CARRICE HONAKER,

Grievant,

v. Docket No. 01-BEP-623

BUREAU OF EMPLOYMENT PROGRAMS/FISCAL
AND ADMINISTRATIVE MANAGEMENT DIVISION,

Respondent.

D E C I S I O N

This grievance was filed by Grievant Carrice Honaker against Respondent, Bureau of Employment Programs/Fiscal and Administrative Management Division ("BEP"), on or about June 1, 2001. Grievant alleges she should have been selected for an Administrative Service Manager I position. As relief she sought to be placed in the position. (See footnote 1)

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 BEP for over 26 years, and has been supervisor of the stockroom since 1998. She has 10 years of supervisory experience, and is 64 years old.

2. On March 13, 2001, BEP posted a position for an Administrative Service Manager I position, “Mailroom Supervisor.” There were 15 applicants for the posted position, including Grievant.

3. Randall Bare is Chief of Support Services, and Grievant's supervisor. He now supervises the Mailroom Supervisor.

4. Grievant spoke to Clarence Bess, Assistant Director of Administrative Support, and asked him to give her the Mailroom Supervisor job. He told her he could not do that, and it was the job of

the interview panel to review the qualifications of the applicants. Grievant believed Mr. Bess was telling her she would not get the job.

5. Grievant told Mr. Bare she was applying for the Mailroom Supervisor position, and this would show her how much he and Mr. Bess liked her. Mr. Bare told Grievant he did not “fix boards.” She responded that it was done all the time, and he said he would not do it.

6. Grievant told Mark Miller, who at that time was Director of the Fiscal and Administrative Management Division, that she was interested in the Mailroom Supervisor job. She also told him she was concerned that Mr. Bess, Mr. Bare, and Bill Adkins, an Administrative Service Manager II, who also worked in her department, had something against her, would not be objective, and she would have no shot at getting the job if they were involved in the selection process. Mr. Miller was Mr. Bess' supervisor, and the mailroom was under Administrative Support. Mr. Miller told Grievant he would have Sheryl Calhoun sit in on the interviews to make sure there was an independent viewpoint. 7. Ms. Calhoun was the Supervisor of the Financial Management and Audit Section of Accounting Services. Mr. Miller had worked with Ms. Calhoun for about five years, and found her to be fair, and to be a good interviewer.

8. Mr. Bess appointed Mr. Bare, Mr. Adkins, and Ms. Calhoun to interview the applicants.

9. Mr. Adkins had been serving as the interim Mailroom Supervisor, and was familiar with the staff and the supervisory issues in the mailroom. Mr. Adkins is 63 years old.

10. Ms. Calhoun did not know Grievant prior to the interview, and neither Mr. Bare nor Mr. Adkins told her anything about Grievant. She did not know Grievant had expressed any concerns about the selection process, and thought Mr. Bare or Mr. Bess had asked for someone outside the mailroom to be on the interview panel. She knew that it was not unusual to have someone outside the unit participate in the interviews when there are internal applicants.

11. The interview panel interviewed 11 of the applicants, including Grievant, in order to evaluate the managerial experience and qualifications of the applicants. One interviewee withdrew from the process after the interview. Each applicant was asked the same set of 23 questions by Mr. Bare. Mr. Bare had selected the questions from a book on management supervision, and they were reviewed and approved by Tom Rardin, BEP's Personnel Administrator. Each member of the interview panel scored the answers given by each applicant on a scale of 0 to 5. A score of 0 meant “none,” 1 meant “unsatisfactory,” 2 meant “fair,” 3 meant “good,” 4 meant “excellent,” and 5 meant

"outstanding." Each interviewer made notes about the answers given by each applicant, scored the answer to each question, and tallied his or her scores for each applicant. The highest score possible was 115. The interviewers did not discuss any of the applicants until all the interviews were completed and the scores tallied. 12. Grievant received a total interview score of 63 from Mr. Bare, 57 from Mr. Adkins, and 56 from Ms. Calhoun, for an average of 58.66. She had the lowest score in the interview of any of those interviewed.

13. Mr. Bare felt Grievant had a terrible interview, and Mr. Adkins agreed. Mr. Adkins was surprised at how poorly Grievant did in the interview. He noted that she frequently referred to policy and procedure in response to a question, and in some instances, policy and procedure were not relevant to the question asked.

14. The interview committee recommended Lisa Bragg for the position, based upon the interview. Ms. Bragg received the highest score in the interview. She received a score of 99 from Mr. Bare, 81 from Mr. Adkins, and 106 from Ms. Calhoun, for an average score of 95.33. Mr. Bess relayed the recommendation to Mr. Miller, Mr. Miller approved of the recommendation and forwarded it to BEP's Office of Personnel Services, which forwarded the necessary paperwork to the Division of Personnel.

