DONNA L. HAMMOND,

Grievant,

v.

DOCKET NO. 98-HHR-484

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/HUMAN RIGHTS COMMISSION,

Respondent.

D E C I S I O N

Grievant, Donna Hammond, filed a written grievance against her employer, the West Virginia Human Rights Commission ("the HRC"), on August 20, 1998, upon learning she had not been selected for a vacant Equal Employment Opportunity Specialist I (EEO Specialist I) position within the HRC. Grievant, a white female, bases this grievance on discrimination and maintains that the HRC has violated Title VII of the Federal Civil Rights Act, the West Virginia Human Rights Act, as well as agency policies and procedures. Grievant seeks to be awarded the EEO Specialist I position, or in the alternative, a salary increase equal to the amount she would have received had she been awarded the position. Grievant also requests a written department policy with regard to job postings and the selection process.

A level one decision was issued on August 19, 1998, by Paul Hamilton, Chief Investigator. A level two decision was issued on September 9, 1998, by Normal Lindell,Acting Executive Director for the HRC. A level three hearing was held on November 9 and 10, 1998, and a level three decision denying the grievance was issued on November 18, 1998, by David W. Forinash, Deputy Director,

West Virginia Department of Health and Human Resources ("DHHR"). Grievant appealed to level four on November 30, 1998, and after several continuances for good cause, the parties agreed to submit the matter for decision based upon the record developed at levels one through three. This matter became mature for decision on August 20, 1999, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant appeared pro se, and Respondent was represented by Tiffany M. Bost, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Answer to Interrogatories of Paul Hamilton.

Ex. 2 -

Answer to Interrogatories of William D. Mahan.

Ex. 3 -

Answer to Interrogatories of Donna L. Hammond.

Ex. 4 -

June 18, 1998 letter from James Tolbert, President, National Association for the Advancement of Colored People, to The Honorable Cecil Underwood, Governor of West Virginia.

Respondent's Exhibits

Ex. 1 -

Minutes of the West Virginia Human Rights Commission Meeting, June 25, 1998.

Ex. 2 -

Job Posting for EEO Specialist I, June 16, 1998.

Ex. 3 -

July 8, 1998 letter from Loretta A. Young to Mr. Norman Lindell, with attached

Application for Employment.

Ex. 4 -

July 9, 1998 letter fro Norman Lindell to Donna L. Hammond, with attached Application for Employment.

Testimony

Grievant testified in her own behalf and presented the testimony of Herman Jones, Don Raynes, Monia Turley, Dawn Jordan, Kaye Bealey, Paul Cooke, Mary KayBuchmelter, Betty Hamilton, David Gillespie, Reverend Homer Davis, Paul Hamilton, James Tolbert, William Mahan, and Norman Lindell. Respondent presented the testimony of Norman Lindell.

FINDINGS OF FACT

1. Grievant, a white female, is employed with the HRC as an Investigator II.

2. On June 20, 1998, HRC posted a position for EEO Specialist I. LII Ex. 1. The posting had a closing date of June 30, 1998.

3. Grievant applied for the EEO Specialist I position by submitting her application to Normal Lindell, Acting Director, on June 30, 1998.

4. One other applicant, also a white female, submitted her application by the closing date of June 30, 1998.

5. On June 25, 1998, representatives from the NAACP accused the HRC of being “lily white” and expressed a concern that there needed to be more minority employees hired by the Commission.

6. Mr. Lindell continued to accept applications beyond the closing date for the EEO Specialist I position, including the application of the successful applicant, Loretta Young, a black female.

7. Mr. Lindell scheduled seven of the applicants for interviews for July 28 and 29, 1998. Normally, Mr. Lindell would have conducted the interviews and completed the hiring of the position.

8. Before that date, however, Mr. Lindell became ill and was required to take a medical leave. The Commissioners expressed a desire to go ahead and complete the scheduled interviews, and a Selection Committee was put together, comprised of BettyHamilton, an HRC Commissioner, Paul

Hamilton, Chief Investigator (See footnote 1) , and Mary Kay Buchmelter, Deputy Attorney General for the West Virginia Civil Rights Division.

9. On July 28 and 29, 1998, the Selection Committee interviewed six applicants (one applicant withdrew), including Grievant and the successful applicant.

10. The Selection Committee unanimously voted to hire Ms. Young, based on her superior qualifications.

11. It has been the practice of the HRC to promote qualified employees from within the Agency when vacancies occurred, and the deadline for receipt of applications has never before been extended past the closing date on a posting.

