THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ANTHONY MARLON SAVAGE,
Grievant,

v. **Docket No. 2010-0668-DHHR**

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/BUREAU FOR
CHILDREN AND FAMILIES,
Respondent.

DECISION

Grievant Anthony Marlon Savage filed this grievance on November 16, 2009, against his employer challenging his non-selection for a Child Protective Service Supervisor position in the Ohio/Brooke/Hancock District. This grievance was denied at level one on December 21, 2009. Level two mediation was conducted on May 19, 2010. Grievant appealed to level three on June 8, 2010. A level three hearing was conducted before the undersigned Administrative Law Judge on November 1, 2010, at the Grievance Board's Westover office location. Grievant appeared *pro se*. Respondent appeared by its counsel, Heather L. Laick, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on December 21, 2010.[1]

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[1]On January 12, 2011, Respondent filed a "Motion to Strike," objecting to Grievant's perceived late filing of his proposals. It appears from the file that Grievant's proposals were filed within close proximity to the time agreed to by the parties. That motion is denied.

Synopsis

Grievant is employed by the Bureau for Children and Families as a Child Protective Service Worker for the Institutional Investigations Unit. He applied for a Child Protective Service Worker Supervisor position which was posted in the summer of 2009. He was not selected for the supervisor's position. Nothing in the record of this grievance establishes that Respondent's selection of another applicant was arbitrary and capricious, or clearly wrong.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievant is employed by the Bureau for Children and Families as a Child Protective Service Worker for the Institutional Investigations Unit, in Moundsville, West Virginia Department of Health and Human Resources office.

2. A position for Child Protective Service Supervisor in the Wheeling office was posted in the summer of 2009. Three applicants, including Grievant, were interviewed for the position on August 21, 2009.

3. The interview committee consisted of Ronda Colanero, Regional Director, Teresa Haught, Social Service Coordinator of Ohio, Brooke, and Hancock Counties, and Mickie Hall, Community Service Manager of Ohio, Brooke, and Hancock Counties.

4. Respondent asked all of the applicants the same questions, individually compiled score sheets, did a candidate comparison chart, then selected the applicant that received the highest score.

5. The candidates' scores were based on their applications, education, tenure with the agency, any outside experience related to the position, answers to the interview questions, and their growth potential for leadership. The record reflects that none of the candidates' Employee Performance Appraisals were considered during the selection process.

6. While Grievant was qualified for the position, he was not selected because he had less management experience, less experience as a Child Protective Service Worker within the district office, and he did not perform as well as the successful applicant during his interview.

7. The Child Protective Service Supervisor's position came open again several months later and the Grievant did not apply for the position. No one made application pursuant to this posting. The position was re-posted and Grievant once again failed to apply for the position.

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. 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 he 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 has not established that the Respondent's selection of the successful applicant was arbitrary and capricious, or that he was the most qualified applicant. The interviewers stated that the qualifications and experience of all applicants were reviewed. While Grievant was qualified for the position, it appears from the record that he was not selected because he had less management experience, less experience as a Child Protective Service Worker with the district office, and he did not perform as well during his interview as did the successful applicant.

It is understandable that Grievant would seek to challenge this decision by Respondent due to Grievant possessing experience in Child Protective Service work. The record established that Grievant worked as a district office Child Protective Service Worker for approximately six months and held that position some six years ago. By contrast, the successful applicant was working as a Child Protective Service Worker in the district office at the time he interviewed for the supervisor position. The successful applicant not only had experience as a Child Protective Service Worker of a more recent nature, he had also been performing the job duties for ten months. In addition, the successful applicant was very familiar with the Safety First system being used at the time of the interview, and he had been utilizing it on a daily basis. Grievant acknowledged that he had not used the Safety First system and had not received training on it.

Grievant points to his years of experience while classified as a Child Protective Service Worker in support of his argument. Grievant performs investigations and license inquiries of foster homes, daycare centers, in-home daycare, residential placements, detention centers, and schools. A Child Protective Service Worker within the district office investigates abuse and neglect with families, performs case management, prepares safety

plans, files petitions in court for removal of children, and finds placements for children who are removed. Therefore, a Child Protective Service Worker for the Institutional Investigations Unit performs different duties, requires different training, and they use different agency systems.

Respondent acknowledges that Grievant holds a higher level of education than the successful applicant and Grievant was scored accordingly; however, even with his higher level of education, Grievant overall scored lower than the successful applicant. Grievant received a lower score on the interview from all three members of the committee. Grievant did not appear to have a good understanding of what it meant to be in a supervisor's position. Grievant stated during his interview that he wanted the Child Protective Service Worker Supervisor's position because he needed two years of supervisory experience before he would be eligible for a Community Service Manager's position. The successful applicant's reason for wanting the Child Protective Service Worker Supervisor's job was because he enjoyed the work and wanted to progress in that position. The interview committee wanted to hire someone who was enthusiastic about the work and planned to stay in the position for some time.

Based upon the foregoing discussion, Grievant has failed to prove by a preponderance of the evidence that Respondent's decision was arbitrary and capricious or that it was clearly wrong. It appears from the record that Grievant was not offered the position of Child Protective Service Worker Supervisor because the successful applicant was more qualified for the position in that he had more supervisory experience; more experience as a Child Protective Service Worker engaged in investigating abuse and neglect with families, performing case management, preparing safety plans, filing petitions

in court for removal of children, and finding placements for children who are removed; and performed better in the interview portion of the selection process. Not to mention the undisputed fact that Grievant could have held the position had he bothered applying for the position when it was subsequently posted after the initial posting.

The following conclusions of law support the decision reached.

Conclusions of Law

1. 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. 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).

2. In a selection case, a grievant must prove, by a preponderance of the evidence, that he 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. Grievant has failed to prove by a preponderance of the evidence that Respondent's decision was arbitrary and capricious, or clearly wrong, due to the undisputed fact that Respondent considered and ranked each candidate's applications, education level, tenure with the agency, outside experience related to the position, their answers to the interview questions, and their growth potential within the position.

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 30, 2011

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Ronald L. Reece
Administrative Law Judge