TROY MCCAULEY, JR.,

Grievant,

v. **DOCKET NO. 00-CORR-244**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL
CENTER,

Respondent.

DECISION

Troy McCauley, Jr., ("Grievant") filed three separate grievances in June of 2000, alleging discrimination arising from the selections for two case manager positions for which Grievant interviewed in March of 2000. Grievant seeks as relief to be reallocated to case manager, with back pay and interest. The grievances were denied at levels one and two, and a level three hearing was held on July 6, 2000. The grievance was denied in a written level three decision dated July 14, 2000. Grievant appealed to level four on July 22, 2000. After numerous continuances granted for good cause shown, a level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on May 11, 2001. Grievant represented himself, and Respondent was represented by Assistant Attorney General Jendonnae L. Houdyschell. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 7, 2001.

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant is employed by Respondent at Huttonsville Correctional Center as a Correctional Counselor.

2. In early 2000, Respondent posted two vacancies for case managers at Huttonsville Correctional Center ("HCC").

3. Interviews of the applicants were conducted by a committee of three people appointed by

HCC Warden William Haines.

4. The applicants were given numerical scores by each member of the interview committee, and those scores were averaged to reach a final total score for each applicant. After the interviews, Lance Yardley had received the highest score, and Grievant was ranked second.

5. Upon reviewing the interview scores, Warden Haines believed there was too much of a disparity between the scores given by the committee members. Therefore, he eliminated each applicant's highest score and recalculated the averages. Lance Yardley was still the number one candidate, and Grievant was ranked third.

6. Kenny Akins interviewed for the case manager positions, and was ranked sixth after the interviews. At that time, Mr. Akins was employed as a case manager at St. Mary's Correctional Center and had requested a transfer to HCC.

7. After checking Mr. Akins' references and discussing the transfer request with Commissioner Paul Kirby and Deputy Commissioner Jim Rubenstein, Warden Haines decided to transfer Mr. Akins into one of the vacant case manager positions.

8. As the number one ranked candidate, Lance Yardley received one of the case manager positions. 9. Mr. Yardley and Mr. Akins began working as case managers on May 15, 2000.

10. Grievant and the other unsuccessful applicants were notified by letter dated May 23, 2000, that they had not been selected for the positions.

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 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. 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 of the selection process. Thibault v. Division of Rehabilitation Services, Docket No. 93-RS-489 (July29, 1994). Unless proven arbitrary or capricious or clearly wrong, an agency decision regarding promotion will be upheld. Ashley v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-070 (June 2, 1995). 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).

Grievant has made several allegations with regard to the filling of the positions at issue. Chiefly, it appears that Grievant believes he should have received one of the positions after originally scoring second in the candidate rankings. He points out that Mr. Akins ranked sixth, yet was allowed to transfer into one of the case manager positions, andcontends that Mr. Akins' transfer was “politically motivated.” Grievant also testified that Warden Haines' secretary told him shortly after the interviews that he had scored highest, outranking Lance Yardley and being assured of a position. He contends that all of these actions show that his non-selection was the result of discrimination.

Respondent's Policy Directive 132.00 governs the promotion of non-correctional officer personnel. It provides for an interview committee of up to three people, including the warden as chairperson. After conducting the interviews, the committee (or individual) is to “make a determination regarding which applicant will be selected.” No further guidelines are provided. Grievant contends that Warden Haines did not have the authority to “manipulate” the final interview scores, especially since he did not take part in the interviews. Nevertheless, the undersigned does not find that the policy was violated. The policy is quite vague concerning the interview process itself. However, in the instant case, Warden Haines' decision to throw out the highest scores did not alter the outcome of the selection decision. Lance Yardley still scored highest, and the second position was filled by Mr. Akins' transfer. Therefore, even if Grievant had remained second in the rankings, he would not have received either of the positions.

As to Mr. Akins' transfer, Grievant has failed to prove that this decision was improper. Pursuant to the Division of Personnel's Administrative Rule, § 11.6, an agency has the right to transfer employees geographically when there is a need, and, unless the transfer was made in an arbitrary and capricious manner, the transfer is valid. See Mitias v. W. Va. Public Serv. Comm'n, Docket No. 95-PSC-029 (July 17, 1997). The evidence in this case shows that Mr. Akins had repeatedly requested a transfer to HCC, interviewed for the position like all other candidates (which he did not have to do), and was awardedthe position after his references were contacted and gave favorable reviews of his work. As to the allegation that the decision was politically motivated, Warden Haines testified that both the commissioner and deputy commissioner “encouraged” him to approve the

transfer, but he was not pressured or threatened in any manner. Grievant has provided no evidence to contradict Warden Haines' credible testimony, other than hearsay “rumors” from some HCC employees. The undersigned concludes that Mr. Akins' transfer was conducted in accordance with applicable rules and was not arbitrary and capricious.

Moreover, Respondent was not obligated or required to fill either of the positions, once the posting and interview process was completed. This Grievance Board has previously held that it is permissible for an agency to withdraw a posting and re-post it, prior to the extension of any employment offer. In Law/Bragg v. W. Va. Dep't of Health and Human Resources, Docket No. 95-HHR-452 (July 17, 1997), the administrative law judge noted that "it is not uncommon for agencies to withdraw recommendations of employment for a variety of reasons, including loss of funds, abolishment of the position, a failure to draw a sufficient field of applicants, and errors in the posting." See also Staggers v. W. Va. Dept. of Transp., Docket No. 98-DOH-505 (Apr. 30, 1999).

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, 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 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).

It is unclear how Grievant believes the decisions at issue were discriminatory, and he has failed to identify the employees with whom he is similarly situated. He has not contested the qualifications of Mr. Yardley, the highest ranking candidate, and he is simply not similarly situated to Mr. Akins, who was transferred. As to the warden's secretary's alleged comments, there is no evidence to support her statements, and she did not testify in this grievance. Grievant also alleged it was discriminatory for the successful applicants to begin working on May 15, when he was not notified of his non-selection until several days later. Respondent was under no obligation to inform Grievant of his non-selection at any particular time, and all other non-successful applicants were informed at the same time. Grievant has failed to make a prima facie case of discrimination regarding any of these allegations.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-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 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Unless proven arbitrary or capricious or clearly wrong, an agency decision regarding promotion will be upheld. Ashley v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-070 (June 2, 1995).

3. Pursuant to the Division of Personnel's Administrative Rule, § 11.6, an agency has the right to transfer employees geographically when there is a need, and, unless the transfer was made in an arbitrary and capricious manner, the transfer is valid. See Mitias v. W. Va. Public Serv. Comm'n, Docket No. 95-PSC-029 (July 17, 1997).

4. In order to establish a prima facie case of discrimination, as defined by W. Va. Code § 29-6A-2(d), a 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 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).

5. Grievant has failed to establish that the selection and transfer decisions at issue were discriminatory, arbitrary and capricious, or improper in any manner.

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, and 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.

Date: August 2, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge