JAMES MAYNOR,

Grievant,

v.

Docket No. 05-HHR-156

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, PINECREST HOSPITAL and DIVISION OF PERSONNEL,

Respondents.

DECISION

Three distinct grievances were brought by the grievant, James Maynor ("Maynor"), against his employer, respondent West Virginia Department of Health and Human Resources ("DHHR"). The Level Three hearing on all three grievances began on April 14, 2005, and concluded on April 15, 2005. (See footnote 1) Thereafter, three distinct Level Three decisions were issued on May 6, 2005.

The three Level Three decisions were simultaneously appealed by Maynor to Level Four on May 9, 2005. He submitted his three original grievance statements under a cover letter in which he requested a Level Four hearing because he did "not agree" with the lower level decisions. The three grievances were treated as a consolidated action. (See footnote 2) Accordingly,a unitary Level Four hearing was held on June 21, 2005, in the Beckley hearing room of the West Virginia Education and State Employees Grievance Board ("the Grievance Board"). At Level Four, Maynor represented

himself, Landon R. Brown, Senior Assistant Attorney General, represented DHHR, and the Division of Personnel ("DOP") appeared by Assistant Director Lowell D. Basford.

At the conclusion of the Level Four hearing, the parties declined the opportunity to submit proposed findings of fact and conclusions of law. Rather, it was agreed that the underlying record would be incorporated at Level Four and the grievance would be resolved on the underlying record, as supplemented or clarified at Level Four. Thereafter, this grievance matured for decision on June 13, 2005, upon the Grievance Board's receipt of the complete record and transcript of the Level Three proceedings.

OVERVIEW

Decision A: Working Out of Classification

Decision A deals with Maynor's claim that he is entitled to back pay because he has been "working more than 20% out of job classification." For relief, Maynor sought "back pay for doing Supervisor worker [sic] related job duties" for the period from December 1, 2004, until February 13, 2005.

Specifically, Maynor, who is a Food Service Worker, asserts that he performed duties that are appropriate to the higher position of Food Service Supervisor. DHHR does not dispute that Maynor performed the duties in question, but asserts that Maynor was not working outside of his job classification in doing so. DOP, who was a party to this portionof the consolidated grievance, noted that Maynor does not function in a supervisory capacity.

Decision B: Increase in Settlement Award

Decision B deals with Maynor's request for an additional "4% back pay plus interest on previous Settlement order [d]ated on 11/17/2004." Not to be confused with the claim for back pay addressed in Decision A, this claim relates to an earlier grievance in which Maynor sought back pay for serving as an acting Food Service Supervisor (See footnote 3) from February 15, 2004, through September 17, 2004.

On November 17, 2004, after the parties had agreed to settle this earlier grievance, the Level Three grievance evaluator entered her "Settlement Order." In addition to dismissing the grievance, the Settlement Order described two alternative methods for determining the amount of back pay that would be awarded to Maynor. One such method was, as Maynor asserts, that he would receive back pay that equaled ten percent of his regular salary for the period. However, the other method identified

in the Settlement Order, and never addressed by Maynor, is simply the difference between his pay as a Food Service Worker (pay grade 3) and the pay of a Food Service Supervisor (pay grade 5) for the period of time he was an acting Food Service Supervisor.

On February 14, 2005, Maynor executed a written “Settlement Agreement and Release” that specified that he would receive a settlement award in the total amount of $698.35, which included $49.28 in interest through March 16, 2005. In turn, Maynoragreed to the dismissal, with prejudice, of his grievance and all claims arising out of the same events. There is no suggestion that Maynor did not receive his back pay award in the specified amount.

Nonetheless, he brought the instant grievance claiming that, pursuant to the Settlement Order, his back pay award should have been ten percent of his regular salary for the period from February 15, 2004, through September 17, 2004, when he served as an acting Food Service Supervisor. Under the Settlement Agreement, he received six percent of his regular salary for that period of time.

Maynor is now seeking the additional four percent that would bring his settlement award to a full ten percent. This claim was rejected at Level Three based on the contents of the written “Settlement Agreement and Release” (“Settlement Agreement”) Maynor had executed, which specified the precise amount Maynor was to receive in settlement of that grievance.

Decision C: Non-selection for Food Service Supervisor Vacancy

Decision C arises out of Maynor's non-selection for the position of Food Service Supervisor. In his statement of grievance, Maynor claims “I was treated differently and less favorably during my interview for Food Service Supervisors [sic].” For relief he asks to be “[r]einterviewed with Qualified and experienced[,] with[-]tenure Supervisor.” During his Level Four hearing, Maynor clarified that he was attempting to state a claim of discrimination.

West Virginia Code section 29-6A-2 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.” This samedefinition is found in the statutes relating to education employees. W. Va. Code 18-29-2(m). In discussing a discrimination claim raised by an education employee, the Supreme Court of Appeals of West Virginia noted that “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004).

In this case, Maynor and the other applicants for the Food Service Supervisor vacancy were

interviewed by a three-member panel using standard questions. Each interviewer independently scored each applicant during the interview. Later, the scores were compiled and the position was awarded to the applicant who received the highest interview score and was ranked sixth out of twelve on the register. Maynor was twelfth on the register. Not surprisingly, DHHR contends that the selection process was fair and lawful.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. Maynor is employed by DHHR as a Food Service Worker assigned to Pinecrest Hospital. He began working for DHHR in October 1999.

2 2. The position description for a Food Service Worker includes, in pertinent part, "'[p]erform work in the preparation and serving of food to patients.'" 2Tr.12. It further provides that "'[w]ork is performed under the direct supervision of a Food Service Supervisor.'" 2Tr.13.

3 3. There are approximately 275 employees at Pinecrest Hospital.

Decision A: Working Out of Classification

4 4. "Checking the line" means to check the food trays before the trays go out to the patients to ensure compliance with each patient's dietary needs and restrictions.

5 5. The parties stipulate that there was a period of time, from December 1, 2004, through February 12, 2005, (See footnote 4) when Maynor was asked to "check the line." 1Tr.23-25, 36.

6 6. The parties also stipulate that, during this same period of time, Maynor was asked to check the temperatures on the dishwasher and the refrigerator. 1Tr.24-25. He subsequently added that he also checked the temperature of the food, and Angela Booker, CEO of Pinecrest, ("CEO Booker") concurred with this assertion. 3Tr.20-21.

7 7. Maynor did not perform any other duties that he considered were out of his classification. 1Tr.24.

8 8. As Maynor agreed at Level Four, he spent the majority of his time on his duties as a Food Service Worker.

9 9. Maynor does not perform employee performance appraisals for other employees at Pinecrest.

10 10. Maynor does not establish policies or procedures for his work unit.

11 11. Maynor does not hire, fire, promote, demote, or discipline employees.

12 12. Maynor does not authorize leave or pay raises for employees.

13 13. Upon review of a Position Description Form ("PDF") prepared by Maynor, DOP concluded that his position was properly classified as a Food Service Worker because Maynor's duties did not place him in a supervisory role. Gr.Exh.4 at Level Four.

Decision B: Increase in Settlement Award

14 14. In an earlier grievance, Maynor claimed that he worked as an "acting" Food Service Supervisor from February 15, 2004, through September 17, 2004. Gr.Exh.13 at Level Four, 3Tr.12. This was done without the knowledge or approval of CEO Booker and does not appear to have been approved by DOP as a temporary upgrade. 3Tr.11.

15 15. The "Settlement Order" entered at Level Three on November 19, 2004, dismissed the grievance. The Settlement Order described two, alternative methods by which Maynor's back pay award might be calculated. These included 1) the difference between pay grade 3, which was the pay grade applicable to a Food Service Worker, and pay grade 5, which was applicable to a Food Service Supervisor, for the period from February 15, 2004, through September 17, 2004, when he was an acting Food Service Supervisor, or 2) "a 5% per pay grade equaling a 10% pay increase for the relevant period, plus applicable interest for the period [from] February 15, 2004, through September 17, 2004." Gr.Exh.14 at Level Four.

