THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PATRICIA DEAK,
Grievant,

v. **Docket No. 2009-0378-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant Patricia Deak filed a grievance against her employer, Division of Highways ("DOH"), on September 16, 2008. The statement of grievance reads, "Non-selection of Highway Administrator 2 on bulletin #613." For relief, Grievant seeks "To be made whole including being appointed to the position of HWYADM2 [sic]."

A level one hearing was held on November 13, 2008, with the grievance being denied by letter dated December 4, 2008. A mediation session was held on March 24, 2009. Grievant then appealed to level three, and a level three hearing was held in the Grievance Board's Charleston Office on June 28, 2009. Grievant was represented by Gordon Simmons, United Electrical Radio and Machine Workers of America (UE), and Respondent was represented by Barbara Baxter, Esq. This case became mature on August 13, 2009, upon the submission of findings of fact and conclusions of law.

Synopsis

Grievant applied for the position of Highway Administrator 2 ("HWY ADM 2"), but was not the successful applicant. She asserts that she should have been the successful candidate because she received a rating of "exceeds" in the categories of knowledge, skills and experience. Grievant argues that the rating of "does not meet expectations" in

interpersonal skills makes the evaluation and subsequent selection arbitrary and capricious.

Respondent avers the selected applicant exceeded the qualifications for the position in the area of "knowledge, skills and abilities." Respondent asserts also that Grievant's interpersonal skills do not meet the needs of this position. Respondent argues the selection was not arbitrary and capricious.

Grievant has not met her burden of proof. Therefore, this grievance is DENIED.

Findings of Fact

1. Grievant is employed by Respondent at District 3 Headquarters as a Transportation Systems Analyst 1.

2. On January 11, 2008, Respondent posted a vacancy for HWY ADM 2.

3. The following was listed as a brief sketch of job duties:

> Under general direction performs full performance level work administering highway maintenance operations in a county in accordance with established procedures and policies of the Division, national highway standards, and legal requirements set forth by regulatory agencies. Directs and implements a scheduled highway maintenance program within an operating annual budget, including the security of materials and equipment personnel and materials. Responds and resolves citizen or employee complaints. Performs related work as required.

4. The minimum qualifications for the position are "Bachelor's degree from an accredited college or university with a degree in engineering, business or public administration, or related field." Experience of "four years of full-time or equivalent part-time paid professional or managerial experience in business administration, public administration, transportation, construction, manufacturing, mining or the armed services" could be substituted for the required training on a year for year basis.

5. Grievant and Michael Daley applied for the position.

6. Both applicants met the minimum qualifications for the position and were interviewed.[1]

7. Debbie Farnsworth, Administrative Services Manager 1 for District 3, and Dave Brabham, Assistant District Engineer for District 3, interviewed and selected Mr. Daley as the successful applicant.

8. Applicants were ranked based on their interviews and applications.

9. All applicants were asked the same questions, and notes were kept on the applicants' answers.

10. After the interviews were completed, Ms. Farnsworth and Mr. Brabham completed an Application Evaluation Record. This ranked the interviewee on the following areas: Education, Relevant Experience, Possess Knowledge, Skills and Abilities, Interpersonal Skills, Flexibility/Adaptability, Present Ability, and Overall Evaluation. For each of those areas, the candidate could be ranked as Does Not Meet, Meets, or Exceeds.

11. The successful applicant was ranked as meeting all of the qualifications and was ranked as exceeding the qualifications in the area of "Possess Knowledge, Skills, and Abilities." The interviewers took into consideration that Mr. Daley worked directly on Respondent's work sites with Highways equipment. Mr. Daley was also certified on several different types of equipment. Mr. Daley also had training as a volunteer firefighter.

12. The Grievant was ranked as meeting all the qualifications, but was ranked as not meeting the qualifications in the area of Interpersonal Skills.

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[1]The undersigned was not provided with information concerning how many individuals applied.

13. Mr. Daley was recommended for hire. Grievant was not recommended for the position.

14. Mr. Brabham had been Grievant's supervisor since 2007.

15. Part of Grievant's job duties as a Transportation Systems Analyst 1 was to complete an Overtime Justification Form. In July of 2006, Grievant completed the form and in the column which required a justification code she wrote, "Because he does what he wants to" beside the names of two employees. It was explained to her that this was inappropriate.

16. At Grievant's work station, she had a sign placed under the glass top of her desk which read, "Remember where you work; the people you work with; most important of all, the less you do the more you are thought of; helping does not pay off."

17. Grievant has a history of using profanity around employees.

18. On December 21, 2005, Grievant completed a sheet labeled Time Reporting Documentation. Under a Brief Description of Work Performed and Location Grievant wrote, "Pee on work. Work of a non-essential employee." This was completed upon discovering she did not get another job for which she had applied.

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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

In a selection case, a grievant must prove, by a preponderance of the evidence, that she was the most qualified applicant for the position in question. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). 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 Grievance Board recognizes that selection decisions are largely the prerogatives 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 Rehabilitation Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998); *Ashley v. W. Va. Dep't of Health and Human Resources*, 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.* 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.*, 210 W. Va. 105, 556 S.E.2d 72 (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 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." *Id.* (*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*.

Grievant asserts she should have been the successful candidate. She avers that there were no verifiable facts or measures for Mr. Daley's rating of exceeding the requirements, thus making it arbitrary and capricious. Grievant also argues that her rating in interpersonal relationships of not exceeding the requirements was based on a "repeated and factually unsubstantiated bias against Grievant." Grievant's Proposed Findings of Facts and Conclusions of Law.

Grievant's first argument fails because Mr. Brabham had worked with Mr. Daley and observed his work. Mr. Daley had experience with the Division of Highways maintenance and equipment. The interviewers also took into consideration that Mr. Daley worked directly with the equipment and had been certified on several different types of the equipment. Mr. Daley's training as a volunteer firefighter was more applicable to the position than Grievant's clerical and computer experience.

Grievant's next assertion that her ranking as not meeting expectations in the area of interpersonal skills shows a bias against Grievant must also fail. Grievant demonstrated a negative attitude throughout her tenure. Mr. Brabham has been Grievant's supervisor since 2007, and during that time he witnessed her use profanity with other employees. Her attitude was blatantly obvious from the unprofessional comments put on the Overtime Justification Form and the Time Reporting Documentation, as well as the sign placed on her desk. It should be noted, however, that Respondent's examples of Grievant's poor behavior took place some time before the posting. Unfortunately for Grievant, it was considered by the interviewers when looking for the best candidate for this position.

There were numerous examples given of Grievant's negative attitude and poor interpersonal skills. Grievant's interpersonal skills and attitude toward the workplace are

hostile and combative. It is not arbitrary and capricious for Respondent to determine she should not be recommended for the position. Therefore, this grievance is DENIED.

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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

2. In a selection case, a grievant must prove, by a preponderance of the evidence, that she was the most qualified applicant for the position in question. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). 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).

3. The Grievance Board recognizes that selection decisions are largely the prerogatives 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 Rehabilitation Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998); *Ashley v. W. Va. Dep't of Health and Human Resources*, 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.* 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.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

4. "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.

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5. Grievant did not prove Respondent's decision to hire Mr. Daley was arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: March 12, 2010

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Wendy A. Elswick
Administrative Law Judge