ELAINE HOPE COLEMAN,

Grievant,

v.

DOCKET NO. 03-HHR-318

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES,

Respondent.

D E C I S I O N

Grievant, Elaine Coleman, filed this grievance against her employer, the West Virginia Department of Health and Human Resources ("DHHR") on July 21, 2003, alleging she did not understand why "I was not selected to be the Acting Director of Children's Mental Health in light of my experiences, job responsibilities, and apparent success at representing the Bureau and Children's Mental Health over the past five years." As part of her requested relief sought, Grievant is seeking a course of action designed to help clarify her role and her responsibilities in the upcoming months under the Bureau's reorganization. Also, as part of her relief sought, Grievant is seeking to be named as the Acting Director of Children's Mental Health Services. After her requested relief was denied at the lower levels, Grievant made a timely appeal to level four on October 14, 2003. A level four hearing was held in the Grievance Board's Charleston, West Virginia, office on December 15, 2002, and this case became mature for decision on January 15, 2004, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by William D. Ryan, Esq., and DHHR was represented by Landon R. Brown, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

Employee Performance Appraisal, dated February 21, 2003.

Ex. 2 -

Areas of Responsibility/Involvement with Behavioral Health Providers/

Children's Programs.

Ex. 3 -

September 14-15, 2003, handout for Children's Mental Health Conference; Utilizing Evidence-Based Practice.

Level Three DHHR Exhibit

Ex. 1 -

W. Va. Div. of Personnel Temporary Classification Upgrades Policy.

Level Four Grievant's Exhibits

Ex. 1 -

Employee Performance Appraisal, dated March 6, 2002.

Ex. 2 -

Classification Specification for Health and Human Resources Specialist, Senior.

Ex. 3 -

Draft letter from David Majic to All Child Mental Health Grantees, 13 Comp. Execs and Clinical Staff.

Ex. 4 -

October 23, 2003, memorandum from Hope Coleman to David Majic.

Ex. 5 -

Employee Performance Appraisal, dated September 29, 2003.

Testimony

Grievant testified in her own behalf, and presented the testimony of Lisa Estep Bruer, Desmond Byrne, David Majic. DHHR presented the testimony of David Majic.

Based upon a review of the testimony and evidence of record, I find the following facts to be proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed by DHHR as a Health and Human Resources Specialist, assigned to work for the Bureau for Behavioral Health and Health Facilities(BHHF) in Charleston, West Virginia, and at the time the grievance was filed, had been working for BHHF for approximately 1-1/2 years.

2. Immediately prior to the filing of the grievance, BHHF underwent a reorganization. Then-Director of Children's Mental Health, David Majic, was appointed as Assistant Commissioner, and he in turn appointed Patty Kelly as the Acting Director of Children's Mental Health.

3. On March 6, 2002, Mr. Majic gave Grievant her mid-year performance appraisal, which rated her as “meets expectations.” LIV G. Ex. 1. Mr. Majic commented that “[e]mployee shows consistent motivation & cooperation in achieving multiple tasks successfully.” LIV G. Ex. 1.

4. On February 21, 2003, Mr. Majic gave Grievant her interim performance appraisal, which rated her as “meets expectations.” LIII G. Ex. 1. Mr. Majic commented that “Hope demonstrated a productive and vigorous work schedule for the first half of the year with many successes as seen by the implementation of the Block Grant site reviews, and the school based training agendas.” LIII G. Ex. 1.

5. Grievant filed this grievance over the appointment of Patty Kelly as Acting Director of Children's Mental Health on July 21, 2003.

6. The level three hearing in this grievance was held on September 25, 2003.

7. On September 29, 2003, Mr. Majic gave Grievant her annual performance appraisal, which rated her as “meets expectations.” LIV G. Ex. 5. Mr. Majic rated Grievant as “meets expectations” in 18 out of 23 categories, and an “exceeds expectations” rating in 3 categories. He gave her a “needs improvement” rating in 2 categories, the first being“[a]cts independently while keeping supervisor

informed," and the second being "[e]mployee consistently meets deadlines." LIV G. Ex. 5.

8. Mr. Majic's summary comments stated:

> Employee shows enthusiasm in daily job performance and presents well as representative of both the Bureau and Division. Functional skills and knowledge are good given type of assignments. Some challenges for employee are management of time, prioritizing projects, meeting time lines, and keeping supervisor informed of issues and or concerns which present as problems.

LIV G. Ex. 5.

9.

Mr. Majic stated as an Improvement and/or Developmental Plan that:

> Employee has been made aware of problem issues as stated above. Employee will develop new work plan with new supervisor for FY04. Within the new plan, a schedule of supervision and on-going progress reporting of assignments is to be established.

LIV G. Ex. 5.