16 16. Subsequently, the parties memorialized their agreement in the Settlement Agreement, which was executed by Maynor on February 14, 2005. Gr.Exh.13 at Level Four. The Settlement Agreement expressly provided that DHHR would pay Maynor $649.07 in back pay for the period in question, plus interest through March 16, 2005, in the amount of $49.28, for a total of $698.35. Gr.Exh.13 at Level Four.

17 17. In exchange for the payment of $698.35, Maynor agreed to dismiss, with prejudice, "this and any and all other Grievances against the Respondent arising from the facts and circumstances of this [grievance.]" Gr.Exh.13, paragraph 2 at Level Four.

18 18. The Settlement Agreement expressly provided that Maynor "acknowledges that he has read this Settlement Agreement and Release and has had a reasonable period of time to consider this Settlement." It contains a further acknowledgment that Maynor "understands all the terms of this

Settlement Agreement and has voluntarily agreed to this settlement and release." Gr.Exh.13, paragraph 4 at Level Four.

19 19. Shortly after signing the Settlement Agreement, Maynor filed the grievance that was subsequently designated 031105-1B, in which he claimed entitlement to more than the specified amount of $698.35. 3Tr.18-19. He took this action despite his promise to dismiss all grievances arising from the same facts and circumstances of the grievance he had just settled.

20 20. The $698.35 paid to Maynor under the Settlement Agreement was less than ten percent of his salary for the relevant period, which was one of the methods for calculating back pay that was described in the Settlement Order. (See footnote 5) 1Tr.39-40. However, Maynor was informed in advance of signing the Settlement Agreement that only three percent per pay grade, for a total of six percent of his salary, could be paid as back pay for the period he had served as an acting Food Service Supervisor. 3Tr.15-17.

21 21. Maynor voluntarily executed the Settlement Agreement, knowing that he would receive a total of $698.35 and that such amount was less than ten percent of his regular salary for the period in question. In executing the Settlement Agreement andaccepting the back pay award, plus interest, Maynor obligated himself to release all related claims.

Decision C: Non-selection

22 22. Maynor was among five applicants who were interviewed for a posted Food Service Supervisor position. The interviews were conducted by a three-member committee composed of CEO Booker, Dietary Manager Regina Saunders, and Human Resources Director Aimee Bragg.

23 23. Maynor was mistaken in his belief that his interview took place on February 8, 2005. Maynor was interviewed on February 3, 2005. (See footnote 6)

24 24. The last interviews for the position in question took place on February 7, 2005.

25 25. The applicants were asked a standardized set of questions during their respective interviews. The scoring sheets were independently completed by each member of the interview committee. 3Tr.37. Thereafter, a summary sheet of the interview scores was created. Gr.Exh.20 at Level Four.

26 26. The successful applicant, Shirley Robinson-Miller had an interview score of 93. Maynor's score of 52 was the lowest among the five applicants. Gr.Exh.19 at Level Four, 3Tr.63.

27 27. The successful applicant was rated sixth on the register, whereas Maynor was twelfth.

Gr.Exh.21 at Level Four.

28 28. At his interview, Maynor wore jogging pants and a t-shirt. Members of the interview committee deemed his attire inappropriate for an applicant who was interviewing for a supervisory position.

29 29. At least one member of the interview committee considered his appearance to have been otherwise neat and clean.

30 30. Another member of the interview committee noted that Maynor needed a haircut at the time of his interview. She observed that he presented a better appearance at the Level Four hearing.

31 31. Maynor's responses during the interview were disorganized. He reiterated throughout the interview that he felt that he was “qualified for the position” instead of providing more responsive answers.

