CARA YONEY,

Grievant,

v. **DOCKET NOS. 99-PEDTA-284/285**

PARKWAYS ECONOMIC DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

Grievant, Cara Yoney, filed two grievances against her employer, Respondent Parkways Economic Development and Tourism Authority ("Parkways"), which have been consolidated for decision. The first was filed on or about July 16, 1997, when she was not selected for one of four posted full-time toll collector positions. She alleged, "[v]iolation of Parkways policy I-1 Hiring and promotion procedures." She sought as relief, "[g]ive position to the grievant."

The second grievance was filed on or about September 17, 1997, when Grievant again was not selected for one of eight posted full-time toll collector positions. She alleged, "[v]iolation of Parkways policy I-I Violation of WV. Code 29-6A, `Retaliation'". She sought as relief, "[g]ive Grievant position, Make whole in every way."[1]

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[1] Grievant's supervisor responded on July 25, 1997, that he was without authority to decide the first grievance. Grievant appealed to Level II, and a decision denying the (continued...)

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievant has been employed by Parkways as a part-time toll collector at Toll Barrier A near Ghent for eight years.

2. Parkways posted four positions for full-time toll collectors on March 28, 1997.[2]

3. There were more than twenty applicants for these positions, including Grievant.

4. A Selection Board was appointed by Lawrence Cousins, Parkways' Deputy General Manager, to rate the applicants. He normally appoints from three to six individuals to serve, depending on availability, knowledge, and personal relationships. He tries to vary

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[1](...continued)
grievance was issued on August 15, 1997. Grievant then appealed to Level III.

As to the second grievance, Levels I and II were apparently waived by the parties after some disagreement about whether the grievance statement was too vague. The two grievances were then consolidated for hearing at Level III. Two days of hearing were held at Level III on March 20, 1998, and April 23, 1999. The two grievances were denied on July 1, 1999, and Grievant appealed to Level IV on July 8, 1999. After a Level IV hearing was scheduled, the parties agreed to submit this consolidated grievance for a decision based upon the record developed at Level III. This matter became mature for decision upon receipt of Respondent's written argument on October 15, 1999. Grievant declined to submit written argument. Respondent was represented by A. David Abrams, Jr., Esquire, and Grievant was represented by Boyd Lilly.

[2] One of these positions was to be filled after a foreman position was filled. It was July 1997 before this last position was filled. Grievant questioned why positions which came open in the fall were not filled from the March posting's applicant list, when this position was not filled until July. As Respondent explained, it knew the position would be available later, and went ahead and posted it. It did not know the other positions would be available when the posting occurred in March, so those positions were not posted at that time. When the other positions became available, it was appropriate to post them at that time so potential applicants would know of them and could then apply and be evaluated.

the Selection Board membership, but always has someone on the Selection Board with the ability to evaluate any technical requirements. He appointed four employees to serve on this Selection Board. Those appointed were James Kelley, Director of Toll Operations, Tyrone Gore, Joy Bailey, Complex Office Manager at Beckley South, and Thelma Hickman.

5. Mr. Kelley compiled information about the applicants for use by the Selection Board members, such as, length of service, leave usage, hours worked, performance ratings, and availability.

6. The applicants were interviewed by the Selection Board, and each member of the Selection Board scored each applicant. The maximum amount of points available from each Selection Board member was 110. Toll collector performance made up 40 points of the total score. The remaining categories rated were longevity, 15 points; availability (call-outs, etc.), 15 points; interview, response to questions, 5 points; interview, appearance, 5 points; communication skills, 10 points; leadership potential, 5 points; projects a positive image, 5 points; and supervisor's recommendation, 10 points.

7. The Selection Board members did not discuss the scores among themselves. They turned their score sheets over to Mr. Kelley, and did not keep copies.

8. Mr. Kelley gave the score sheets to Carrie Roache, Director of Human Resources. Ms. Roache added the individual scores assigned by each member of the Selection Board to compile a total score for each applicant. She then ranked the applicants according to their scores.

9. Mr. Cousins then reviewed the scores, and William H. Gavan, General Manager, approved the scores assigned by the members of the Selection Board. Neither altered any of the scores.

