JENNINGS ASHBY,

Grievant,

v v.

DOCKET NO. 02-ADMN-076

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION/GENERAL SERVICES DIVISION,

Respondent.

D E C I S I O N

Grievant, Jennings Ashby, filed this grievance against his employer, the West Virginia Department of Administration/General Services Division ("GSD") on February 15, 2002, alleging his non-selection for a Building Supervisor I position was the result of discrimination and favoritism. The grievance was denied at level one by Jim Bumpus, Administrative Services Manager, and at level two by David Pentz, Director, General Services Division. Following a level three hearing on March 13, 2002, the grievance was denied by Hearing Examiner William J. Charnock, Esq. Grievant appealed to level four on March 26, 2002, and a level four hearing was held on May 2, 2002, at which this grievance became mature for decision, the parties having declined submitting proposed findings of fact and conclusions of law. Grievant was represented at level four by Pam DuKate, and GSD was represented by Amy Haynie, Esq.

SUMMARY OF EVIDENCE

Grievant's Exhibits

None.

LIII GSD Exhibits

Ex. 1 -

June 28, 2001 memorandum from David Pentz to Nichelle Perkins re: Temporary Upgrade.Ex. 2 -
December 18, 2001 memorandum from David Pentz to Nichelle Perkins re: Request for a 30-day Extension.

Ex. 3 -

Application for Examinations of Jennings Ashby, John Carter, and Carles Farley.

Ex. 4 -

November 28, 2001 classified position vacancy posting for Supervisor I.

Testimony

Grievant testified in his own behalf, and presented the testimony of David Pentz, Tim Lee, Jim Bumpus, Roger Paxton, John Carter, Bill Thaxton, and Carles Farley. GSD presented the additional testimony of Jim Burgess.

FINDINGS OF FACT

Based upon a review of all of the testimony and evidence of record, I find the following facts have been proven by a preponderance of the evidence.

1. Grievant is employed by GSD as a Maintenance Worker, a lead worker position. Grievant has been employed by GSD for approximately 17 years.

2. In or about June 2001, the need arose to temporarily fill the position of Building Supervisor I, and GSD Director David Pentz requested from the Division of Personnel a six-month temporary upgrade for Carles Farley. LIII GSD Ex. 1.

3. At the time of the temporary upgrade, Mr. Farley had been employed by GSD as a Groundskeeper for approximately 2 years

4. On November 28, 2001, GSD posted the position vacancy for a full-time Building Supervisor

I. LIII GSD Ex. 4.

5. Three internal candidates submitted applications for the position: Grievant, Mr. Farley, and John Carter. LIII GSD Ex. 3.

6. The three internal candidates were interviewed for the position by Jim Bumpus, Administrative Services Manager, and Bill Thaxton, Assistant Director. 7. Mr. Farley's interview lasted approximately 20-30 minutes. Grievant's interview lasted approximately 5 minutes.

8. Mr. Bumpus, Mr. Thaxton, and Mr. Pentz considered Grievant and Mr. Farley equally qualified for the Building Supervisor position.

9. Mr. Farley was selected for the position of Building Supervisor I by Mr. Pentz.

DISCUSSION

In non-disciplinary matters a grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant alleges he has been the victim of discrimination and favoritism in his non-selection for the Building Supervisor I position. GSD argues that both Grievant and Mr. Farley were equally qualified for the position, and the selection of Mr. Farley was neither discriminatory or the result of favoritism, but the result of a careful review of the applications of the candidates.

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 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).

Favoritism is similarly defined by W. Va. Code § 29-6A-2(h), as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of favoritism, Grievant must establish the following:

(a)

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

(b)

that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c)

that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Frantz v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999); Blake v. W. Va. Dept. of Transp., Docket No. 97-DOH-416 (May 1, 1998). See McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996).

As with discrimination, if Grievant establishes a prima facie case of favoritism, GSD may rebut this showing by articulating a legitimate reason for its action. However, Grievant can still prevail if he can demonstrate that the reason proffered by GSD was mere pretext. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281

(Jan. 28, 1990).

In matters of non-selection for state employees, the grievance process is not that of a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. McCauley v. W. Va. Div. of Corrections, Docket No. 00-CORR-244 (Aug. 2, 2001); Thibault v. Div. of Rehabilitation Serv., 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. Dept. 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). In addition, the West Virginia Division of Personnel Rules, Section 11.1, governing promotion provide as follows:

> (a) In filling vacancies, appointing authorities shall make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. Whenever practical and in the best interest of the service, an appointing authority may fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the classified service based on demonstrated capacity and quality and length of service.
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> (b) The Director must certify that a candidate for promotion possesses the qualifications for the position as set forth in the specifications for the class of position for which he or she is a candidate, and the appointing authority mayrequire the candidate to qualify for the new position by a promotional competitive or non-competitive examination administered by the Director.

