RUTH ANN DOUGLASS,

Grievant,

v. Docket No. 04-HHR-069

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

BUREAU FOR CHILDREN & FAMILIES,

Respondent.

D E C I S I O N

Ruth Ann Douglass ("Grievant"), employed by the Department of Health & Human Resources ("DHHR") as a Social Services Worker III, filed a level one grievance on or about September 5, 2003, following her nonselection for the position of Social Services Supervisor. Grievant seeks instatement to the position and back pay. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied at levels two and three, and the matter advanced to level four on February 17, 2004. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on March 30, 2004. The grievance became mature for decision at the close of the hearing when both parties waived the opportunity to file proposed findings of fact and conclusions of law. Grievant was represented by Heather Wood, Esq. of Frankovitch, Anatakis, Colantonio, & Simon. DHHR was represented by Landon R. Brown, Senior Assistant Attorney General.

Based upon a review of the testimony and evidence of record, the following facts are proven by a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by DHHR since March 16, 1999, and has held the classification of Social Services Worker III at all times pertinent to this grievance.

2. In August 2003, DHHR posted a vacancy for the position of Social ServicesSupervisor for the Brooke/Hancock office. The requirements listed on the posting were a Bachelors degree in Social Work or in an approved substitute area, a current social work license in West Virginia, and two years of full-time or equivalent part-time paid experience.

3. Grievant and William Mathess were the only two applicants for the position. The

candidates were evaluated by Robert Clark, Community Service Manager, and Louis Palma, Regional Director. Both were found to hold an acceptable degree, Grievant holds a permanent certification in social work, while Mr. Mathess holds a temporary certificate, and both have two years of experience.

4. Both applicants were interviewed by Mr. Clark and Mr. Palma. The same twenty questions were posed to both Grievant and Mr. Mathess during their interviews. The administrators completed an "Applicant Interview Rating" sheet on which they evaluated the applicants in the areas of oral expression, intelligence/reasoning process, judgement/objectivity, tact/sensitivity, appearance, poise/confidence, and leadership potential. When the scores were averaged, Grievant was awarded twenty-one points, and Mr. Mathess was awarded twenty-two points.

5. Finally, a candidate comparison chart was completed in which the applicants were ranked as one or two in the areas of interview performance, education, experience, leadership, concerns with limitations of candidates, and a rating of candidates in order of preference. Grievant received a total of nine points, while Mr. Mathess received eight points.

6. Mr. Mathess was awarded the position based upon his superior level of organization and professionalism.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met her burden. Id.

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 "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)). A searching and careful inquiry into the facts is required; 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). 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 argues that based upon her licensure and experience with DHHR, she was more qualified for the position than Mr. Mathess, and the failure to select her was discriminatory. (See footnote 1) **Grievant further asserts that Mr. Mathess was shown favoritism as he had been pre-selected for the position of Supervisor. Finally, Grievant claims that the promotionof Mr. Mathess creates a practice that constitutes a substantial detriment to, or interference with her effective job performance, her health, and her feelings of safety.**

DHHR denies that it engaged in discrimination or favoritism in the selection of Mr. Mathess, or that his appointment would be detrimental to Grievant's job performance, health,

or safety. DHHR acknowledges that the candidates were both well qualified, but asserts that Mr. Mathess was the better qualified applicant for this position at this time.

It is clear from the evidence that both Grievant and Mr. Mathess were qualified for the position of Supervisor, and that the margin in their ranking was very narrow. Grievant has more experience with DHHR, while Mr. Mathess has more supervisory experience in the private sector. Both Mr. Palma and Mr. Clark testified that they found Mr. Mathess to be the best qualified applicant for this position based upon his experience as a supervisor, and by his organizational and professional skills. Mr. Palma testified that he was surprised to find the similarities of skills and responsibilities that Mr. Mathess had acquired as a manager of an auto parts store, and how they would transfer to those of the Supervisor. Mr. Clark also testified that fact Mr. Mathess holds a temporary license was not crucial because the designation does not restrict the individual's activities. Simply, a social worker with a temporary license can perform any duties of a social worker holding a permanent license. While the administrators indicated that Grievant has supervisory potential, they simply found Mr. Mathess to be more qualified for this position.

DHHR Policy Memorandum 2106 provides the procedural framework for employee selection, including conducting interviews, the interview rating sheet, and the candidate comparison chart. It requires a comparison of applicants' relative strengths andweaknesses based upon similar factors. However, the Policy also states, “[t]he ultimate selection decision should be based upon the interviewer's judgement as to which candidate would best do the job.” While the selection process was conducted with much objectivity in assigning numerical scores to categories, there is nothing which prohibits an interviewer from taking subjective factors into consideration. In fact, subjective determinations regarding an applicant's personality and other qualities are a vital part of the selection process. Crouser v. W. Va. Dep't of Tax & Revenue, Docket No. 00-T&R-239 (Sept. 21, 2000); Shull v. W. Va. Dep't of Health & Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998). Based upon the evidence presented, Grievant has failed to prove the selection of Mr. Mathess was arbitrary, capricious, or clearly wrong.