10. The successful applicants, based upon their compiled scores, were Nora Greene, Doris Pishner, Toby Tolliver, and Allen Gore. Ms. Greene declined to accept a position, and Heather Maynard, who had the fifth highest score at 347.25, was selected.

11. Grievant was ranked 21st, with a score of 228.75.

12. Grievant was rated "good, good" on her toll ratings by Ms. Bailey, Mr. Gore, and Mr. Kelley, with a score of 20 assigned by each, out of a possible 40.

13. Grievant's supervisor, Stephen Wyatt, wrote a letter of recommendation for her, which he did not type because his son was in the hospital, and he did not have time to type it. He typed a letter of recommendation for Mike Roles. Mr. Roles does not work for him, but Mr. Roles' mother does.

14. Grievant asked to work four days a week for a couple of months due to her son's illness, and this request was approved by Mr. Kelley. Mr. Wyatt included in Grievant's letter of recommendation that she had limited herself to four days, but because they had continued to call her to see if she wanted to work the fifth day, an accurate percentage could not be established for call outs. He included this information so that no adverse conclusions would be drawn. He also stated in the letter that Grievant "has done her job extremely well, has a good personality and gets along well with all parties involved."

15. Mr. Gore assigned Grievant a 0 in the category "supervisors recommendation," Mr. Kelley assigned her a 6, and Ms. Bailey assigned her a 5.[3]

16. Ms. Bailey gave Grievant 3 out of a possible 15 points on call-outs/availability, while both Mr. Gore and Mr. Kelley scored her at an 8 in this category. Both noted on the score sheets that Grievant had limited her time to four days per week; however, Mr. Gore's score sheet noted she had a small son and could not be on call-out.

17. Mr. Gore knows Heather Maynard and her husband through work-related social events.

18. On August 5, 1997, six additional full-time toll collector positions were posted. After that, two employees resigned, creating two additional vacancies, which were announced August 18, 1997. With these additional vacancies, the deadline for applications was extended to August 25, 1997.

19. There were more than twenty applicants for these positions, including Grievant.

20. Mr. Cousins appointed five employees to serve on the second Selection Board. Those appointed were James Kelley, Tyrone Gore, Fred Combs, Thelma Hickman and Steve Maynard.

21. Mr. Kelley was aware of Ms. Yoney's grievance filed over her failure to be selected for one of the positions posted in March 1997, as he issued the Level II decision on that grievance on August 15, 1997. There is no indication that any of the other members of the Selection Board was aware of that grievance.

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[3] Ms. Hickman's score sheet was not made a part of the record.

22. Mr. Kelley again compiled information about the applicants for use by the Selection Board members, such as, length of service, leave usage, hours worked, performance ratings, and availability.

23. The applicants were interviewed by the Selection Board, and each member of the Selection Board scored each applicant, using the same categories and possible points as were used by the first mentioned Selection Board. The members did not discuss the scores among themselves. They turned their score sheets over to Mr. Kelley, and did not keep copies.

24. Mr. Kelley gave the score sheets to Ms. Roache, who again added the individual scores assigned by each member of the Selection Board to compile a total score for each applicant. She then ranked the applicants according to their scores.

25. Mr. Cousins then reviewed the scores, and Mr. Gavan approved the scores assigned by the members of the Selection Board. Neither altered any of the scores.

26. Lisa Askew was ranked first, with a score of 498.25, but declined to accept the position offered, as did another high ranking applicant, Christina Lester. Allen Gore, who already held a full-time toll collector position, was offered a move to a different toll barrier based upon his score within the top applicants, and accepted. When the positions were all filled, and Mr. Gore's location changed, the top 11 highest scoring applicants had been offered the vacancies. Those employees accepting positions and their scores were: Allen Gore, 498; Kim Worrell, 459; Susan Arnold, 455.85; Jo Ann Sexton, 453.90; Tessie Lester, 453.40; Monica Trent, 448.50; Lucy McKinney, 438.15; Jeff Reynolds, 437.95; and Suzy Smith, 426.25.

27. Grievant was ranked 18th, with a score of 402.30. Except for Suzy Smith, each of the other successful applicants had also been ranked higher than Grievant by the first mentioned Selection Board. It does not appear that Ms. Smith applied for the positions posted in March 1997. The applicants ranked 12th through 17th had likewise been ranked higher than Grievant by the first mentioned Selection Board.