10. Grievant refused to sign the September 29, 2003 annual evaluation. LIV G. Ex. 5.

11. At the time the grievance was filed, Grievant had been with BHHF for approximately five (5) years.

12. At the time the grievance was filed, Patty Kelly had been with BHHF for a little over one year.

13. Grievant amended her grievant at the level four hearing to include a claim of retaliation, based upon the September 29, 2003 performance evaluation.

14. DHHR raised a timeliness issue with respect to the claim of retaliation.

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. Dept. of Health & Human

Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. Grievant alleges Mr. Majic's appointment of Patty Kelly as Acting Director of Children's Mental Health was based on favoritism, was arbitrary and capricious, and was a violation of past practice and custom. Grievant further claims Mr. Majic gave her a bad performance evaluation on September 29, 2003, in retaliation for her testimony at the level three hearing in this grievance.

DHHR denies it violated any rule or policy with respect to the appointment of Patty Kelly, that its actions were arbitrary and capricious, or based upon favoritism. DHHR further denies it retaliated against Grievant after the level three hearing, and asserts her claim of retaliation is time-barred.

Grievant alleges there was a past practice and custom in BHHF to fill appointments by seniority and experience. At level three, Grievant testified that, “from talking to employees it was like the seniority is what's going to be recognized in the shuffling of people,” in reference to the reorganization that was occurring at BHHF. LIII Grievant's Test., p. 14. At that time, Grievant was not aware of any policy or rule which stated that seniority was to be considered in assigning positions. At level four, Grievant reiterated her belief that there was a past practice and custom of making assignments within BHHF based upon seniority. Again, she could produce no written rule or policy in support of her position. DHHR denied there was any past practice or custom in BHHF regarding seniority- based assignments. Mr. Majic testified Patty Kelly was temporarily upgraded to Assistant Director in accordance with the Division of Personnel's Temporary Upgrade Policy, which states, in pertinent part:

> C. This policy applies to both classified and classified-exempt employees who are temporarily assigned to a higher classification under the following conditions:
>
> 1. To a position in an acting capacity as a result of the separation or extended leave of absence of a higher-classified employee; for a short-term project; or for an emergency situation.
>
> . . .
>
> F. Employees proposed for temporary upgrade shall meet, or be within 3

> months of satisfying, the minimum requirements of training and experience for the position to which they will be temporarily upgraded. Any licensure requirements, however, must be satisfied at the time of the upgrade.

LIII DHHR Ex. 1.

Grievant has failed to produce any evidence to support her claim that assignments with BHHF were made, as a matter of past practice and custom, based upon seniority, such that the agency would be bound by such practice. DHHR proved it adhered to the Division of Personnel's rules in temporarily upgrading Ms. Kelly to the Acting Director position.

Grievant further contends that Ms. Kelly's appointment was on the basis of political favoritism, violating the precedent set forth in Akers v. W. Va. Dept. of Health, 188 W. Va. 698, 425 S.E.2d 840 (1992) and W. Va. Code § 29-6-4(e). See also Lowther v. W. Va. Dept. of Transp., Docket No. 01-DOH-589 (Mar. 27, 2002), aff'd Cir. Ct. of Kanawha Cty. Case No. 02-AA-55 (July 27, 2003)(Posted position of Braxton County MaintenanceSupervisor was improperly filled on a temporary basis based upon political patronage, and not upon fitness and merit). In selection cases where political motivation is alleged, the grievant must offer sufficient evidence to permit a finding that the selection was substantially motivated by political considerations. The requisite political motivation, as with any state of mind, can be proven by circumstantial evidence, as it is commonly the only kind available for this purpose. Mercer v. W. Va. Dept. of Highways, Docket No. 01- DOH-604 (Mar. 20, 2002); Wiley v. W. Va. Dept. of Highways, Docket No. 99-DOH-109 (Aug. 3, 1999).

However, unlike Akers, supra, and Lowther, supra, Grievant's evidence in this case is insufficient to make a finding that Ms. Kelly's appointment was made on the basis of political patronage. Grievant's evidence consists of the fact that Ms. Kelly's husband is a “high-ranking administrator to the Secretary” of DHHR, and she saw Mr. Kelly sitting in Desmond Byrne's office with his feet on his desk about a week after Ms. Kelly was named Acting Director. Mr. Byrne is the Director of Human Resources, Planning, and Development for the BHHF. He testified he was not involved at all in the appointment of Ms. Kelly, and was unaware of any political pressure to have her named as Acting Director. Grievant presented no evidence regarding anyone's political affiliation. Grievant simply has no direct evidence to prove Ms. Kelly was hired for purely political reasons.

Grievant further maintains that Ms. Kelly did not meet the minimum qualifications for the Acting

Director position, and her hiring was arbitrary and capricious. 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 adifference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). 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 board of education. 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. Dept. 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)).

