NIGEL MAXEY,

Grievant,

v. **Docket No. 98-HHR-231**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION

Nigel Maxey (Grievant) is employed by the West Virginia Department of Health and Human Resources (DHHR), as an Economic Service Worker in the Wyoming District. This grievance challenges his non-selection for a position as a Family Support Supervisor or Family Support Specialist, (See footnote 1) alleging that he was asked an improper interview question in violation of the Americans with Disabilities Act (ADA), that scores assigned to him by interviewers as part of the selection process were incorrect, and that he was the victim of retaliation for past grievances. On September 9, 1997, this grievance was denied at Level I by Immediate Supervisor Sharon Fields. On October 7, 1997, it was denied at Level II by Administrator Joyce K. Phipps. On June 25, 1998, it was denied at Level III by Grievance Evaluator Barbara J. Wheeler.

This grievance was appealed to Level IV, where a hearing was held in the Grievance Board's Beckley office on August 31, 1998. DHHR was represented at thishearing by Assistant Attorney General Meredith A. Harron, Esq., and Grievant represented himself. The parties were given until September 30, 1998, to submit proposed findings of fact and conclusions of law, and the matter became mature for decision at that time. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed by the West Virginia Department of Health and Human Resources

(DHHR), as an Economic Service Worker in the Wyoming District.

2. DHHR, as part of implementing the West Virginia Works program, sought applicants for one Family Support Supervisor position and seven Family Support Specialist positions.

3. Grievant applied unsuccessfully for all positions.

4. A separate three person team interviewed candidates for each position.

5. A standard set of 18 questions, which DHHR had used in West Virginia Works pilot counties, was asked by each interviewer of each candidate for the Family Support Specialist positions. Each interviewer assigned a score, on a scale of one through five, for each question. The interviewers' scores were then averaged to produce a single interview score for each candidate.

6. One interview question asked how much time an applicant was away from his or her job in the average 12 months because of illness or unplanned annual leave.

7. The interview score comprised one-sixth of the entire selection process. The other five factors considered were education, past experience and demonstrated ability, business and community contacts, leadership or growth potential, and concerns with orlimitations of candidate.

8. The ten candidates for the Family Support Specialist positions were each ranked on a scale of one through ten in each of the six factors, and these scores were averaged to produce a final score for each candidate.

9. Of the six applicants for the one Family Support Supervisor position, Grievant placed third.

10. Of the ten applicants for the seven Family Support Specialist positions, Grievant placed eighth.

11. In the interviews for the Family Support Specialist position, the successful, seventh place candidate, received a score of 222, and Grievant, the eighth place candidate, received a score of 210.

12. Between 1990 and 1993, Grievant filed a substantial number of grievances, eight of which resulted in decisions at Level IV.

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. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No.

ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as “evidence which is 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.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equallysupports both sides, a party has not met its burden of proof. Id.

Grievant challenges his non-selection for a position as a Family Support Specialist. He first alleges that he was asked an improper interview question in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-17, 12201-13 (Supp. V 1994). Specifically, Grievant argues that the interview question,“[i]n an average 12 months, how much time have you been away from your job because of illness or unplanned annual leave?,” was calculated to improperly elicit information about a disability, (See footnote 2) resulting in discrimination against him for his illness.

W. Va. Code § 29-6A-2(d) defines "discrimination" 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." To establish a prima facie case of discrimination, Grievant must show:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (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 thegrievant in writing.

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50- 260 (Oct. 19, 1989).

Grievant has failed to establish a prima facie case of discrimination. He has shown that he is similarly situated, in a pertinent way, to one or more other employee(s) because he was one of several DHHR employees who applied for the Family Support Specialist positions. However, Grievant fails to meet the second prong of the test. He was not treated by his employer in a manner

that the other employees were not. DHHR rated all applicants for the positions by the same method, and established a legitimate, nondiscriminatory reason for its question concerning unplanned leave. (See footnote 3)

DHHR established that this question related to a bona-fide occupational qualification; attendance. The question was used to determine whether an applicant was likely to have excessive unplanned absences, which would compromise the efficient operation of the office, create additional workload for co-workers, directly affect clients, and make it difficult for supervisors to plan.