15. Ms. Bragg was employed in BEP's Office of Judges. The Division of Personnel had concerns about the information on the application submitted by Ms. Bragg when she applied for the Mailroom Supervisor position, and did not approve the transfer of Ms. Bragg into the Mailroom Supervisor position.

16. Mr. Miller asked Mr. Bess to review the applicants and determine whether they needed to re-post the position. Mr. Bess relayed this to Mr. Bare, who then recommended that one of the original applicants, Judy Haas Howard, be placed in the position.

17. Ms. Haas-Howard received an interview score of 79 from Mr. Bare, 70 from Mr. Adkins, and 79 from Ms. Calhoun, for an average score of 76. She was rated fourth overall by the interviewers. Mr. Bess and Mr. Miller accepted the recommendation of Ms. Haas-Howard for the position, and forwarded it to the Office of Personnel Services, whichin turn forwarded the paperwork to the Division of Personnel. The Division of Personnel approved the hiring, and Ms. Haas-Howard was placed in the position.

18. The applicants who were ranked second and third by the interviewers were not

recommended because both were overqualified for the job, and the interview panel did not believe either would stay very long, and they were looking for stability in the position.

19. Ms. Haas-Howard had been employed by BEP for 20 years, and is 44 years old. At the time she was interviewed, she worked in the Communications Division as a Public Information Specialist 2. In that position she had supervised a summer intern each summer since 1994. She was responsible for writing news releases and speeches, she was editor of the agency newsletter, she planned and executed publicity for projects, arranged press coverage, communicated with the public and the news media, and produced training and other videotapes. In previous jobs she had supervised a secretary for a year and a half, and two work study employees for four months. In 1997 and 1998 she served as the coordinator of the West Virginia State Employees Combined Campaign, which required her to act as the leader of a group of about a dozen state employees from various state agencies.

20. Mr. Bare considered his experience with Grievant when he rated the answers she gave to the interview questions. In particular, he gave her a rating of 3 on question 2, because her response was she would follow policies and procedures. Mr. Bare was looking for something other than this as a response, and he felt Grievant did not know policies and procedures, because he felt she did not follow them. He gave her a rating of 2 on question 11 because, based on his experience with Grievant, he knew she did not mean what she said, and he felt he could not trust her. He gave her a rating of 2 on question 12, because he knew her answer was not true. Mr. Bare did not share his experience with Grievant with Mr. Adkins or Ms. Calhoun, although he and Mr. Adkins haddiscussed problems Mr. Bare had had with Grievant in the normal course of managing the unit.

21. An employee under Grievant's supervision told Mr. Bare he should hire Grievant for the posted position and get her “out of their hair.” Mr. Bare responded that “it would be a cold day in hell when she got the job.”

22. Ms. Calhoun was looking for management strengths in the applicants, such as organizational skills, fairness, and concern for the employees. She did not think Grievant gave strong management answers. Grievant stated more than once during her interview that if the interviewers were not familiar with the seniority statute, they should get familiar with it. Ms. Calhoun felt Grievant was threatening the interviewers that if she did not get the job she would take some action, although it was not clear what she would do. Ms. Calhoun did not think Grievant should have been threatening

the interviewers.

23. Ms. Haas-Howard gave Ms. Calhoun the impression during the interview that she was a very motivated person, who would be concerned about the welfare of the people working for her.

24. Grievant had more seniority with the state than any of the other applicants. She had worked in the mailroom one day when it was short staffed, and is familiar with the machines in the mailroom.

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 Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). In a state selection case, 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). The arbitrary and capricious standard of review of personnel decisions requires a searching and careful inquiry into the facts; however, the scope ofreview 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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). Further, 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.

Grievant asserted that BEP was required by law to select her, because she was the most senior applicant. It is apparent that this is the attitude she took to the interview. This argument is based upon W. Va. Code § 29-6-10(4), which provides, in pertinent part:

> The [state personnel] board shall have the authority to promulgate, amend or repeal rules, according to chapter twenty-nine-a [§§ 29A-1-1 et seq.] of this code, to implement the provisions of this article:
>
> (4) For promotions within the classified service which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination, when such examination is practicable. . . . When any benefit such as a promotion, wage increase or transfer is to be awarded, . . . and a choice is required between two or more employees in the classified service as to who will receive thebenefit, or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit or have the benefit withdrawn, as the case may be.

