JOHN LIGHTNER,

Grievant,

v. DOCKET NO. 97-HHR-225

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION

Grievant, John Lightner, instituted this grievance at level four on April 29, 1997, alleging as follows:

> Applied for a WV Works Family Support Specialist position in Wood County. Was turned down for position. I believe this was really personal discrimination (perhaps age discrimination) against me & was not based on my qualifications for this position.

He seeks as relief to be placed in one of the Family Support Specialist positions. The grievance was filed at level one on January 6, 1997, where Grievant's immediate supervisor was unable to grant relief. After denials at levels two and three, the matter was submitted on the existing record at level four. The parties submitted proposed findings of fact and conclusions of law by June 13, 1997. This matter was reassigned to the undersigned for administrative reasons on July 29, 1997, at which time it became mature for decision.

The following findings of fact are appropriately made from the record developed below.

Findings of Fact

1. Grievant is employed by the Department of Health and Human Resources (DHHR), where he is currently classified as an Employment Relations Specialist.

2. On October 15, 1996, DHHR posted a new position of “Family Support Specialist”at Pay Grade 10. The posting stated that thirteen positions were available, and the deadline for applications

was October 28, 1996.

3. Grievant applied for one of the Family Support Specialist positions and was one of fourteen candidates interviewed.

4. DHHR only hired four people to serve as Family Support Specialists, rather than filling the thirteen positions listed in the posting, because of financial constraints.

5. Four people conducted the interviews as a team. The same questions were asked of each candidate, and each interviewer completed a “Candidate Interview Evaluation” whereby each candidate was evaluated in a variety of areas using a numerical rating system ranging from 1 through 5. These points were then totalled and the candidates ranked numerically.

6. Grievant ranked eighth of the fourteen candidates under the numerical evaluation system.

7. Grievant has introduced no evidence comparing his qualifications to those of the successful candidates, nor any other evidence regarding his claims of discrimination.

Discussion

In non-disciplinary matters, the grievant bears the burden of proving all of the allegations of his complaint by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996). The lower level record in this case is extremely sparse, there being very little testimony at the level three hearing. Grievant asked a few questions of two people who were on the interviewing team regarding how he could not have been chosen for one of the available positions, when he felt he had an appropriate background. Nancy Casto, Community Services Manager, explained the selection process, whereby candidates were interviewed and rankedaccording to their performance. All that Grievant introduced in support of his case was several letters recommending him for the position, the majority of which were dated well after the positions in question were filled, along with his resume and some positive performance evaluations. He did not testify, but stated at the conclusion of the hearing that he did not understand how he could not have been selected.

Although he has attempted to make a claim of discrimination, Grievant has failed to identify any violation, misapplication or misinterpretation of any specific statute, policy, rule, regulation, or written agreement. See Morgan v. W. Va. Dept. of Health and Human Resources, Docket No. 96- HHR-182 (June 11, 1997), and W. Va. Code § 29-6A-2. While he may have been qualified for the position in

question, he has not shown any evidence that the successful applicants were less qualified, nor has he proven (or even alleged) any flaw in the interview or selection process.

Grievant has provided absolutely no evidence in support of his discrimination allegation, on the basis of age or otherwise. “Discrimination” is defined by Code § 29-6A-2(d) as:

> 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.

A prima facie case of discrimination requires the grievant to prove the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employees;
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hindman v. W. Va. Div. of Corr., Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va.Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996).

The record does not reflect that Grievant has at any time during this grievance process made an attempt to compare himself with any other person. Accordingly, he has failed to state a prima facie case of discrimination, and no further analysis is necessary. See Anderson v. W. Va. Div. of Highways, Docket No. 95-DOH-549 (July 14, 1997). Moreover, it is well settled that the grievance process is not intended to be a “super interview,” but, rather, allows for a review of the legal sufficiency of the selection process. An agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary and capricious. Thibault v. Div. of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994). Grievant has failed to meet his burden of proof.

In addition to the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In non-disciplinary matters, the grievant must prove all of the allegations of his complaint by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996).

2. An agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary and capricious. Thibault v. Div. of Rehabilitation Services, Docket No. 93- RS-489 (July 29, 1994).

3. A prima facie case of discrimination requires the grievant to prove the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employees;

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hindman v. W. Va. Div. of Corr., Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996).

4. Grievant failed to prove that Respondent's failure to select him for the position of Family Support Specialist was discriminatory or arbitrary and capricious in any respect.

Accordingly, this grievance is **DENIED**.

Any party 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.

Date: August 13, 1997 _____

V. DENISE MANNING

Administrative Law Judge