The undersigned Administrative Law Judge agrees with DHHR's argument that thisquestion could elicit many answers that would not disclose disability-related information. An applicant could have unplanned absences due to day care or transportation problems, other employment, leave abuse, or the deaths or illnesses of family members. Similarly, DHHR argues that it must ask about an applicant's use of sick leave in order to make an accurate forecast of his or her likely attendance, because such leave is generally unplanned, and because an applicant can be expected to take substantially all of his or her planned annual leave. This argument too is well taken. DHHR's use of this question was not calculated to elicit information about an applicant's disability, and did not constitute discrimination against Grievant. In any event, even if the question did violate the ADA, Grievant failed to establish that he was a “qualified individual” entitled to protection under the ADA.

Grievant next alleges that scores assigned to him by interviewers as part of the selection process were incorrect, in effect arguing that the method of assigning the scores was arbitrary and capricious. ___In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra at 286, Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96- 20-362 (Jan. 30, 1997). Furthermore, in matters of non-selection, the grievance process is not that of a “super-interview,” but rather serves as a review of the legal sufficiency ofthe selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

Grievant introduced no convincing evidence to prove that the selection process was conducted in

an arbitrary and capricious manner. The 18 questions used in the interview, and the five other factors considered, were reasonably calculated by DHHR to elicit information on factors relevant to the positions to be filled. The selection process followed DHHR's Policy Memorandum 2106, entitled Employee Selection, which seeks to “give due consideration to applicants for posted positions, to conduct interviews consistent with applicable Federal and State Civil Rights Laws and to select the best candidate.”

Each applicant went through an identical selection process. A single interview question comprised only a tiny portion of a candidate's overall score. With 18 questions comprising just one of six factors, any single question equaled less than one percent of a candidate's overall score.

Furthermore, the undersigned notes that when the question regarding attendance was scored, the successful, seventh-place candidate received the highest possible score, five points, from each interviewer. That candidate missed one or two days of work in an average year. Grievant received two points from each interviewer, having missed eight to ten days of work in an average year. Even if Grievant was awarded five points for this question by each interviewer, his interview score would still fall three points short of the successful, seventh-place candidate's.

At Level IV, Grievant also argued that question 11, which asked if a candidate would have problems meeting an expectation that he or she dress professionally, was not fairly graded. However, the successful, seventh-place candidate's answers to this questiondemonstrated an enthusiastic willingness to meet the professional dress expectation, while Grievant's answers reflected that he would do what was required. It was not arbitrary or capricious to give a higher score to the successful candidate's more enthusiastic answer. Furthermore, the successful candidate scored 13 points on this question, and Grievant scored 11 points. Even if Grievant was awarded five points for this question by each interviewer, his interview score would still fall eight points short of the successful, seventh- place candidate's.

Grievant was unable to demonstrate a clear error of judgment on DHHR's part. The undersigned can not say that Grievant, who finished eighth, is a better candidate than the candidate who finished seventh. DHHR's selection process was legally sufficient.

Finally, Grievant alleges that his non-selection was the result of retaliation or reprisal for his past grievances. “Reprisal” means the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or

any lawful attempt to address it. W. Va. Code § 29-6A- 2(p).

To establish a prima facie case of retaliation, the burden is upon a grievant to prove by a preponderance of the evidence 1) that grievant engaged in protected activity, 2) that grievant's employer was aware of the protected activities, 3) that grievant was subsequently treated in an adverse manner by the employer and (absent other evidence tending to establish a retaliatory motivation), 4) that complainant's adverse treatment followed his or her protected activities within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986), Ruby v. Insurance Comm'n of W. Va., Docket No. 90-INS-399 (July 28,1992).