There is no dispute that Grievant has considerable training and experience in the area of children's mental health compared to Ms. Kelly. Mr. Majic testified that the qualities he and Eugenie Taylor were looking for in determining whether to hire Grievant or Ms. Kelly for his former position were: leadership, the ability to develop objectives for programs statewide, ability to collaborate with others, quick thinking, technical capability, analysis skills, presentation, and someone who could step in and take over the Bureau.

Mr. Majic was very familiar with Grievant's work with the Bureau, and considers her a valuable resource. However, Mr. Majic had experienced some problems with Grievant's performance in the past, and while those problems were not of any magnitude, they caused him concern, and influenced him in his decision to give Ms. Kelly the position. Specifically, Mr. Majic testified that Grievant often needed prompting and reminding about deadlines, and that she could not accept any constructive criticism.

Most importantly however is the fact that this appointment was only a temporary upgrade, and the agency has great discretion in such matters. Ms. Kelly possessed the necessary skills to perform in the position, although she had less seniority than Grievant. Grievant, in her argument that her seniority and experience should have been determinative, relies on the general laws of selection for permanent, posted positions in state government, citing W. Va. Code § 29-6-10(4), which states, in

pertinent part:

> When any benefit such as a promotion, wage increase or transfer is to be awarded, and a choice is required between two or more employees in the classified service, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit.

Even then, seniority is merely a factor to be considered, and is not determinative, as an employer retains the discretion to select a less-senior applicant with greater qualifications. Lewis v. W. Va. Dept. of Administration, Docket No. 96-DOA-027 (June 7, 1996).

Ultimately, the appointment of Patty Kelly as Acting Director was completely within the discretion of the agency. Despite that discretion, Mr. Majic and Ms. Taylor did consider both Grievant and Ms. Kelly for the position.

Finally, Grievant claims she was retaliated against by Mr. Majic for filing this grievance, as evidenced in her annual evaluation, which was completed shortly after the level three hearing in this matter. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any otherparticipant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5)

> the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant testified in the level three hearing in this grievance on September 25, 2003. On September 29, 2003, Grievant received her annual performance appraisal from Mr. Majic, which rated her overall as “meets expectations.” Grievant disagreed with the evaluation, and refused to sign it. LIV G. Ex. 5. Grievant claims she was rated as “needsexpectations” in two areas because of her testimony at level three. Grievant has established a prima facie case of retaliation.

Mr. Majic denies he had any retaliatory motive in completing Grievant's annual evaluation. He testified Grievant's attitude and performance changed after Ms. Kelly was appointed Acting Director. Grievant had not accepted Ms. Kelly's appointment, and there was a struggle between the two, which he often had to step in and mediate. Some areas of Grievant's performance were continuing in nature, specifically her needing prompting and reminding to meet specific deadlines. Mr. Majic testified his ratings were based on specific things that had occurred in the past year, and were an accurate reflection of Grievant's performance.

Grievant admits that her performance “might” have declined under Ms. Kelly, but states it is because there are unclear delineations of responsibility, and communication problems. Grievant feels she is not being informed of what is going on in the office, but feels the after-effects when her performance is not up to par. Grievant does not see the lack of communication as being “all” her fault, but admits it is there. Grievant testified that she was very late with one project that she didn't feel comfortable doing. She said she should have backed out of the project, but didn't, and then missed the deadline. She also said she has missed other deadlines, and felt she may have made mistakes in judgment when prioritizing her work.

Based upon Grievant's own testimony regarding her performance over the past year, the undersigned concludes that Mr. Majic's ratings were accurate, and there is no evidence they were

given in retaliation for filing this grievance. The findings of fact and discussion are 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. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. In selection cases where political motivation is alleged, the grievant must offer sufficient evidence to permit a finding that the selection was substantially motivated by political considerations. The requisite political motivation, as with any state of mind, can be proven by circumstantial evidence, as it is commonly the only kind available for this purpose. Mercer v. W. Va. Dept. of Highways, Docket No. 01-DOH-604 (Mar. 20, 2002); Wiley v. W. Va. Dept. of Highways, Docket No. 99-DOH-109 (Aug. 3, 1999). Grievant failed to prove by a preponderance of the evidence that the appointment of Ms. Kelly was motivated by political considerations.

3. 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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, thescope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

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. Adkins v. W. Va. Dept. 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. Grievant has failed to establish that Ms. Kelly's appointment was arbitrary and capricious.

6. 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." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

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5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986).

7. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

8. Grievant established a prima facie case of reprisal in the form of unfavorable comments on her annual performance evaluation, completed just days after Grievant's testimony at level three.

9. DHHR successfully rebutted the presumption of retaliation by showing Grievant's performance and attitude had declined in the past year, justifying the comments made on her evaluation.

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 appealingparty 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 27, 2004