Grievant's reading of this Code Section is erroneous. The first query is whether the applicants were "substantially equal" or had "similar qualifications." Ward v. Dep't of Transp., Docket No. 96-DOH-184 (July 24, 1997). “Where the grievant and the successful applicant meet the minimum qualifications for the job, but one applicant, or in this case, seven applicants, are more qualified than the grievant, their qualifications are not substantially equal or similar, and seniority need not be considered. Mowery, supra.” Sheppard and Gregory v. W. Va. Dep't of Health and Human Resources, Docket No. 97- HHR-186/187 (Dec. 29, 1997). "The employer retains the discretion to discern whether one candidate has superior qualifications than another, without regard to seniority as a factor." Lewis v. W. Va. Dep't of Admin., Docket No. 96-DOA-027 (June 7, 1996). If the qualifications of the applicants are similar or substantially equal, the statute still does not require that the most senior applicant be selected. It says that seniority must then be considered as a factor in the decision-making process.

Grievant argued that the selection process was flawed, because Mr. Bare had already determined before the interviews that she would not get the job. Grievant also argued that the selection process was arbitrary and capricious, because the members of the interview panel were not “able through testimony to explain any meaningful rationale to explain how they decided what number would be allocated to which respondent for any given response,” no training was provided “in the utilization of the score sheet,” and “Grievant was asked questions not on the prepared form and not asked of other

applicants" regarding a disagreement she had had with Mr. Bare.

As to Grievant's assertion that she was asked questions not asked of other applicants, while there may well have been some follow-up or clarification questions askedof Grievant which were not asked of others, Grievant was not asked about a disagreement she had had with Mr. Bare. All the applicants were asked to "Tell me about a time when a directive from above caused you to reschedule your workload. How did you feel? How did staff react?" They were also asked to "Tell me about a time when people were making emotional decisions about your projects?" and "What happened and what did you do?" Grievant responded to one or more of these questions by referring to a decision Mr. Bare had made with which she disagreed. Mr. Adkins then asked as a follow-up whether the situation was working out.

Grievant presented no evidence of any training which could have been provided to the interviewers on how they were to score answers to questions for which there was no right answer and no wrong answer, or how much training would be necessary in order for the interviewers to be able to score answers appropriately, nor did she present evidence that such training was necessary for these interviewers. The members of the interview panel had conducted interviews and scored applicants on other occasions, and were managers themselves, so they were not without experience in interviewing. The real question is not whether one interviewer should have given Grievant a 1, 3, or 5, on a particular answer, but whether each interviewer scored all the applicants in a consistent manner. Grievant did not point out any scoring inconsistencies.

As to the assertion that the members of the interview panel were unable to explain how they scored the answers, the undersigned disagrees. While the members of the interview panel could not recall why they felt some of Grievant's answers were not great answers when they testified so many months after the interview, they were able to recall and explain what they were looking for on many of the questions, and why the answers given by Grievant, as reflected in the notes taken during the interview, were not what they were looking for. Mr. Adkins' explanation on how he scored a few of Grievant's answers was simply that he thought the answer was a good answer, but not excellent in his opinion. In a subjective process such as an interview, this is how the interviewers are going to evaluate some answers. It will be noted, however, that Mr. Adkins did recall specifically the reasons he had rated most of Grievant's answers as he had. Grievant is essentially arguing that it is arbitrary and capricious to compare the applicants through the interview process, and she has failed to prove

this.

Grievant did demonstrate that Mr. Bare should not have been on the interview panel, and he should have asked to be excused from the panel, as it is clear that he would not have recommended Grievant for the position under any circumstances. However, Grievant did not demonstrate that either Mr. Adkins or Ms. Calhoun bore any ill will toward her, that Mr. Bare exerted any influence over Mr. Adkins or Ms. Calhoun, or that the outcome would have been any different had Mr. Bare not been a part of the interview process. Both Mr. Adkins and Ms. Calhoun rated Grievant even lower in the interview than Mr. Bare did, and Ms. Calhoun rated her the lowest of all those interviewed. This was perhaps in part because of what Ms. Calhoun considered to be threatening behavior during the interview. It was not improper for Ms. Calhoun to consider Grievant's behavior toward the interview panel in evaluating Grievant's people and management skills. Salmons v. Dep't of Transp., Docket No. 99-DOH-385 (Apr. 25, 2000).

