JEFFREY McCALLISTER and

THOMAS JESSUP,

Grievants,

v. **DOCKET NO. 04-HE-158**

MARSHALL UNIVERSITY,

Respondent.

DECISION

On March 18, 2004, Grievants Jeffrey McCallister and Thomas Jessup (See footnote 1) filed a grievance against their employer, Marshall University, claiming,

> Unfair hiring process for Position #10964 Manager/Physical Plant II (Electrical Shop). The position was advertised as non-exempt and during the interview we were informed the position was exempt. In our opinion, the position was filled with an individual who has no supervisory experience and little or no electrical experience. We feel the Assistant Director of Physical Plant II (Mechanical Trades) gave the position to the individual (Virgil Crockett) because of a personal friendship. Each of us exceed all qualifications for this position. We also feel the position was given to the person who was least qualified.

As relief, Grievants seek "This position should be re-advertised as exempt and all applicants should be re-interviewed by a non-biased committee including one or more members from Marshall University Personnel Department, interview should be based on qualifications, knowledge, years of experience, years of service, etc." Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on November 5, 2004. Grievants were represented by Terry Olson. Respondent was represented by counsel, Jendonnae Houdyschell, Assistant Attorney General. The matter became mature for decision on December 10, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievants are both Trades Specialists employed by Marshall University.

2. Respondent issued a Recruiting Bulletin on January 23, 2004, that listed a job opening for "Search No. 10964. Manager/Physical Plant II, Physical Plant." The posting specified the job was "Full-time, regular status, classified, non-exempt, pay grade 17, $26,783/annually."

3. The "non-exempt" designation was listed erroneously; the job was exempt.

4. Grievants applied for the position, were found to be qualified, and were interviewed by a committee comprising Tony Crislip, Tony Vaugh and Bill Lewis. At the interviews, each of the five qualified applicants was informed of the mistake in the listing, and all indicated they were still interested in the job.

5. The qualifications listed as necessary in the job posting were as follows:

> Associate's Degree and over three years of experience in electrical trades with a Master license preferred. Candidates must have knowledge of OSHA, national, state and local electrical codes, fire codes and a broad knowledge of commercial and industrial construction requirements and methods; must possess a valid driver's license. Successful candidate should also possessextensive knowledge of both electrical and mechanical building components. The candidate should have the ability to use sophisticated diagnostic equipment and have an excellent understanding of electrical theory. Excellent math, communications, clerical, financial and administrative skills are required as well as the ability to diagnose technical problems and compile complex scheduling.

6. The duties of the position were stated as follows:

> Participate in all phases of Electrical projects which includes layout, design, material and cost estimation, material requisition, installation of various types of lighting depending on need, building capabilities and codes. Maintain various types of schedules and records as well as possess effective supervisory skills. Candidate must perform higher end technical diagnosis. Maintain all tools and equipment in good working condition. Read and comprehend blueprints.

7. Grievant McCallister has been employed by Respondent since 1992 as a manager in the physical plant, renovation and alteration shop. He has also been employed part-time since 1995 as an Electrical/Mechanical Supervisor for Industrial Machine, designing and installing various types of electrical and mechanical control systems, and troubleshooting and repairing machine shop equipment. (Grievant's Exhibit No. 6).

8. Grievant Jessup has been employed by Respondent since 1990, and works in the

Department of Residence Services as a Certified Trades Worker, where he spends 20% of his time working on HVAC (See footnote 2) equipment, 20% of his time on electrical equipment, 10% on plumbing and 20% on kitchen equipment. He has also operated his own electrical contracting business since 1984. He is certified as a Master Electrician

9. Mr. Crockett had been filling the position at issue on an interim basis since December 1, 2003. He had worked for Respondent since August, 1992, and was an HVAC Mechanic before he took over as interim manager. Prior to working at MU, Mr.Crockett had worked as a Carpenter at Huntington Museum of Art, a Maintenance Mechanic at Heiner's Bakery and as an Environmental Supervisor at Wayne Continuous Care Nursing Home.

10. As part of the interviews, each candidate was asked a series of standard questions of a practical nature. These questions were: (See footnote 3)

1. Transients are slow voltage fluctuations lasting at least 2 cycles. [True or False?]

2. Haronics are?

3. Harmonics are caused by?

4. What normally provides transient protection?

5. What can cause sags and swells?

6. Can you name these three (3) electrical symbols?

Figure

Graphic file number 0 named . with height 8 p and width 7 p Left aligned

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A.

Figure

Graphic file number 0 named unknown. with height 13 p and width 10 p Left aligned

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B.

Figure

Graphic file number 0 named . with height 10 p and width 8 p Left aligned

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C.

11. The candidates were also asked a series of subjective questions, such as: “Describe the supervisory style you would use, if hired.” “Should a manager do any physical work or delegate? Why?” “Why have you applied for the position of Manager, Physical Plant II and how are you qualified?” Each candidate was asked the same set of questions, and the questions were decided upon by the committee prior to the interviews. Answers were rated on a scale of one to five.