28. Grievant was rated "good, good" on her toll ratings by Mr. Gore, with a score of 20 assigned, but was rated "good, excellent" on her toll ratings by Mr. Kelley, with a score of 25 assigned.[4] It appears that Mr. Kelley rated Grievant based upon 30 months of data, while Mr. Gore rated her based upon 12 months of data.

29. No one attempted to influence the scores given by Mr. Kelley or Mr. Gore to the applicants during their service on either of the Selection Boards, nor did anyone discuss their scores with them. No one attempted to influence the scores given by Ms. Bailey, or discuss her scores with her.

Discussion

Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997). Parkways is a "classified-exempt" agency, and as such, is not subject to the rules established by the Division of Personnel which govern the selection procedures for most other state agencies. Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-546 (June 24, 1998). Even so, the standard of review of the selection process remains the same, so that Parkways' decision as to who

[4] The score sheets of Ms. Hickman, Mr. Combs, and Mr. Maynard, were not made a part of the record, nor was any information about their scoring made a part of the record.

is the most qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Id. See Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

The arbitrary and capricious standard of review of personnel decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the agency. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Thibault, supra.

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). If a grievant can demonstrate that the selection process was so significantly flawed that he might reasonably have been the successful applicant if the process had been conducted in a proper fashion, the employer will be required to compare the qualifications of the grievant to the successful applicant. Thibault, supra.

Parkways has adopted an administrative regulation which sets forth its procedure for selection. That regulation, Personnel Policy I-1, provides that it is

> the responsibility of a Selection Board to interview and select the candidate who is the most qualified for the position based upon merit, fitness and qualifications. If a choice is to be made between two or more applicants and all other factors are equal, consideration shall be given to the level of seniority of each of the respective applicants as a factor in determining which

> of the applicants will receive the board[']s recommendation. Selection Board results and recommendations will then be presented to the General Manager for final approval.

Grievant did not make clear what her arguments were. Accordingly, it was difficult for Respondent to make a response, other than to affirm the validity of the selection process, and deny any retaliation.

As to the first posting, Grievant did not identify how she believed the selection process was flawed, or what score she should have received in any category. She presented no evidence that any other applicant's score should have been lower.

Grievant suggested her supervisor did not provide an appropriate recommendation because it was hand-written, and it listed that she had worked only four days a week. There was no evidence, however, that the recommendation was disregarded because it was hand-written, or that it should have been better or different. Grievant's supervisor is not even required to provide a letter of recommendation, but did so at Grievant's request.

It further appears that Grievant believes the Selection Board discounted her score in availability/call-outs because she had asked to work only four days a week during a short period of time when her son was ill. No other information on Grievant's availability was placed in the record, however, so the undersigned cannot properly evaluate this category.

While Grievant elicited testimony regarding Mr. Gore's work friendship with Heather Maynard and her spouse, she provided no evidence that Ms. Maynard's score was wrong. Further, even had Ms. Maynard not been selected, Grievant was not the next in line.

Even if Grievant's score were adjusted to the highest possible score in the categories supervisor's recommendation and availability, and assuming she had been given a zero in these two categories by Ms. Hickman, whose score information was not

made a part of the record, her score would still be only 297.75, which would have placed her at number 15 in the ranking of applicants.

Grievant presented testimony regarding a meeting she and other employees had with General Manager Gavan in 1993, but did not indicate how or why this meeting affected her score. Further, assuming that meeting demonstrated Mr. Gavan did not like Grievant, the evidence did not support a finding that Mr. Gavan influenced the outcome of the selection process in any way. The evidence does not support a finding that Grievant was better qualified than any of those selected, and should have been selected.

Grievant pointed out that she has been a part-time Parkways employee for a long time. It appears Grievant is arguing that part-time toll collectors should be selected for full-time toll collector positions based solely on seniority. While that is certainly one way Parkways could have chosen to approach the selection process, that is not the course it chose in its policy. Once the policy was adopted, Parkways was required to follow its policy. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). While Grievant may certainly disagree with the policy, she has not demonstrated the policy is not valid, or is arbitrary and capricious. She merely offered the opinion that seniority should control.

