties of a full-time position. The posting was clear the Toll Collector positions were full-time, and it was also clear from the testimony the main reason Grievant was ranked 16 out of 17 related to the scores she received in the areas of availability and leadership. These low ratings were based on Grievant's inability to perform the essential duties of the position. A full-time Toll Collector works at least five shifts a week. Grievant, by her own testimony, notes she can work no more than three shifts a week. Accordingly, Grievant, even if selected, would not be entitled to the position because she cannot perform the essential duties of the position. See Mullan v. Div. of Juvenile Serv., Docket No. 01-DJS-345 (Oct. 12, 2001); Fisher v. Dep't of Admin., Docket No. 98-DOA-492 (Oct. 28, 1999). See also Mayhew v. Dep't of Envt'l Protection, Docket No. 01-DEP-516 (Aug. 28, 2003); Thibault, supra. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Clark v. Putnam County Bd. of Educ., Docket No. 97-40-313 (April 30, 1998). This grievance must be denied as Grievant is not qualified for the position.

B. Favoritism

Grievant asserts other employees have been treated more favorably. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Administrative notice is taken that the West Virginia Supreme Court of Appeals recentlyrevised the legal test for discrimination/favoritism claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, Slip Opinion No. 31717 (Oct. 28, 2004), the West

Virginia Supreme Court of Appeals held a grievant must establish a case of favoritism by showing: **(See footnote 8)**

> **(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. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Respondent no longer has the option of demonstrating legitimate reasons to substantiate its actions. See Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992); Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant did not meet her burden of proof and establish a prima facie case of favoritism. She was not similarly situated to other applicants. No other applicant wascurrently working only three days a week and would not accept call-outs as needed by PEDTA. The notation on the spreadsheet related to the "actual job responsibilities" of the full-time position she was seeking. It is entirely appropriate for the Selection Board to be aware Grievant was unable to fulfill the essential duties of the position when it was choosing the successful applicants to fill the full-time Toll Collector positions. Accordingly, Grievant did not demonstrate the presence of unlawful, unreasonable, or arbitrary and capricious behavior in this selection process. Skeens-Mihaliak, supra.

The above-discussion will be supplemented by the following Conclusions of Law.

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.

Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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). "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. W. Va. Dep't of Health and Human Res,, Docket No. 92-HHR-486 (May 17, 1993).

2. In a selection case, 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 Rehab. Serv., Docket No. 93-RS-489 (July 29, 1994). 3. This 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-Mihaliak v. Div. of Rehab. Serv., Docket No. 98-RS-126 (Aug. 3, 1998); Ashley v. W. Va. Dep't of Health and Human Res., Docket No. 94-HHR-070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket Nos. 89-WCF-208/209 (Aug. 7, 1989).

4. An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault, supra.

5. Grievant's burden is to demonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. Surbaugh v. Dep't of Health and Human Serv., Docket No. 97-HHR- 235 (Sept. 29, 1997). See Jones v. Bd. of Trustees/W. Va. Univ., Docket No. 90-BOT-283 (Mar. 28, 1991).

6. "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 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. 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 a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

7. Grievant did not meet her burden of proof and establish the presence of unlawful, unreasonable, or arbitrary and capricious behavior in this selection process. Skeens-Mihaliak, supra.

7. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

8. In The Board of Education of the County of Tyler v. White, Slip Opinion No. 31717 (Oct. 28, 2004), the West Virginia Supreme Court of Appeals revised the legal test for discrimination/favoritism claims raised under the grievance procedure statutes. A grievant must establish a case of favoritism by showing:

> **(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. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).**

9. Grievant has failed to establish a prima facie case of favoritism.

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." Any 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 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 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: December 21, 2004

Footnote: 1

Grievant Kincaid represented herself, and Respondent was represented by General Counsel, David Abrams.

Footnote: 2

Grievant also wanted to address the issue of her prior treatment at Barrier B, and how it had disadvantaged her in the selection process. Respondent objected noting Grievant had filed a prior grievance about her treatment, and it was dismissed at Level IV at Grievant's request after a settlement agreement was reached which resulted in Grievant receiving a requested transfer to Barrier A. A review of the Grievance Board's records established a grievance was filed by Grievant on September 5, 2001, and it was dismissed as settled on May 2, 2002. The parties agree this was the prior grievance on favoritism. Additionally, Grievant was unable to explain with any clarity how the treatment at Barrier B disadvantaged her in the selection process, especially since she had been working three days a week since February 2, 2002, and the Selection Board met May 1, 2002.

Footnote: 3

Some Selection Board members were able to remember specifics.

Footnote: 4

Before Grievant went to the three shifts a week only schedule, she was subject to call out.

Footnote: 5

One witness indicated he had served on approximately 15 to 20 boards since he served on this one over two years ago.

Footnote: 6

Transfers are not automatic at PEDTA. If a full-time employee wants a transfer ti another barrier, he must earn it by going through a selection board and being chosen with a high enough ranking to pick the barrier where he wants to serve.

Footnote: 7

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 8

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).