DISCUSSION

Grievant alleges she was discriminated against on the basis of race, by the HRC, when it extended the deadline for accepting applications for the EEO Specialist I position past the closing date on the posting. Grievant is not complaining that her qualifications are superior to Ms. Young's. Grievant alleges violations under Title VII of the Civil Rights Act and the West Virginia Human Rights Act. The Grievance Board does not have jurisdiction to determine claims that arise under the Human Rights Act or Title VII of the Civil Rights Act. However, the Grievance Board will address Grievant's claim as one of discrimination which is prohibited under W. Va. Code § 29-6A-2. Vest v. Nicholas County Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Curry v. W. Va. Dept. of Transp., Docket No. 95- DOH-579 (Aug. 6, 1996). 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.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that she has, to her 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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once Grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). After the employer articulates a legitimate reason for the adverse employment decision, then, in order to prevail, Grievant must prove that the employer's stated reason for its action is a pretext to hide intentional discrimination.

Grievant alleges that after state and local members of the National Association for the Advancement of Colored People (NAACP) placed pressure on the HRC to hire more African-Americans, the HRC engaged in employment discrimination by acceptingapplications after the established deadline for the vacant position in order to intentionally target African-American candidates. Although Grievant and one (1) other Caucasian candidate were the only individuals to submit their applications by the established deadline, the HRC chose Loretta Young, an African-American, as the successful applicant. Grievant maintains that, historically, the HRC has abided by an accepted policy of first attempting to fill all vacancies within the Agency with qualified in-house applicants. If no applications were received by the established deadline, or no qualified employees applied for the vacant position, the HRC would then proceed to solicit applications from outside the Agency. Although Grievant was an in-house applicant and met the minimum qualifications for the EEO Specialist I position, the HRC selected a candidate not in its employ. Although Grievant concedes the successful applicant is more qualified for the position, she maintains that the HRC engaged in discrimination based on the facts asserted above.

Mr. Normal Lindell, Acting Director for the HRC, testified that he posted the EEO Specialist I position in accordance with the West Virginia Division of Personnel Administrative Rules. He testified that, historically, the Agency has attempted to first fill all of its vacant positions through internal

promotions or reallocations. However, he added that vacant positions within the Agency have never been exclusively limited to in-house employees, and that, in other instances, unlike this situation, there were more applications received than just one or two.

Mr. Lindell authorized the extension of the deadline for the EEO Specialist I position in order to obtain a larger pool of applicants. He explained that since only two (2) applications had been received by the June 30, 1998 deadline, he did not believe this lownumber would produce a well-rounded interview process, and he wanted to see what other people could bring to the table.

All three members of the Selection Committee testified that their selection of Ms. Young for the EEO Specialist I position had everything to do with her superior qualifications for the position, and nothing to do with race.

Accepting that HRC's past practice was to promote from within the agency when there was an available, qualified candidate, Grievant has made a prima facie case of discrimination under the Grievance Board's statutory definition of “discrimination”, in that other qualified employees within HRC were promoted from within, while she was not.

However, HRC has presented a legitimate, non-discriminatory reason for its selection of Ms. Young: her qualifications were superior to any of the other candidates, including Grievant's. Indeed, Grievant stipulates that Ms. Young's qualifications are greater than hers. In fact, according to the testimony of the Selection Committee members, Grievant ranked third out of the six candidates that were interviewed. Superior qualifications of an applicant is a legitimate, non-discriminatory reason for hiring, and Grievant has failed to prove this reason was a pretext for intentional racial discrimination. Thus, Grievant's claim of discrimination must fail.

Notwithstanding the foregoing analysis, Grievant maintains she would have been awarded the EEO Specialist I position if the HRC had not accepted applications after the established deadline, and that the failure to promote a qualified applicant from within the HRC was arbitrary and capricious.

W. Va. Code § 29-6-24 governing the posting of job openings for state government employees, provides as follows:

> Whenever a job opening occurs within the classified service, the appointing authority shall, in addition to any other requirement of law or regulation for the posting of job opening notices, at least ten working days before making an appointment to fill the job opening, post a notice within the building or facility where the duties of the job will be performed and throughout the agency, which notice states that a job opening has occurred and describes the duties to be performed by a person employed in that position.

W. Va. Code § 29-6-1 provides that:

> The general purpose of this article is to attract to the service of this State personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods of governing the appointment, promotion, transfer, layoff, removal, discipline, classification, compensation and welfare of its civil employees, and other incidents of State employment. All appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness . . . .

In Mingo County Bd. of Educ. v. Jones, ___ W. Va. ___, 512 S.E.2d 597 (1998), the West Virginia Supreme Court held, with regard to hiring statutes for state education employees, that:

> Effect should be given to the spirit, purpose and intent of the lawmakers without limiting the interpretation in such a manner as to defeat the underlying purpose of the statute. Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language. Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.