Grievant asserted she was the most qualified applicant, apparently relying upon the fact that she had been the stockroom supervisor since 1998, had some other supervisory experience, and was familiar with the mailroom. While Grievant had been a supervisor in the stockroom for quite a while, this alone did not make her the most qualified applicant. If years of supervisory experience was the sole criterion for determining the most qualified applicant, then the applicant ranked second by the interview panel was the most qualified applicant, followed by Dan Kimble, with 19 years of experience, and Connie Cline, with 18 years of experience. As to Grievant's experience with the mailroom, while this certainly was something of a plus for her, she had only worked in the mailroom one day. Grievant also asserted that Ms. Haas-Howard should not have been considered because she had lied about her supervisory experience on her application, asserting that Ms. Haas-Howard had no supervisory experience. This assertion apparently is based upon the definition of supervisor used in classifying employees. Grievant has not demonstrated that Ms. Haas-Howard lied on her application. Ms. Haas-Howard stated on her application that she had supervised summers interns since 1994. She testified that she gave them assignments, checked the assignments, and approved their leave. Ms. Haas-Howard stated on her application that she had supervised two work study employees for four months in 1991. She testified that she made sure they completed tasks and signed off on their time. They did not receive evaluations. Ms. Haas-Howard stated on her application that she had supervised employees as Coordinator of the State Employees Combined Campaign,

and explained in listing her duties and responsibilities that she had “led a committee of about a dozen employees from various state agencies.” She testified that the agency representatives all reported to her, she helped them with problems, trained them, and was responsible to the Governor for the output of everyone on the committee. While none of this experience may meet the Division of Personnel's definition of supervision when it is determining what classification is appropriate, Ms. Haas-Howard did not lie when she said she supervised in these situations. The application does not tell the applicant what constitutes supervision.

Finally, Grievant alleged she was unlawfully discriminated against because of her age, in violation of W. Va. Code §§ 29-6A-2(d) and 5-11-1, et seq. (the Human Rights Act), and the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621, et seq. ("ADEA"). "This Grievance Board does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act . . .. Nevertheless, the Grievance Board's authority to provide relief to employees for 'discrimination,' 'favoritism,' and 'harassment,' as those terms are defined in W. Va. Code § 29-6A-2, includes jurisdiction to remedydiscrimination that would also violate the Human Rights Act." Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997).

W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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.

This definition encompasses all types of discrimination, including discrimination based upon age. It is not necessary to analyze Grievant's claim under either under the Human Rights Act or the ADEA, as such claims are subsumed by § 29-6A-2(d). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, Docket No. 95-BOT-387 (Jan. 31, 1995).

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant pointed to a statement made by Mr. Bare in his testimony at Level III, that “the number two [applicant] was seventy-some years old and a nice gentlem[a]n, but thepanel felt that he was not there to stay. He was not a person that was going to work in the basement,” as support for her claim of age discrimination. “Such a statement, while suspect, does not prove that [an interviewer] engaged in age discrimination, but does prove he chose his words unwisely.” Sheppard and Gregory, supra. It is clear that Mr. Bare and the other committee members looked at this applicant's age only as an indication of how many years he had spent in management, and neither Mr. Bare nor the other interviewers believed the Mailroom Supervisor position would be much of a challenge for such an applicant. Grievant failed to show that age played any role in the selection process, or that she otherwise was discriminated against. See Aglinsky, supra.

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 Natural 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).

3. Grievant failed to prove she was more qualified than the successful applicant, or that BEP's decision was otherwise arbitrary and capricious or clearly wrong.

4. "This Grievance Board does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act . . .. Nevertheless, the Grievance Board's authority to provide relief to employees for 'discrimination,' 'favoritism,' and 'harassment,' as those terms are defined in W. Va. Code § 29-6A-2, includes jurisdiction to remedy discrimination that would also

violate the Human Rights Act." Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997). The W. Va. Code § 29- 6A-2(d) definition of discrimination encompasses all types of discrimination, including discrimination based upon age. It is not necessary to analyze Grievant's claim under either under the Human Rights Act or the ADEA, as such claims are subsumed by § 29-6A-2(d). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, Docket No. 95-BOT-387 (Jan. 31, 1995).

5. A grievant alleging discrimination must establish a prima facie case by demonstrating:

(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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

6. Grievant did not demonstrate that she was discriminated against in the selection process because of her age or otherwise.

Accordingly, this grievance is **DENIED**.

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.

BRENDA L. GOULD

Administrative Law Judge

Date: March 18, 2003

Footnote: 1

The grievance was denied at Level I on June 6, 2001, and Grievant appealed to Level II on that date. The grievance was denied at Level II on June 14, 2001, and Grievant appealed to Level III. A Level III hearing was held on August 30, 2001. The grievance was denied at Level III on December 10, 2001, and Grievant appealed to Level IV on December 14, 2001. Two days of hearing were held at Level IV on June 13 and October 30, 2002. Grievant was represented by Christopher G. Moffatt, Esquire, and Respondent was represented by Kelli D. Talbott, Esquire. This grievance became mature for decision on January 14, 2003, upon receipt of Grievant's written argument. Respondent declined to submit written argument.