BETTY R. WENDLING, .

Grievant, .

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V. .DOCKET NUMBER: 94-REC-514

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WEST VIRGINIA REAL ESTATE COMMISSION, .

Employer. .

DECISION

Grievant, Betty Wendling, filed this grievance against her employer, the West Virginia Real Estate Commission, on April 11, 1994, claiming as follows:

> Since being notified by Richard Strader on March 21, 1994, that Stuart Ellis had been appointed to the position of Deputy Director, I have felt that I have been unfairly and unjustly treated in reference to the newly created position of Deputy Director. I was not aware that the position had been created; nor was I given the opportunity to interview for this position. I feel that I am qualified for the position based upon prior education, continuing education, prior job experience, and also experience and knowledge gained in the position I have held with the Commission for the last eight years.

As relief, Grievant seeks to be promoted to the position of Deputy Director and awarded the salary currently being paid to Mr. Ellis. The grievance was denied at both level one and two by the Employer's Executive Director Richard Strader, and at level three by the Employer on August 23, 1994. Appeal was made to level four on August 26, 1994.

The case was first set for hearing on August 29, 1994; however, many continuances were granted for good cause. Further, the parties engaged in discovery that was completed on or about February 29, 1995. An evidentiary hearing was held on September 21, 1995, at the Grievance Board's

Charleston, West Virginia Office. Post-hearing briefs were received by November 20, 1995. After that, Grievant's counsel submitted a Motion for Sanctions or in the Alternative to Re-Open the Proceedings for Submission of Evidence and Testimony. This motion was based upon Grievant's counsel's belief that the Employer had withheld evidence from him prior to and during the hearing. The Employer also submitted a written Motion in Response. A second hearing was convened on February 26, 1996, to hear argument on Grievant's Motion and to accept additional evidence. A ruling on Grievant's Motion for Sanctions will be held until after the discussion of the merits of the case.

At the beginning of the level four hearing, the Employer's counsel made an oral Motion to Dismiss claiming that Grievant had failed to state a claim upon which relief could be granted. In essence, the Employer contends that Grievant, as an at-will, classified-exempt employee, could not prevail on her claim that she was entitled to be promoted to the position of Deputy Director. Itbriefed this issue in its post-hearing submission. Grievant's counsel has responded by contending that the Motion to Dismiss was untimely filed, and that Grievant has alleged facts sufficient to support a cause of action under West Virginia Code §§29-6A-1, et seq.

Section 4.5 of the Procedural Rule of the Education and State Employees Grievance Board, 156 CSR 1, states as follows regarding the filing of motions:

> Except as provided in this Rule, all motions shall be in writing and shall be delivered, as soon as possible after the reasons for the motion arise, to the Hearing Examiner and to all other parties and their representatives, if any. . . .
>
> Only if a situation necessitating a motion arises immediately before, or during, a hearing may an oral motion be made at the hearing. The movant shall be prepared to state cogent reasons as to why the motion was not made sooner. . . . Motions not timely made in the determination of the Hearing Examiner may be denied on that basis alone.

The Employer had adequate notice and opportunity to file its Motion to Dismiss for Failure to State a Claim, in writing, prior to the level four hearing but did not do so. The level three hearing in this case was extensive and Grievant's counsel filed a written brief in support of Grievant's legal position prior to a decision being rendered. The Employer was sufficiently and adequately aware of the nature of the claim at issue, prior to the level four hearing, long after the level three decision was issued and

after discovery had been completed. Therefore, its Motion to Dismiss should properly have been presented, in writing, prior to the level four hearing. Accordingly, the Motion is denied. Additionally, Grievant's claim does state a cause of action upon which relief may be granted based upon the facts, as asserted, taken in a light most favorable to her. The Grievance Procedure for State Employees permits employees "employed in any department, other governmental agencies, or by independent boards or commissions created by the Legislature" to file claims against their employers that could fall within the definition of the term "grievance." A "grievance" is defined as:

> any claim by one or more affected state employees alleging a violation, misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

The terms discrimination and favoritism are specifically defined within Code §29-6A-2. It is therefore determined that the grievance procedure statute does provide state employees with substantive rights and independent causes of action, separate and apart from the "statutes, policies, rules, regulations or written agreements" under which they may also work. Grievant claims that she has been the victim of discrimination and that Mr. Ellis was given preferential or "favored" treatment by being awarded the position in question, and she relies upon the definitions of those terms within the grievance procedure statute. Therefore, her complaint states a cause of action, despite the fact that she is anat-will, classified-exempt employee, and even though the Employer is not bound to follow any specifically established rules or procedures for the filling of positions.

The merits of Grievant's case shall now be addressed, and the following findings of fact are properly derived from the evidentiary record in the case:

Findings of Fact

1. Grievant is employed as a Secretary III by the West Virginia Real Estate Commission. She is an at-will employee of the Commission, and her employment title is derived from the State Division of Personnel's classified-exempt plan.

3. In 1990, Richard Strader became the Executive Secretary for the Employer. The title of this

position was later changed to that of Executive Director.

4. In 1990, Lois Chapman was promoted by the Employer to the position of Administrative Assistant. She held this position until her retirement in October 1993. Ms. Chapman's duties were clerical in nature.

5. After Ms. Chapman's retirement, her duties were primarily assumed by the remaining staff: Mr. Strader, Stewart Ellis and Grievant.

6. On March 16, 1994, Mr. Ellis was promoted to the position of Deputy Director, a newly-created position which included the duties previously performed by Ms. Chapman, and additional duties, including, but not limited to, computerized accounting functions, revising the test administered by the Employer for the issuance ofreal estate licenses and the method for the grading of the test, handling all incoming complaints, and testifying before the Employer concerning investigation results. Further, Mr. Ellis is “second in command” under Mr. Strader and provides some supervision of Grievant.

7. The position of Deputy Director was not advertised for competitive bid. No formal interviews were conducted and no selection standards or procedures were formally established or used.

8. Mr. Ellis was selected for the position because he possesses an undergraduate degree in accounting, has some experience working as an accountant and has experience within the office as an investigator.

9. Mr. Strader was aware that Mr. Ellis, Grievant, and at least one person not employed by the Employer were interested in the position of Administrative Assistant.

10. There is no official job description for the position of Deputy Director, and therefore, no minimum qualifications have been adopted.

11. The job duties of the Deputy Director's position are still being revised.

12. Grievant possesses a college degree in Business Administration. She has had some college-level accounting classes.

13. Prior to Mr. Ellis being offered the position in question, he was an investigator for the Employer. 14. Immediately prior to Mr. Ellis assuming the duties of the Deputy Director's position, he mainly worked out of the Charleston office and did not perform field investigations.

Arguments of the Parties

Grievant first contends that the decision to hire Mr. Ellis was the result of an arbitrary and

capricious exercise of authority. She maintains that the selection process was inconsistent with the Employer's prior practice of promoting the employee in the position of Secretary II to the position of Administrative Assistant. She also alleges that there was no rational selection process utilized, but instead, Mr. Ellis was given preferential treatment and was “groomed” for the position. She argues that the Employer was bound to have developed a set list of job duties for the Deputy Director's position prior to filling the position. Grievant maintains that she was a victim of discrimination and favoritism shown Mr. Ellis. (See footnote 1)

The Employer argues that Grievant has not been subjected to discrimination. It avers that she was not as qualified for the position as Mr. Ellis, given the qualities deemed important for the position. It maintains that she has not established any right toa promotion, either based upon past practice or law. It concluded that Mr. Strader has been and is attempting to restructure the office and the way in which it conducts its business, and that the promotion of Mr. Ellis was consistent with his goals. It denies that Mr. Ellis has been shown favoritism or that his promotion was the result of an arbitrary or capricious decision.

