THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KAREN ROBINSON,
Grievant,

v. **Docket No. 2012-1231-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Grievant, Karen Robinson, filed this grievance on May 2, 2012, her statement of grievance indicates, in part, "interviews for Procurement Officer position & person selected was working in this position out of classification doing this job since 3/16/12 when position became vacant & was promised the position by CFO. On numerous occasions CFO stated throughout the hospital that this position was hers including the morning before the interviews were conducted & she was given the position this is preselection." Grievant seeks, for relief, that the interviews be conducted by an outside selection committee and that the most qualified individual be offered the position.

This grievance was denied at level one, following a hearing, by decision dated June 12, 2012. A level two mediation session was conducted on December 6, 2012. Grievant perfected her appeal to level three on December 21, 2012. A level three hearing was scheduled to be conducted before the undersigned Administrative Law Judge on July 25, 2013. Prior to this hearing, the parties contacted the Grievance Board and gave notice that they desired to submit the grievance on the record developed at level one. The parties

were given until September 2, 2013, to submit any proposals. Grievant appeared by her Representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Harry C. Bruner, Jr., Assistant Attorney General. The matter is now mature for consideration.

Synopsis

Grievant claimed the selection for the position for which she applied was flawed because Grievant believes the successful applicant was preselected. Grievant's claim was not substantiated by the evidence. Nothing about the selection decision was arbitrary and capricious, nor so fundamentally flawed as to require that it be once again conducted.

The following findings of fact are based on the record developed at level one.

Findings of Fact

1. Grievant is employed by Respondent as a Storekeeper II in Central Purchasing at the William R. Sharpe, Jr. Hospital. She has been employed at Sharpe Hospital since 1989.

2. On March 16, 2012, Kevin McHenry, Procurement Officer at Sharpe Hospital, left his position. At that time, Chief Financial Officer, Rob Kimble, took steps to replace Mr. McHenry. Mr. Kimble divided the Procurement Officer duties among a few employees, including Barbara Daugherty.

3. During the time the Procurement Officer position was vacant, no employee, including Ms. Daugherty, assumed all the duties associated with that position.

4. On April 12, 2012, an interview team of Mr. Kimble, Chief Executive Officer Parker Haddix and Assistant Chief Executive Officer Terry Small interviewed Grievant and

three other candidates for the Procurement Officer position. The interview team asked all the candidates the same set of thirteen interview questions. Each member then rated the candidates' answers to each question using a matrix from excellent to poor.

5. Prior to the interviews, Respondent confirmed that all of the candidates met the minimum qualifications of education and experience for the position.

6. Grievant was given a total score of 34. The successful applicant, Ms. Daugherty, was given a total score of 143. Ms. Daugherty scored well ahead of all applicants.

7. All of the applicants were internal candidates, so the interview team was familiar with each of the candidates. Considering education, experience, knowledge, leadership potential and the interview scores, all of the interview team members rated Ms. Daugherty as the top candidate.

8. Bureau officials and the Division of Personnel approved Respondent's recommendation, and Ms. Daugherty undertook the full duties of Procurement Officer on May 1, 2012.

9. Grievant presented witnesses at the level one hearing that indicated that Mr. Kimble stated that Ms. Daugherty would be hired as the Procurement Officer prior to the interviews. Mr. Kimble denied any allegations of preselecting. The witnesses also acknowledged that when positions are posted at Sharpe Hospital rumors circulate about who will be selected.

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*.

In the instant case, Grievant does not contend that she was more qualified than the chosen candidate. Grievant does contend that the selection process was fundamentally flawed because Grievant believes that Ms. Daugherty was preselected. Respondent contends that the record does not support a finding that the Hospital acted in an arbitrary and capricious manner, relied on improper factors, or reached an implausible decision in regard to the selection process.

Grievant has not established that the Respondent's selection of the successful applicant was arbitrary and capricious. A selection team of three members was used so that no one person's opinion would dictate the outcome. All candidates were asked the same list of questions designed to elicit answers which would display the knowledge of purchasing, supervisory potential, management skills and other factors of the candidates. Each team member completed their scoring of the candidates without the input of the other team members. Ms. Daugherty received the highest interview scores. After due deliberation, based on the selection process, the team decided that Ms. Daugherty was the person best qualified for the position. A recommendation to hire was made to the Commissioner of the Bureau for Behavioral Health & Health Facilities and the Division of Personnel. The interview team's recommendation was adopted and approved by those officials. Grievant did not meet her burden of proving the selection process was insufficient or fatally flawed.

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 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).

2. 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 a preselection. Respondent considered and ranked each candidate's applications, education level, tenure with the agency, experience related to the position, and their answers to the interview questions.

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 (eff. July 7, 2008).

Date: October 2, 2013

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Ronald L. Reece
Administrative Law Judge