Grievant argued she did not receive a full-time position as a result of the second posting because Parkways was retaliating against her for filing the grievance over her failure to be selected for one of the positions posted in March. W. Va. Code § 29-6A-2(p) defines "reprisal" as "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 redress it." A grievant alleging retaliation must first establish a prima facie case by demonstrating:

> (1) that he engaged in activity protected by the statute;
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> (2) that his employer was aware of the protected activity;
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> (3) that, thereafter, an adverse employment action was taken against him by the employer; and
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> (4) that the adverse action was the result of retaliatory motivation, or the action followed his protected activity within such a period of time that retaliatory motive can be inferred.

Dunford, supra. Once a prima facie case of retaliation is established, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. If the employer successfully rebuts the presumption, the employee may offer evidence to demonstrate the reasons given by the employer were merely a pretext. Id.[5]

It is clear from the evidence that retaliation played no part in Grievant not being selected. The applicants were ranked based upon the scores assigned to them individually by each member of the Selection Board. There was no evidence that any member of the Selection Board other than Mr. Kelley was even aware of the first grievance at the time the scores were assigned, and no evidence that anyone tried to influence the score of any member of the Selection Board. Comparing the list of applicants for both postings and

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[5] It is unclear whether the evidence regarding the meeting with General Manager Gavan in 1993 was offered in support of the claim of retaliation. If that was the purpose of the testimony, it does not support the claim of retaliation as no grievance had been filed at that time, and there is no indication that a grievance was filed as a result of that meeting. The statutory definition of retaliation makes it clear that the protected activity is participation in the grievance procedure for state employees. Dunford, supra. Further, there was no evidence that General Manager Gavan influenced the selection process at issue here.

their rankings reveals that Grievant rated about the same in relation to the other applicants both times.

The only irregularity pointed out by Grievant was that Mr. Kelley appears to have had 30 months of toll collector performance data, which resulted in a rating of good-excellent for Grievant, while Mr. Gore appears to have had only 12 months of toll collector performance data, which resulted in a rating of good-good. No explanation was provided, and it is unknown how Mr. Maynard, Ms. Hickman, and Mr. Combs ranked Grievant in this area. It is clear that each member of the Selection Board was supposed to use the same data in arriving at a score in this category. As the undersigned has insufficient information to determine how this error affected Grievant's score, it is necessary to return this matter to Parkways for a review of the scoring in this area, to make sure each member of the Selection Board used the same data, and to recalculate Grievant's score, if necessary.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. An agency's decision as to who is the most qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). Grievant failed to prove she was more qualified than any of the successful applicants, or that Parkways' decision was otherwise arbitrary and capricious or clearly wrong.

3. Grievant failed to demonstrate a flaw in the selection process for the positions posted in March 1997.

4. W. Va. Code § 29-6A-2(p) defines "reprisal" as "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 redress it." A grievant alleging retaliation must first establish a prima facie case by demonstrating:

> (1) that he engaged in activity protected by the statute;
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> (2) that his employer was aware of the protected activity;
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> (3) that, thereafter, an adverse employment action was taken against him by the employer; and
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> (4) that the adverse action was the result of retaliatory motivation, or the action followed his protected activity within such a period of time that retaliatory motive can be inferred.

Dunford, supra. Once a prima facie case of retaliation is established, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. If the employer successfully rebuts the presumption, the employee may offer evidence to demonstrate the reasons given by the employer were merely a pretext. Id.

5. Grievant was not retaliated against by Parkways for filing a grievance.

6. Grievant demonstrated a flaw in the second selection process, in that the members of the Selection Board did not all utilize the same data in arriving at her score in the category toll collector performance.

Accordingly, this grievance is **DENIED IN PART AND GRANTED IN PART**. Respondent is **ORDERED** to review the scoring by the members of the Selection Board

for the postings in August 1997, in the category toll collector performance, to make sure each member used the same data in arriving at a score, and to correct Grievant's score accordingly. If this results in Grievant's new score being within the top 11 applicants, she is to be placed in one of the posted positions, and paid backpay, with interest, to the date the positions were filled as though she had been a full-time employee.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD
Administrative Law Judge

Date: November 12, 1999