Discussion

The Employer has been created by the Legislature through the passage of W. Va. Code §47-12-3. Under this article, the Employer is authorized to employ an executive director and such clerks, investigators and assistants as are necessary. It is also authorized to establish the duties and fix the compensation of its positions. Employees of the Employer are at-will employees. Further, they are categorized as classified-exempt employees by the Legislature and the West Virginia Division of Personnel. This means that the positions are not covered by Personnel's merit system standards, though the employees hold position titles included within Personnel's classified plan and their positions would have corresponding classification specifications. See, W. Va. Code §29-6-10; 143 CSR 1.3.

Because the Employer is not a covered agency within the civil service, see, W. Va. Code §29-6-4, the provisions of the legislative rule promulgated by the Division of Personnel dealing with applications and examinations and appointments and promotions do not govern it in its actions. Further, the record indicates that the Employer has not adopted any formal policies or proceduresfor the filling of positions either by original appointment or promotion. Grievant's contention that the

Employer should be bound to adhere to the same promotional practices it has used in the past is simply unpersuasive. Further, the recogition of a past practice is that action which an employer has followed on more than just a few occassions. Under the facts as presented, no legal authority is found to support Grievant's claim. Therefore, the Employer had a substantial amount of discretion to exercise in the filling of the Deputy Director's position. It cannot be required to advertise positions for competitive bid, interview for positions, or base its decision on any one factor such as seniority, tenure, qualifications, etc.

Grievant's contention that the selection process was flawed or arbitrary and capricious is also not persuasive. The fact is that there was no selection process utilized. The position of Administrative Assistant was vacated by that employee's retirement. Then, after a period of a few months, Mr. Strader promoted Mr. Ellis to the position then titled Deputy Director. The record suggests that the duties for this position incorporated some functions of the former Administrative Assistant, and some additional duties, including supervisory authority. The record supports the conclusion that the former Administrative Assistant position has evolved into a new position, although the Employer may still have the same number of budgeted positions.

In any event, Mr. Strader knew that both Mr. Ellis and Grievant, along with another state employee from the Auditor'sOffice, were interested in the position. The position was not posted, no formal applications were submitted and no formal interviews were conducted. Instead, Mr. Strader simply promoted from within based upon his knowledge of Mr. Ellis' qualifications and experience. While this might not have been the method utilized by some or most other commissions' directors, this was the method used by Mr. Strader, and Grievant has not shown it to be inconsistent with his authority. What is important is that the promotional decision, consistent with the testimony of Mr. Strader, was based upon Mr. Ellis' qualifications which specifically include his undergraduate degree in accounting, his experience as an investigator for the office, and his other experience gained outside the office.

Grievant contends that she was discriminated against and that Mr. Ellis was shown favoritism. She also believes that this discrimination was motivated by Mr. Strader's bias against women. Discrimination is defined, very generally, by Code §29-6A-2(m) as follows: “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” Obviously a claim of discrimination based upon

differences in sex falls within this definition. (See footnote 2) Such a claim requires that a particular motivation or illegal motive for the discrimination be found. (See, Barefoot v. Sundale Nursing Home, 457 S.E.2d 475 (W. Va. 1995), fora complete discussion of the burdens imposed upon the parties in a cases alleging employment discrimination).

Grievant also claims, in essence, that the discrimination shown her resulted in favoritism being shown to Mr. Ellis. Favoritism is defined by Code §29-6A-2(h) as the "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Here, if it is not determined that Grievant was the victim of discrimination, then favoritism will also not be found as the difference in treatment, the promotion of Mr. Ellis, would not have been unfair.

Grievant contends that her qualifications for the position of Deputy Director are as strong as Mr. Ellis'. She introduced circumstantial evidence to establish that Mr. Strader is biased in favor of men; therefore, he did not promote her in favor of Mr. Ellis. She also claims that the manner is which the selection was made indicates that she was not given meaningful consideration for the position, and that Mr. Strader was predisposed to promote Mr. Ellis despite the fact she expressed interest in the position. She maintains that the reasons given to support Mr. Ellis' promotion are pretextual, to justify Mr. Strader's selection "after the fact." Mr. Strader denies that he based the decision on her sex and asserts that Mr. Ellis was promoted based upon the skills and education he possessed which fit a position that has evolved since it was vacated.