12. During the interviews, the committee members each completed an “Interview Rating Form” on which they rated each candidate as “outstanding,” “above average,” “average,” or “below average” in a number of areas, such as “interest in personalimprovement,” “ease of expression/poise,” and “preparation - general knowledge of job and institution.”

13. Virgil Crockett was selected to fill the position by unanimous agreement of the committee members. The consensus was that he answered more of the practical questions correctly and performed better during the interview. The committee did not check any of the applicants' references, since they were all in-house employees.

DISCUSSION

Since this grievance does not challenge a disciplinary action, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that each claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH- 287 (Jan. 22, 1996).

Grievant's first claim, that the error in posting the position as non-exempt somehow invalidates the posting, has no merit. Grievants failed to show how they were harmed by this error. Each interviewee was informed of the error at the interview. Typically, a Grievant must show “an injury-in-fact, economic or otherwise” to have what “constitutes a matter cognizable under the grievance statute.” *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha*

County Bd. of Educ., Docket No. 20-87-102-1 (June 30, 1987).

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 Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994). “The role of the undersigned is to review of the legal sufficiency of the selection process, at the timeit occurred. *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (Jun. 26, 1989).” *Wingrove v. W. Va.* Univ., Docket No. 04-HE-230 (Sep. 30, 2004). “'The exercise of administrative judgment by appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or capricious or clearly wrong.' *Sloan v. W. Va. Univ.*, Docket No. BOR-88-109 (Sept. 30, 1989).” *Wingrove , supra.*

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." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). "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 [his] judgment for that of [the agency]." *Trimboli*, *supra*.

Grievants contend that Mr. Crockett was chosen for the job based not on his qualifications, but on his friendship with Mr. Crislip. They contend Mr. Crockett had less expertise and less supervisory experience. Respondent's position is that the better qualified applicant was selected, the selection was not arbitrary and capricious, and that the selection was not made by Mr. Crislip alone, but by unanimous agreement of the committee. Grievants place much of their reliance on the fact that Mr. Crockett has fewer years of supervisory experience, and has supervised fewer people, than either Grievant. Mr. Crislip, explained, however, that supervisory experience was not the most important consideration for the position, and the applicants were rated on their applications and interview performance overall. On the subjective questions, Mr. Crockett gave more specific and detailed answers, and he was able to answer more of the practical questions correctly. In addition, the interviewers all believed he had a better attitude than either Grievant. (See footnote 4) Grievants'

concentration on only one aspect of the qualifications needed for the job is understandable, but overlooking the "whole candidate" forecloses any conclusions based on the qualifications as a whole.

Mr. Crislip's testimony that his admitted friendship with Mr. Crockett had no influence on his choice is not credible. If nothing else, it certainly gave him familiarity and a preconception of Mr. Crockett's attitude, a factor Mr. Crislip saw as important. However, Mr. Crislip was but one of the three members of the interview committee, and all independently rated Mr. Crockett higher. There is no evidence, as was suggested by Grievants, that Mr. Crislip gave Mr. Crockett expected answers to the interview questions ahead of time. Given the unanimity of the decision and the lack of substantial evidence that this relationship was a determinant factor in the selection process, it is not seen by the undersigned as a reason for overturning the decision. Grievants have not proven by a preponderance of the evidence that Respondent's selection of Mr. Crockett was arbitrary and capricious. The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. Non-disciplinary grievances must be proven by the Grievant by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that each claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id*.

2. A grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987). Grievants failed to show the error in posting the position as non-exempt caused an injury of any sort.

3. "The role of the undersigned is to review of the legal sufficiency of the selection process, at the time it occurred. *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (Jun. 26, 1989)." *Wingrove v. W. Va.* Univ., Docket No. 04-HE-230 (Sep. 30, 2004).

4. "'The exercise of administrative judgment by appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shownto be arbitrary or capricious or

clearly wrong.' *Sloan v. W. Va. Univ.*, Docket No. BOR-88- 109 (Sept. 30, 1989)." *Wingrove , supra.*

5. 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 Resources*, 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 [his] judgment for that of [the agency]. *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*; *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20- 470 (Oct. 29, 2001).

6. Grievants have not proven by a preponderance of the evidence that Respondent's selection of Mr. Crockett was arbitrary and capricious or clearly wrong.

For the foregoing reasons, 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: January 10, 2005 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

A third Grievant, Henry Lambert, participated at the lower levels but did not appeal to level four.

Footnote: 2

HVAC stands for Heating, Ventilation and Air Conditioning.

Footnote: 3

The correct answers are: 1)False; 2) Integer multiples of the fundamental frequency; 3)Non-linear power supplies and variable speed drives; 4)TVSS devices installed at load centers, fuses, and filter breakers; 5) Motors starting operation and utility switching _ things out of our control; 6A)Vacuum switch; 6B) Temperature-actuated switch; 6C) Flow switch.

Footnote: 4

It was noted by two of the interviewers that Mr. Jessup argued with them during the interviews about the questions being asked.