The evidence shows that the Building Supervisor position was properly posted, and three internal candidates timely applied. The three candidates, including Grievant and Mr. Farley, were interviewed by two mid-management employees, Mr. Bumpus and Mr. Thaxton. Grievant's interview lasted approximately five minutes, and Mr. Farley's interview lasted approximately 20-30 minutes. No evidence was provided as to how long the third applicant, Mr. Carter's, interview lasted. During the interviews, the applicants' evaluations were reviewed, and the applicants were asked questions, including whether they had any additional information or documentation they wished to provide for consideration. Following the interviews, Mr. Bumpus and Mr. Thaxton recommended Mr. Farley to

Mr. Pentz, who accepted that recommendation, prepared the WV-11 and supporting documentation, and forwarded the information to his superiors and to the Division of Personnel.

Grievant takes issue with the fact that his interview only lasted five minutes, while Mr. Farley's lasted longer. Little evidence was adduced as to the questions asked during the interviews, or exactly how the interviews were conducted, except that Mr. Bumpus took the lead in the interviews, as Mr. Thaxton had not been employed with GSD very long at the time of the interviews. While on its face, the time given for the interviews is not equal, it is also possible that Mr. Farley had more to say in answer to the questions asked, or asked questions himself, which resulted in a longer interview.

At level four, Mr. Bumpus testified that Grievant and Mr. Farley were equally qualified for the job. Mr. Bumpus felt the decision should have been his to make, but hefelt pressured to recommend Mr. Farley for the position. Mr. Bumpus also testified that the decision to temporarily upgrade Mr. Farley to the position six months before was made without his input. He testified that although Mr. Pentz did not come out and say it, he implied that Carles Farley was his man. Mr. Bumpus testified that although Mr. Thaxton told the candidates he was too new to make a decision on hiring, he told Mr. Bumpus he wanted Mr. Farley for the job. Despite his misgivings, Mr. Bumpus confirmed that he could have recommended Grievant for the job, but he did not.

Mr. Thaxton testified at level four that he was too new on the job to make an informed decision regarding the hiring, and deferred to his supervisors. Mr. Thaxton did tell Mr. Bumpus that he should wait until Grievant came back from Workers Compensation to conduct the interviews for the positions. Grievant testified Mr. Thaxton told him later that he had to go with his supervisor's decision to hire Mr. Farley.

Mr. Pentz testified he felt Mr. Farley was the best man for the job. He testified he did not know Mr. Farley outside of work, and did not socialize with him in any way. He looked at the fact that Mr. Farley had been satisfactorily performing the job for six months in the temporary upgrade, had his own landscaping business, had a certificate in horticulture, and an excellent work record. Mr. Pentz did look at longevity as a factor, but it was not the determining factor. Mr. Pentz testified he never promised Mr. Farley the job.

The evidence demonstrates that Mr. Pentz chose Mr. Farley for the position. However, there is no evidence that his decision was motivated in any way by favoritism for Mr. Farley, or discrimination against Grievant. Quite simply, there were two equally qualified candidates for the position, and one

had to win. Understandably, Grievant believes his long years of service with GSD should have weighed in his favor. Mr. Bumpusapparently feels chagrin that he was not consulted about the temporary upgrade of Mr. Farley, and somehow felt “pressured” to recommend Mr. Farley because he knew Mr. Pentz wanted him for the job. However, Mr. Bumpus acknowledged that he could have recommended Grievant for the position, and Mr. Pentz still could have gone with Mr. Farley. More importantly, Mr. Bumpus acknowledged that Grievant and Mr. Farley were equally qualified, and it came down to a difference in opinion among the managers as to whom to hire. In this regard, there is nothing improper about the higher-ranking manager having the final say in the hiring process.

CONCLUSIONS OF LAW

1. In non-disciplinary matters a grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

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, Grievant must show:

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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 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).

3. Favoritism is defined by W. Va. Code § 29-6A-2(h) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment ofanother or other employees." In order to establish a prima facie case of favoritism, Grievant must establish the following:

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4. In matters of non-selection for state employees, the grievance process is not that of a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. McCauley v. W. Va. Div. of Corrections, Docket No. 00-CORR-244 (Aug. 2, 2001); Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July29, 1994).

5. Unless proven arbitrary or capricious or clearly wrong, an agency decision regarding promotion will be upheld. Ashley v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-070 (June 2, 1995). 6. 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).

7. The West Virginia Division of Personnel Rules, Section 11.1, governing promotion provide as follows:

> (a) In filling vacancies, appointing authorities shall make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. Whenever practical and in the best interest of the service, an appointing authority may fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the classified service based on demonstrated capacity and quality and length of service.
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> (b) The Director must certify that a candidate for promotion possesses the qualifications for the position as set forth in the specifications for the class of position for which he or she is a candidate, and the appointing authority may require the candidate to qualify for the new position by a promotional competitive or non-competitive examination administered by the Director.

8. Grievant has failed to prove that his non-selection for the Building Supervisor position at GSD was the result of discrimination, favoritism, or a violation of rules or policies governing selection of State employees.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. 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 sonamed. 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: May 15, 2002