The record easily establishes that a prima facie case of discrimination has been shown. Also, the Employer has offered alegitimate, nondiscriminatory reason for the fact that Grievant was not promoted, based upon her qualifications for the position as it exists within the scheme of the workings of the office. The question is whether Mr. Strader's decision was motivated, in some part, by the fact that Grievant is female, and not whether there existed other reasons to support his decision to promote Mr. Ellis. It must be determined whether the legitimate reasons produced in support of Mr. Strader's action are either pretextual or are not the only reasons.

The circumstantial evidence Grievant relies upon to show that Mr. Strader is biased against women, and therefore, Mr. Ellis was chosen or "groomed" for the position, needs to be summarized. First, Grievant relies upon the fact that there are no formal hiring procedures guiding the Employer. She relies upon the fact that the position has no formal, written job description with minimum

requirements established. She believes that the person holding the position does not need to have an accounting degree. She also opined that all of the necessary skills for the position could be, and are being, learned on the job. Grievant testified that Mr. Strader once jokingly said something to the effect that he would like to get rid of all of you (meaning the support staff who are all female) and replace you with my people. She also believes that Mr. Strader changed the title of his position from Executive Secretary to Executive Director, and the title of the position given to Mr. Ellis, because he did not want himself or Mr. Ellis to be recognized as a secretary. Further, she relies upon the factthat the support staff are all women and the administrators are all men.

Grievant really does not claim that after a review of the candidates' qualifications, Mr. Strader decided to promote Mr. Ellis because he did not want a female in the position. The essense of her claim is that she was not given serious consideration for the position, in the first place, because she is a female. She testified that she was never told that the position was going to be filled or when, and that she was never told by Mr. Strader he wanted someone in the position with an accounting background. Finally, she concludes that she is as capable of performing the functions of the job as Mr. Ellis.

Grievant bears the burden of proving her claims by a preponderance of the evidence. See, W. Va. Code §29-6A-6. She must show that it was more likely than not Mr. Strader promoted Mr. Ellis to the position of Deputy Director rather than her, based in part, because she is a female. Typically, the type of evidence available to establish such a claim is circumstantial evidence from which an inference of discrimination is drawn. Grievant has not met her burden of proof or persuasion.

The evidence establishes that Mr. Strader promoted Mr. Ellis to the position of Deputy Director based upon his belief that Mr. Ellis' qualifications and experience would be beneficial to that position. Inferences from the evidence presented by Grievant support the conclusion that Mr. Strader did not feel Grievant was well-suited for the position based upon her qualifications and notbecause she was a female. Grievant and Mr. Ellis held different positions within the office prior to the promotion. Also, Mr. Ellis had previously been employed as an accountant for a private business. Their undergraduate education was different and they had both performed different tasks and maintained different responsibilities for the Employer. While the reasons given for why Grievant was not promoted may not appear logical to her, it determined that these reasons were not pretextual. In conclusion, Grievant has not established that she has been discriminated against or that Mr. Ellis was given

unfair, preferential treatment. Grievant's claim on the merits is denied.

Motion for Sanctions

Grievant's counsel argues that the Employer acted in bad faith by withholding evidence requested by Grievant to support her case. Grievant asserts that an “application” for the position of Deputy Director, submitted by Barbara Daniel, an Assistant Director of Payroll for the Auditor's Office, was intentionally not produced prior to the hearing, after the Employer had been requested to provide information concerning all of the applications for the position. Grievant's counsel contends that this application (a handwritten letter) was only produced after the West Virginia Human Rights Commission entered an Order allowing substantial discovery in the matter pending before it. Grievant's counsel contends that the Employer did not simply discover this letter after the hearing in this case, but intended to withhold such information until it determined that it could not do so in light of the discovery in theHuman Rights Commission action. Based upon this alleged bad faith, Grievant requests that the grievance be granted on the merits and the Employer be ordered to pay her fees and expenses incurred in the case.