In Jones, supra, Mr. Jones was the only applicant for a vacancy posting, with a stated deadline of November 30, 1995. The selection committee reported to the Superintendent of schools that Mr. Jones met the basic minimum qualifications for the job, however, it alsorecommended that the position be reposted, to enable it to evaluate other applicants for the job. The position was reposted, and was identical to the first, but with a new deadline of December 14, 1995. Jada Hunter submitted an application during the second posting period. The selection committee evaluated Ms. Hunter's qualifications, and reported to the superintendent that both Mr. Jones and Ms. Hunter were qualified for the position. The superintendent recommended to the Board that Ms. Hunter be selected to fill the position.

Mr. Jones filed a grievance, and this Board granted the grievance, ordering the Mingo County Board to place him in the position. The Circuit Court reversed this Board's decision, and Ms. Hunter appealed to the West Virginia Supreme Court.

In acknowledging that boards of education have substantial discretion in matters relating to the hiring of school personnel, the Court nonetheless held that they must also comply with procedures prescribed in the relevant statutes, in that case, W. Va. Code § 18A-4-7a. That Code Section provides that “if one or more applicants meets the qualifications listed in the job posting, the

successful applicant . . . shall be selected by the board. . . ." (Emphasis added). The Court found that the Legislature, in its use of the words "the posting" recognized that there would be situations where there would be only one qualified applicant, and in such a case, the statute uses the word "shall" to mandate that the position be filled by the qualified applicant. Thus, the Court held that "when a school board posts a notice of vacancy pursuant to W. Va. Code § 18A-4-7a . . ., and one or more qualified applicants apply for the position within the posting period, the school board must select a qualified applicant from those who applied during the posting period." Id. Grievant, in essence, is arguing that the same hiring principles dictated by Jones, supra, should apply to the hiring of state classified service employees. However, this Grievance Board has previously ruled in Forth v. W. Va. Dept. of Transp., Docket No. 98- DOH-433 (July 22, 1999), that "the statutory protections afforded education employees are far greater than those offered state classified service employees, and Grievant has presented no authority to support her contention that the strict hiring policy dictated by W. Va. Code § 18A-4-7a should apply to state employees."

With regard to posting of state classified service positions, all job postings should be accomplished ten (10) working days before the date of filling. The posting shall include a description of duties, job classification, and job location. Supervisors are to make job specifications available to employees so they can determine the minimum qualifications for the job. See W. Va. Code § 29-6-24. As in Forth, the HRC in this case complied with all applicable job posting requirements set forth by statute, as well as the by the Division of Personnel Administrative Rule, in posting the EEO Specialist I position.

Grievant has presented no evidence or authority contrary to Forth, supra, that it was unlawful, or arbitrary and capricious for HRC to extend the deadline for accepting applications past the closing date on the posting. Grievant presented no evidence to show her own application would not have been considered had it been received past the closing date of the posting. Thus, she has failed to show she would not have been afforded the same opportunity to file her application past the deadline as was given to the successful candidate. Grievant was given due consideration in this case, but Ms. Young was simply the most qualified applicant.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the Grievant must prove her grievance by a preponderance

of the evidence. W. Va. Code § 29-6A-6(5); Tucci v. W. Va. Dept. of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995).

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." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that she has, to her 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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

3. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). 4. After the employer articulates a reason for the adverse employment decision, then, in order to prevail, Grievant must prove the employer's stated reason for its action is a pretext to hide intentional discrimination.

5. The successful applicant, Ms. Young's, qualifications were superior to those of Grievant.

6. Grievant has failed to demonstrate that the HRC's stated reason for its selection of Ms. Young, i.e, her superior qualifications, was a pretext to hide discrimination against Grievant.

7. All job postings should be accomplished ten (10) working days before the date of filling. The posting shall include a description of duties, job classification, and job location. Supervisors are to

make job specifications available to employees so that they can determine the minimum qualifications for the job. W. Va. Code § 29-6-24; West Virginia Division of Personnel Administrative Rule, Job Postings.

8.

All the requirements for the job posting were met by the HRC.

9. Grievant has failed to demonstrate that it was arbitrary and capricious for the HRC to extend the deadline on the posting, and accept additional applications for consideration past the closing date. See Forth v. W. Va. Dept. of Transp., Docket Nol. 98- DOH-433 (July 22, 1999).

Accordingly, this 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: September 9, 1999

Footnote: 1

Betty Hamilton and Paul Hamilton are not related.