Grievant also alleges the selection of a male for the position was the result of discrimination. 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, a 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 her 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. Dep't 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. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has established a prima facie case of discrimination by proving that she is similarly situated to Mr. Mathess, another employee who has been treated differently by their employer in a significant particular, i.e., the selection for the Supervisor position, and that the decision was not based on their then-current job responsibilities. However, DHHR has provided evidence that the selection was based upon a legitimate, nondiscriminatory finding that Mr. Mathess was the best qualified applicant for the position. Grievant did not offer any evidence that the stated reason was pretextual. Absent evidence that the selection was based on gender, Grievant failed to prove the claim of discrimination.

Grievant next alleges that Mr. Mathess was selected to be Supervisor as the result of favoritism, since he had stated several months earlier that he and Mr. Clark agreed that he would receive the next supervisory position. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." The test to determine whether a grievant has established a prima facie case of favoritism requires a grievant to establish by a

preponderance of the evidence:(a) that she is similarly situated in a pertinent way, to one or more other employee(s);
(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded her; and,
(c) that the difference in treatment has caused a substantial inequity to her and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once a grievant establishes a prima facie case of favoritism, the burden shifts to Respondent to demonstrate a legitimate, nondiscriminatory reason for the employment decision. Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

As with the discrimination claim, Grievant has established a prima facie case of favoritism. Grievant's allegation that Mr. Mathess had previously stated that he would receive the promotion was supported by her supervisor, Elise Stewart, who testified that she had also heard Mr. Mathess state that he had been promised a promotion. At level three, Mr. Clark testified that he engages employees in discussions regarding career development and advancement, and that he had engaged in conversations with Mr. Mathess regarding his desire to be a supervisor. However, Mr. Clark unequivocally denied committing any position to him prior to the review of both applicants in this matter. Since Mr. Mathess did not testify at either hearing, it is unknown what Mr. Clark may have said that was interpreted to mean he would receive the next promotion. As a long-term employee and administrator for DHHR, it is unlikely that Mr. Clark would have promised apromotion to anyone. It is more likely that Mr. Mathess may have misinterpreted an encouragement to pursue his career goals. In any case, the review and selection process was not conducted by Mr. Clark alone, and there is no allegation that Mr. Palma had made any such promises. Grievant did not offer evidence that the statements of the administrators were pretextual.

Finally, Grievant argues that the promotion of Mr. Mathess, who now functions as her supervisor, creates a substantial detriment to, or interference with her effective job performance, health, and feeling of safety. This allegation is based upon the fact that

following Grievant having experienced a traumatic incident with a former co-worker, Mr. Mathess commented to other office workers that he supported the former co-worker. At a later time, Mr. Mathess had scheduled a party and approached Grievant to advise her that he had invited the co-worker, but would dis-invite him if she would be uncomfortable. Grievant reported both incidents to her superiors, and hopefully Mr. Mathess now understands that he should not discuss this situation with Grievant or other office workers. Although he acted in an insensitive manner which should not occur again, there is no evidence to suggest Mr. Mathess' promotion will result in an interference with Grievant's job performance, health, or safety.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her allegations by a preponderance of the evidence. Procedural Rulesof the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health and Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Hundley v. W. Va. Div. of Corr., Docket No. 98-CORR-218 (1998).

2. 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 "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

3. Grievant failed to prove that DHHR acted in an arbitrary and capricious manner, or made a decision which was clearly wrong by a failure to rely on factors that were intended to be considered, 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.

4. 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 jobresponsibilities 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, a 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 his detriment, been treated by her 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. Dep't 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. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

5. Grievant has established a prima facie case of discrimination; however, DHHR has provided evidence that the selection was based upon a legitimate, nondiscriminatory reason, and Grievant did not offer any evidence that the stated reason was pretextual. 6. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." The test to determine whether a grievant has established a prima facie case of favoritism requires a grievant to establish by a preponderance of the evidence:
(a) that she is similarly situated in a pertinent way, to one or more other employee(s);

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

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

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once a grievant establishes a prima facie case of favoritism, the burden shifts to Respondent to demonstrate a legitimate, nondiscriminatory reason for the employment decision. Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

7. Grievant established a prima facie case of favoritism; however, DHHR provided a legitimate reason for the selection, and Grievant did not allege the reason was pretextual.

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.

DATE: APRIL 26, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Although Grievant alleged violations of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 and the Pregnancy Discrimination Action of 1978, and other unidentified federal laws prohibiting discrimination on the grounds of gender, they were not addressed at levels two or four, and are determined to be abandoned.