ALLEN ASH, SR.,

Grievant,

v. **Docket No. 04-DJS-409**

DIVISION OF JUVENILE SERVICES/

INDUSTRIAL HOME FOR YOUTH,

Respondent.

DECISION

Allen Ash, Sr., ("Grievant") initiated this proceeding on September 29, 2004, alleging he should have been placed in a position for which he applied, Building Maintenance Supervisor I. He seeks placement in the position as relief. The grievance was denied at levels one and two, and a level three hearing was conducted on an unspecified date. The grievance was denied at that level on November 9, 2004. Grievant appealed to level four on a date not reflected in the record, and a hearing was held in Westover, West Virginia, on May 20, 2005. Grievant represented himself, and the Division of Juvenile Services ("DJS") was represented by counsel, Steven Compton. The parties elected not to file post- hearing proposals, so this grievance became mature for consideration at the conclusion of the level four hearing.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed at the Industrial Home for Youth ("IHY") in the maintenance department. His position was not specified in the grievance record. 2. In early August of 2004, IHY posted the position of Maintenance Supervisor I.

3. Grievant and four other applicants were interviewed for the position on August 20, 2004. The interview committee consisted of Jerry Nelson, Maintenance Supervisor, Dalin Hayes, Assistant Superintendent of Operations, and Steven Honce, a correctional officer.

4. All interviewees were asked identical questions prepared in advance of the interviews. Their answers were rated on a one-to-five scale by each interviewer, and then the scores were averaged

for a final total score for each applicant.

5. After the interviews, the committee determined that none of the scores were high enough, and none of the applicants met the minimum qualifications for the position. It was reposted on September 21, 2004.

6. Grievant's son, Allen Ash, Jr., is employed at IHY as an institutional investigator. Sometime in the late summer of 2004, Allen Ash, Jr., was quoted in the Clarksburg Exponent Telegram regarding alleged abuse of residents at the facility. He described the facility as being “in total chaos” and stated there was “no accountability.”

7. The members of the interview committee denied knowing anything about Grievant's son being called a “whistleblower” around the institution, and also denied that Allen Ash, Jr., was considered in any way when they made their decision regarding the supervisor position.

Discussion

In a selection case such as this, 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). His claim must be proven by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claims are more likely valid than not. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

In matters of non-selection for state employees, the grievance process is not that of a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994). Unless proven arbitrary or capricious or clearly wrong, an agency decision regarding promotion will be upheld. *Ashley v. W. Va. Dept. of Health and Human Resources*, Docket No. 94-HHR-070 (June 2, 1995). 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). 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 [the employer]." *Trimboli*, *supra*; *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

The basis of Grievant's claim is that his son's alleged “whistleblowing” caused the interview committee to be biased against him, so he was not selected for the position at issue. As set forth above, the committee members denied having any knowledge of any matters involving Allen Ash, Jr., and the only evidence to support Grievant's contentions in this regard are his own unsupported statements. Moreover, it is not as if another applicant was selected over Grievant. The committee determined that none of the applicants met the needed qualifications for the position, so none of them were hired. This Grievance Board has previously held that it is permissible for an agency to withdraw a posting and re-post it, prior to the extension of any employment offer, and failure to draw a sufficient field of qualified applicants is a legitimate justification for doing so. *Law/Bragg v. W. Va. Dept. of Health and Human Resources*, Docket No. 95-HHR-452 (July 17, 1997); *See also Staggers v. Div. of Highways*, Docket No. 98-DOH-505 (Apr. 30, 1999).

Further, Grievant has provided no evidence regarding the requirements of the position or his own qualifications. He has failed to prove any entitlement to placement in the Supervisor I position.

The following conclusions of law support this decision.

Conclusions of Law

1. In a selection case, Grievant must 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).

2. In matters of non-selection for state employees, the grievance process is not that of a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994). Unless proven arbitrary or capricious or clearly wrong, an agency decision regarding promotion will be upheld. *Ashley v. W. Va. Dept. of Health and Human Resources*, Docket No. 94-HHR-070 (June 2, 1995).

3. 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). 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).

4. It is permissible for an agency to withdraw a posting and re-post it, prior to the extension of any employment offer, and failure to draw a sufficient field of qualified applicants is a legitimate justification for doing so. *Law/Bragg v. W. Va. Dept. of Health and Human Resources*, Docket No. 95-HHR-452 (July 17, 1997); *See also Staggers v. Div. of Highways*, Docket No. 98-DOH-505 (Apr. 30, 1999). 5. Grievant has failed to establish by a preponderance of the evidence that he was entitled to placement in the position at issue.

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.

Date: June 3, 2005

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DENISE M. SPATAFORE

Administrative Law Judge