DORIS JEAN MORGAN,

Grievant,

v. DOCKET NO. 96-HHR-182

WEST VIRGINIA DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/MARION HEALTH CARE HOSPITAL,

Respondent.

DECISION

Doris Jean Morgan, Grievant, is employed by Respondent, West Virginia Department of Health and Human Resources/Marion Health Care Hospital. Grievant filed a grievance on October 24, 1995, after she learned that she had not been selected for a laundry position for which she applied. As relief, Grievant seeks to be instated to the laundry position, and to be "made whole."

The grievance was denied at Levels I, II, and III on October 27, 1995, November 10, 1995, and May 10, 1996, respectively. Grievant appealed the Level III decision on May 20, 1996, and a Level IV hearing was scheduled for July 26, 1996. Grievant and her representative claimed they did not receive a notice of the hearing, although notices were mailed on May 28, 1996, by first class mail, to their respective, and proper addresses. After several communications with the parties, and problems in scheduling, a Level IV hearing was eventually scheduled, and held on December 11, 1996. The case matured on January 3, 1997, with receipt of Respondent's post-hearing submission.

The following findings of fact were derived from the record.

FINDINGS OF FACT

1. Grievant has been employed by Respondent for approximately fifteen years, and is currently classified as a Housekeeper, and assigned to the Housekeeping Department.

2. Grievant received a written warning dated August 9, 1995, for abuse of leave.

3. Respondent posted a Laundry Worker position on September 21, 1995.

4. Five or six people applied for the laundry position which was posted by Respondent.

5. Grievant was the only in-house applicant.

6. Ms. Sinclair, Business Manager at Marion Health Care Hospital (MHCH), and Mr. Gray,

Maintenance and Laundry Supervisor, interviewed all of the applicants, and asked each applicant similar questions. After reviewing all the applications, and completing the interviews of all of the applicants, they concluded that Patty Hoskins, the successful applicant, was the best candidate for the position.

7. Ms. Hoskins had relevant past work experience, had a good attendance record, was dependable, and received good recommendations.

8. Grievant was asked the same questions as the other applicants. Respondent considered Grievant's work experience, work history, and her reliability to appear for work. Grievant was not selected because of her poor attendance record.

DISCUSSION

Grievant's position is hard to discern. Grievant failed to identify a violation, a misapplication or a misinterpretation of any specific statute, policy, rule, regulation, or written agreement. See W.Va. Code §29-6A-2(i). The grievance statement merely states: “Open position in laundry denied.” During the Level III hearing, Grievant's representative, in her opening statement, stated that Grievant:

> has been unjustly denied a position that she applied for here in the facility, a position which would have given her sort of like a promotion that would have upgraded her. This position was filled by an outside individual and it's our position content [sic] that workers inside this facility should have first choice, first option of any positions that become open and available when posted.

Level III Transcript p. 2.

Moreover, the opening statement of Grievant's representative at Level IV did not identify a violation, a misapplication or a misinterpretation of any specific statute, policy, rule, regulation, or written agreement. The undersigned administrative law judge is unaware of any statute, regulation, rule, or policy which requires that an incumbent (an employee already employed by agency, department, etc.) “should have first choice, [or] first option of any positions that become open.” Id.

The grievance procedure set forth in W.Va. Code §§29-6A-1, et seq., is not intended to be a "super interview," but rather, allows for a review of the legal sufficiency of the selection process. Furthermore, an agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary orcapricious, or clearly wrong. Thibault v. Div. of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994). In reviewing the actions of the decision-maker to determine

whether it acted in an arbitrary and capricious manner, the Undersigned cannot substitute his judgment for that of the decision-maker. Cutright v. Bd. of Trustees\W. Va. Univ. - Parkersburg, Docket No. 95-BOT-090 (Nov. 2, 1995) citing, Booth v. W.Va. Bd. of Trustees\Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994).

Ms. Sinclair and Mr. Gray conducted interviews, and asked each applicant similar questions. After reviewing all the applications and completing the interviews of all of the applicants, they concluded that Patty Hoskins, the successful applicant, was the best candidate for the position. Ms. Hoskins had relevant work experience, and received good recommendations. Grievant was not selected because of her poor attendance record. Although Grievant received satisfactory evaluations, her 1995 evaluation noted that she needed to improve her attendance, and she received a written warning dated August 8, 1995 for abusing sick leave.

West Virginia Division of Personnel Policy 11.01(a), entitled Method of Making Promotions, provides:

> Whenever practical and in the best interest of the service, an appointing authority will fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the career service upon the basis of the employees' demonstrated capacity and quality and length of service. In filling vacancies, appointing authorities should make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. In this case, given Grievant's poor work attendance record Respondent reasonably determined that it would not be in its best interest to promote her to the Laundry Worker position. Grievant failed to prove, by a preponderance of the evidence, that Respondent acted arbitrarily or capriciously in its selection process.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In non-disciplinary matters the grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989).

2. Grievant failed to prove, by a preponderance of the evidence, that Respondent violated West Virginia Division of Personnel Policy 11.01(a), or acted in an arbitrary and capricious manner in filling the laundry position at MHCH.

Accordingly, the 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 andState 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.

Dated: 6/13/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE