WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TIMOTHY ALLEN MEADOWS,
Grievant,

v. **Docket No. 2013-0566-MAPS**

DIVISION OF JUVENILE SERVICES/
SAM PERDUE JUVENILE CENTER,
Respondent.

D E C I S I O N

Timothy Allen Meadows, Grievant, filed this grievance against his employer, the Division of Juvenile Services/Sam Perdue Juvenile Center, Respondent, on September 25, 2012, protesting his non-selection for the posted position of Juvenile Facility Director. Grievant maintains that "Respondent was clearly wrong in its decision." The relief requested on the grievance form states, "[o]pportunity to meet with Cabinet Secretary Mr. Joseph Thornton and Deputy Director Denny Dotson for reason(s) that I was not selected."

A conference was held on October 10, 2012. At this conference Grievant was represented by Jack Ferrell, CWA Local 2055, but was not present in person. A second conference was held on October 23, 2012. Grievant was present in person. Other participants in the conferences included: Division Director Dale Humphreys, Deputy Director Denny Dodson and Assistant Attorney General Steven Compton. The grievance was ruled both moot and denied by a level one decision dated November 14, 2013.[1]

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[1] The level one decision, in relevant part, stated "The Grievant did not request the position in his grievance, only the reasons for not selecting him. To the extent that relief has been granted, this Grievance is MOOT. Nevertheless, the Grievant has failed to prove that the Division was in violation of any DOP hiring procedure or acted in an arbitrary and capricious manner when selecting the position of Director for the Sam Perdue Juvenile Detention Center and therefore, any remaining issues, if any, are DENIED."

Grievant appealed to level two on November 28, 2012, and a mediation session was held on May 8, 2013. Grievant appealed to level three on May 16, 2013. A level three hearing was held before the undersigned Administrative Law Judge on August 26, 2013, at the Grievance Board's Beckley hearing facilities.[2] Grievant appeared *pro se*. Respondent was represented by Assistant Attorney General Steven Compton. This matter became mature for decision on September 30, 2013, the deadline for the submission of the parties' proposed findings of fact and conclusions of law documents. Both parties submitted fact/law proposals.

Synopsis

Grievant alleged that he should have been selected over the successful applicant for the position of Juvenile Facility Director at Sam Perdue Juvenile Center. Grievant has the burden of proof in this non-disciplinary grievance. Grievant presented little evidence comparing his qualifications to those of the successful applicant. Grievant failed to demonstrate that the selection process was flawed, or that the decision made was arbitrary and capricious. Accordingly this grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

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[2] There is an debatable basis to find that this grievance is moot in that Grievant did not request the position of Juvenile Facility Director as relief on his grievance statements (only the reasons for him not being selected); however, it can be inferred that Grievant's ultimate goal would be to obtain the position; thus the undersigned is persuaded to discuss this grievance matter further.

Findings of Fact

1. Grievant has been employed in a correctional officer position at the Division of Juvenile Services ("DJS") since 1999. Grievant has served as Correctional Officer IV and Chief of Security at Sam Perdue Juvenile Center ("SPJC") since approximately 2005. This position is considered second in command at the facility.

2. In the summer of 2012, Respondent posted a vacancy for the Juvenile Facility Director position at Sam Perdue Juvenile Center.

3. Grievant applied for the posted Director's position along with several other candidates.

4. After the interview process was concluded, another applicant, Gary Patton, was selected for the position of Facility Director at SPJC.

5. Successful candidate Patton is a Division of Juvenile Services (DJS) employee and has previous experience in treatment and security. He also has been involved in the DJS training academy and oversaw the DJS Youth Reporting Center located in Princeton, WV.

6. Candidate Gary Patton is qualified for the position and reportedly he has performed well as Director of the SPJC.[3]

7. Grievant wants the position of Facility Director at SPJC.

8. Grievant had an opportunity and did in fact meet with Deputy Director Dodson who discussed the selection process relevant to this matter with Grievant.

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[3] Grievant specifically conceded that Mr. Patton is qualified for the position, and that he has performed well as the Director. See Grievant's testimony.

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 Bd. 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant alleges that Respondent was clearly wrong in selecting Gary Patton for the position of Facility Director instead of him. Grievant contends that he was more qualified than Mr. Patton. Further, Grievant tends to infer the selection process was tainted by arbitrary and capricious factor(s), i.e., Cabinet Secretary Joseph Thornton. Yet, Grievant did not request the position be awarded to him as relief on the grievance forms filed. For relief, Grievant only asked for an opportunity to have a hearing with Cabinet Secretary Joseph Thornton and Deputy Director Denny Dodson to be given the reasons that he was not selected for position. Respondent, among other responses, notes that as part of the level one process, Grievant met with Deputy Director Dodson who discussed the selection process with Grievant and explained that Cabinet Secretary Thornton did not make the selection, but was advised as to the recommendation which was standard practice in this type of hiring decision.

In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another applicant, by establishing that he was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. *Black v. Cabell County Bd. of Educ.*, Docket No. 89-06-707 (Mar. 23, 1990); *Lilly v. Summers County Bd. of Educ.*, Docket No. 90-45-040 (Oct. 17, 1990), *aff'd* Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). "The grievance procedure . . . allows for an analysis of legal sufficiency of the selection process at the time it occurred." *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989). 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. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter, supra*. 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 selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998). 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 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]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

Grievant highlights that for the last eight years he has been the second in command at SPJC, that he has handled incidents with tact and professionalism. Grievant also notes that he was recommended for the position by a prior director. Understandably, Grievant perceives that becoming the Director at the facility is legitimately the next step. Nonetheless, while Grievant may truly believe that Respondent was wrong in selecting

Gary Patton for the position of Facility Director instead of him, Grievant did not establish this contention as fact. Grievant failed to persuasively identify specific skills which demonstrate he is clearly a more suited candidate than the successful applicant. Grievant conceded that Mr. Patton is qualified for the position. Grievant did not establish that he was the more qualified applicant, or that there existed a substantial flaw in the selection process. Grievant's inference that Cabinet Secretary Joseph Thornton improperly influenced the selection process was not established as anything other than conjecture. Respondent maintains that Secretary Thornton did not make the selection, but was advised as to the recommendation per standard practice in this type of hiring decision.

It is recognized that Grievant and Mr. Patton are both qualified candidates for the position. Further, Respondent conceded that the selection process was close. However, in the end, Respondent selected Gary Patton for the position of Facility Director. Respondent highlights that the selection process is largely the prerogative of management, and emphasizes that a governmental agency's determination of matters within its area of expertise is entitled to substantial weight.

The record does not support a finding that the agency acted in an arbitrary or capricious manner, relied on improper factors, or reached an implausible decision. Grievant has failed to meet his burden; accordingly, this grievance must be denied.

The following conclusions of law are appropriate in this matter:

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 Bd. 156 C.S.R. 1 § 3 (2008).

2. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another applicant, by establishing that he was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 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). 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 selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998). 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*.

4. 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)). 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 employer. *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

5. Grievant failed to demonstrate a flaw in the selection process.

6. Respondent's selection of the successful applicant was not established to be arbitrary, capricious, or clearly wrong.

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: October 11, 2013

Landon R. Brown
Administrative Law Judge