Grievant established that he engaged in protected activity: the filing of grievances, eight of which proceeded to Level IV during the years 1990 to 1993. As respondent to these grievances, DHHR surely knew of them. Grievant was subsequently treated in an adverse manner by his employer when he was not selected for one of the Family Support Specialist positions, for which he was at least minimally qualified. Grievant has established, by a preponderance of the evidence, a prima facie case of retaliation.

However, an employer may rebut a grievant's prima facie case of retaliation by establishing "credible evidence of legitimate nondiscriminatory reasons for its action. . ." Mace v. Pizza Hut, Inc., 180 W. Va. 469, 472, 377 S.E.2d 461, 464 (1988). "Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination." W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 76, 443 S.E.2d 229,233 (1994).

DHHR has rebutted Grievant's prima facie case. DHHR established that Grievant's non-selection for one of the Family Support Specialist positions was based solely upon the relative merit of the candidates for the positions, and that DHHR rated all applicants for the positions by the same method. DHHR thus established credible evidence of legitimate nondiscriminatory reasons for its decision not to select Grievant.

Furthermore, Grievant testified that working conditions at the Wyoming District office have substantially improved since his earlier grievances were filed, and that he does not charge anyone in his office with being responsible for the retaliation he perceives. All witnesses at Level IV testified that

Grievant's past grievances were before their time, andthat they did not know the details of any of them. None of the members of the interview teams was in a management position during the time Grievant filed his grievances. All witnesses agreed that the grievance process is a necessary and important one, and several witnesses had filed grievances themselves. Finally, no witness testified that Grievant's past filing of grievances affected the selection process in any way. Grievant's retaliation claim must fail.

Consistent with the foregoing discussion, the following Conclusions of Law are made 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. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as “evidence which is 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.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

2. W. Va. Code § 29-6A-2(d) defines discrimination 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.

3. To establish a prima facie case of discrimination, Grievant must show:(a) that he is similarly situated, in a pertinent way, to one or more other employee(s); (b) that hehas, 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. Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

4. Grievant failed to establish, by a preponderance of the evidence, a prima facie case of discrimination.

5. Reprisal means the retaliation of an employer or agent toward a grievant, witness,

representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it. W. Va. Code § 29-6A-2(p).

6. To establish a prima facie case of retaliation, the burden is upon a grievant to prove by a preponderance of the evidence 1) that grievant engaged in protected activity, 2) that grievant's employer was aware of the protected activities, 3) that grievant was subsequently treated in an adverse manner by the employer and (absent other evidence tending to establish a retaliatory motivation), 4) that complainant's adverse treatment followed his or her protected activities within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986), Ruby v. Insurance Comm'n of W. Va., Docket No. 90-INS-399 (July 28, 1992).

7. Grievant established, by a preponderance of the evidence, a prima facie case of retaliation.

8. An employer may rebut a grievant's prima facie case of retaliation by establishing credible evidence of legitimate nondiscriminatory reasons for its action. Macev. Pizza Hut, Inc., 180 W. Va. 469, 472, 377 S.E.2d 461, 464 (1988).

9. DHHR rebutted Grievant's prima facie case of retaliation.

10. In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982).

11. Grievant failed to prove, by a preponderance of the evidence, that the selection process used by DHHR was arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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.

-

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated October 14, 1998

Footnote: 1 *At Levels III and IV, Grievant focused his attention on the Family Support Specialist position. At Level IV, Grievant adduced no evidence regarding the Family Support Supervisor position.*

Footnote: 2 *Grievant has suffered from headaches since an automobile accident many years ago. He maintains that his headaches are worsened by job stress. Because of his headaches, Grievant uses moderate amounts of sick leave. There is no issue of sick leave abuse in this grievance, and Grievant did not submit any evidence to show that his headaches constituted a disability under the ADA.*

Footnote: 3 *DHHR bases its interpretation of the ADA upon a document titled "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations", prepared by the U.S. Equal Employment Opportunity Commission.*