As noted earlier, the case was reopened to take evidence concerning the letter from Ms. Daniel and to allow for an explanation about why the document was not earlier produced, or why Mr. Strader had testified that there were only two individuals who had expressed an interest in the position. At the hearing on February 26, 1995, Mr. Strader testified that he had forgotten Ms. Daniel had sent him the letter in question. He further testified that he only discovered the letter after looking through an unrelated file in a file cabinet. Mr. Strader stated that he informed Ms. Daniel after receiving her letter that he intended to fill the Administrative Assistant position from within.

The Employer disavows that it acted in bad faith. It claims that the letter was not presented to Grievant's counsel by oversight, and that Mr. Strader had forgotten he received the letter. The Employer also argues that on January 4, 1996, when it discovered the letter, it voluntarily submitted it, along with an affidavit from Mr. Strader explaining its discovery, to Grievant's attorney. The Employer counterclaims for sanctions against Grievant's attorney for his failure to make this Board aware of its actions of January 4, 1996, and the discussions immediately thereafter.

W. Va. Code §29-6A-7, states, in pertinent part,

> Both employer and employee shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure. The

> hearing examiner may make a determination of bad faith and in extreme instances allocate the cost of the hearing to the party found to be acting in bad faith. Such allocation of costs shall be based on the relative ability of the party to pay such costs.

First of all, even if a finding of bad faith were to be made, the remedy sought by Grievant, that the grievance be granted on the merits, is not an appropriate remedy given the specific language of this Code Section. Nor does it appear to be a related remedy when compared to the alleged harm. Grievant's attorney bases his argument upon the inference that the Employer planned upon not submitting the letter to him and did not intend upon offering testimony concerning this letter until after it formed the belief that it was inevitable the document would be found due to the Human Rights Commission's discovery rulings.

The Undersigned is not convinced that the Employer's actions in this matter warrant a finding of bad faith or that the situation that occurred resulted in the type of extreme circumstance that the Legislature contemplated before empowering this Board's administrative law judges with the authority to assess costs. Here, the testimony of Mr. Strader suggests that the letter was misplaced in the office and that the failure to turn over this document during discovery was based upon inadvertence. In any event, the fact that this letter was not made known to Grievant's counsel or this Board during the hearing, has not prejudicedGrievant's case. Therefore, Grievant's counsel's request for sanctions is denied and the Employer's request is also denied.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Grievant bears the burden of proving her claims by a preponderance of the evidence. See, W. Va. Code §29-6A-6.

2. The Employer's Motion to Dismiss this case is **DENIED** as the motion was untimely filed pursuant to 156 CSR 1.4.5. Further, Grievant's statement of grievance states a claim upon which relief may be granted. See, W. Va. Code §29-6A-2.

3. Grievant has failed to prove by a preponderance of the evidence that she has been the victim of discrimination or favoritism as those terms are defined in W. Va. Code §29-6A-2.

4. Both Grievant's and the Employer's motions for sanctions are **DENIED.** No finding of bad faith

is warranted based upon the Parties' processing of the case at level four of the Grievance Procedure for State Employees. W. Va. Code §29-6A-7.

Therefore, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A- 7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

May 16, 1996

Footnote: 1

Grievant has alleged that she was discriminated against based upon her sex and age. At hearing, her counsel informed the Undersigned that these specific claims were not before the Grievance Board but are pending before the West Virginia Human Rights Commission. However, in Grievant's post-hearing brief, the claim of sex discimination was again argued. Based upon the general definition of discrimination contained within the grievance procedure statute, Grievant's allegation will be addressed in order to conclude whether the decision not to promote her was based upon legitimate reasons related to the job.

Footnote: 2

See, Vest v. Nicholas County Board of Education, 455 S.E.2d 781 (W. Va. 1995).