RANDY STEMPLE,

Grievant,

v. **Docket No. 04-CORR-064** (See footnote 1)

DIVISION OF CORRECTIONS/

DENMAR CORRECTIONAL CENTER,

Respondent.

DECISION

Randy Stemple ("Grievant") initiated this proceeding on December 2, 2003, alleging he should have been promoted to the position of ACA (American Correctional Association) Coordinator at Denmar Correctional Center ("Denmar"). The grievance was denied at level one on December 3, 2003, and at level two on December 15, 2003. A level three hearing was conducted on January 22, 2004, and the grievance was denied in a decision dated January 23, 2004. Grievant appealed to level four on February 2, 2004. In lieu of a level four hearing, the parties elected to submit this matter for a decision based upon the lower level record. (See footnote 2) This grievance became mature for consideration upon receipt of the parties' fact/law proposals on April 2, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant was employed at Denmar as a correctional officer from 1998 until he resigned on March 15, 2004. At the time of his resignation, his classification was Correctional Officer II.

2. In September of 2000, then-Commissioner Paul Kirby directed every warden/administrator designate a full-time ACA Accreditation Manager for their facility.

3. Grievant was designated by Denmar Warden Mark Williamson as ACA Coordinator in October of 2000. It is unclear from the record whether Grievant received additional compensation for performing these duties in addition to his correctional officer duties.

4. On August 22, 2002, Wayne Armstrong, Human Resources Director for the Division of Corrections ("DOC") directed all facility administrators to reallocate all current ACA Accreditation Managers to the working title of Corrections Program Specialist, for which the Division of Personnel had already developed a classification specification.

5. Grievant's reallocation request was refused, because he did not have sufficient work experience, and was therefore not minimally qualified for the Corrections Program Specialist classification. He was subsequently removed from the position.

6. Grievant was suspended for sexual harassment in February of 2003, and he grieved that suspension. In September of 2003, this Grievance Board granted that grievance, reducing the suspension to a verbal reprimand. Grievant did not request reinstatement to the ACA coordinator position during that grievance, nor was it discussed during the litigation.

7. The position of Corrections Program Specialist (ACA Accreditation Manager) was posted at Denmar on September 24, 2003. 8. Grievant applied for the position and was interviewed by a committee appointed by the Warden. Robert Neal was also interviewed and was ultimately selected for the position. He had been employed as an officer at Denmar since 1993, having attained the title of Correctional Officer V.

9. Grievant is no longer interested in being employed at Denmar in any capacity, but is currently seeking back pay from October 1, 2000, to the date of his resignation on March 15, 2004.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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.

The standard of review in the selection process of a state employee is whether the decision 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 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, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the employer. See generally, Harrisonv. 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).

In the instant case, Grievant has failed to prove that the selection process was flawed, or that he was more qualified than the successful applicant. While Grievant felt that he should have been placed in the position because he had previously performed those duties, Mr. Neal was selected because of his longer service in corrections and extensive supervisory experience. This was a decision which was within the ample discretion of Denmar officials, and Grievant has not proven the decision to have been arbitrary and capricious.

Grievant has also made an allegation that he should have been placed back in the ACA coordinator position as part of the relief in his prior grievance regarding the sexual harassment suspension. This claim is completely without merit. As the presiding administrative law judge in that grievance, the undersigned can attest that no claim was ever made in connection with that grievance regarding the ACA position. Moreover, Grievant has failed to prove that he was removed from that position because of the sexual harassment allegation. He has not disputed that the Division of Personnel refused to approve his placement in the position, due to his failure to meet the minimum qualifications in the classification specification.

If a grievant can demonstrate the selection process was so significantly flawed that he might reasonably have been the successful applicant if the process had beenconducted in a proper fashion, the employer will be required to compare the qualifications of the grievant to the successful applicant. Thibault v. W. Va. Div. of Rehabilitation Serv., Docket No. 93-RS-489

(July 29, 1994). Accordingly, even if Grievant had proven the selection process was sufficiently flawed, he has specifically stated that he is no longer interested in the position, making a comparison of qualifications futile. It has been held by this Grievance Board that, once an employee is no longer interested in the position which he has grieved, the grievance becomes moot. McDonald v. West Virginia Dep't of Transp., Docket No. 97-DOH-005 (Oct. 20, 1997); See Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-714 (Feb. 22, 1990); Green v. Kanawha County Bd. of Educ., Docket No. 20- 86-344-1 (Mar. 12, 1986). In McDonald, supra, as in the instant case, the grievant who no longer wanted the position was requesting compensation, to which she had proven no entitlement. Accordingly, Grievant has failed to prove he is entitled to the relief requested in this grievance. No matter how this case is analyzed, Grievant is not entitled to additional pay for his employment at Denmar.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his 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. The standard of review in the selection process of a state employee is whether the decision 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 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).

3. Because Grievant is no longer interested in the promotion which he has grieved, the grievance is moot. McDonald v. West Virginia Dep't of Transp., Docket No. 97-DOH-005 (Oct. 20, 1997); See Smith v. Lincoln County Bd. of Educ., Docket No. 89-22- 714 (Feb. 22, 1990); Green v. Kanawha County Bd. of Educ., Docket No. 20-86-344-1 (Mar. 12, 1986).

4. Grievant has failed to prove entitlement to the relief requested.

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 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.

Date: April 16, 2004

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The previously assigned docket number was an error, and this Decision reflects the corrected docket number

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Footnote: 2

Grievant represented himself at level four, and Respondent was represented by Assistant Attorney General Charles Houdyschell Jr.