32 32. By correspondence, dated February 14, 2005, CEO Booker informed Maynor that someone else had been selected for the position in question. This was a form letter containing the boilerplate statement that “[t]he selection decision was difficult; however, the selection committee chose another candidate for the position at this time.” Gr.Exh.18 at Level Four.

33 33. In her February 14 correspondence, CEO Booker encouraged Maynor to “apply for any future in-house” vacancies for which he was qualified. She ended her letter on a positive note, stating that Maynor's “continued service at Pinecrest is greatly appreciated.” Gr.Exh.18 at Level Four.

34 34. None of the Food Service Supervisors at Pinecrest Hospital are male. Maynor did not provide any evidence as to whether any other men had applied for, and been denied, such position.

DISCUSSION

None of the three underlying grievances involve a disciplinary matter. Therefore, Maynor bears the burden of proving each by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Hunt v. W. Va. Bureau of Employment Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20- 380 (Mar. 18, 1997). It “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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Decision A: Working Out of Classification

This claim relates to the period of December 1, 2004, through February 12, 2005, during which Maynor claims that he spent more than 20% of his time on duties that he thought should have been performed by a Food Service Supervisor. A Food Service Supervisor position is higher in the employment hierarchy than Maynor's position as a Food Service Worker. Maynor argues that his performance of these duties entitles him to an award of back pay for the difference between his salary as a Food Service Worker and the amount he would have earned as a Food Service Supervisor for the relevant period of time.

The duty-based classification scheme applicable to state employees has inherent flexibility to allow an employing agency to assign an employee "duties which are notspecifically duties of their position, on an infrequent basis, without additional compensation." *Clifford v. Div. of Corr*., Docket No. 02-CORR-124 (Aug. 29, 2002). However, "if an employer assigns out of class duties to an employee on a frequent or long- term basis, the employee may be entitled to deletion of the responsibilities and compensation for the period in which they performed out of their classification, if those duties were assigned to a higher paying classification. *Beer v. Div. of Highways*, Docket No. 95-DOH-161 (Feb. 27, 1996); *Shremshock v. W. Va. Dept. of Trans*., Docket No. 94- DOH-095 (Aug. 31, 1994)." *Reed v. W. Va. Div. of Corrections*, Docket No. 97-CORR-127 (May 22,1998), *quoted in*, *Clifford v. Div. of Corr*., Docket No. 02-CORR-124 (Aug. 29, 2002).

DHHR does not dispute Maynor's claim that, while classified as a Food Service Worker, he checked the line and, further, checked the temperatures of the food, dishwashers, and refrigerators. There is no issue about deletion of responsibilities because Maynor is no longer being asked to perform those tasks. As to whether he would be entitled to back pay for the time he was checking the line and monitoring temperatures, the question is whether those tasks fell outside of Maynor's job classification and, if so, whether he performed them only occasionally or with such frequency as to require compensation at the higher rate paid to a Food Service Supervisor.

Checking the line and verifying the temperatures of food and kitchen equipment are important tasks that relate to the health, safety, and well-being of Pinecrest's population. They are tasks that could, indeed, appropriately be performed by a Food Service Supervisor. However, DHHR argues that, in performing these tasks, Maynor was notworking out of his classification because the job specifications for Food Service Worker include "[p]erforms related work as required."

In examining the job specifications for a classified position, the critical portion appears under the "Nature of Work" section. *Atchison v. W. Va. Dep't of Health*, Docket No. 90-H-444 (Apr. 22, 1991). The "Nature of Work" for a Food Service Supervisor is set forth as follows in the Division of Personnel's classification scheme:

> Under general supervision, performs work at the full performance level, (See footnote 7) planning and directing the preparation and service of food in a state facility. Supervises and assigns duties to cooks, butchers, food service workers and other positions assigned to the area. Schedules workers' shifts. May work under the supervision of a nutritionist. Performs related work as required.

"Supervises the cooking and serving of food for adherence to health regulations" is one of the many examples of the work performed by a Food Service Supervisor. This example clarifies that tasks, such as checking the appropriate temperatures and making sure each patient's food tray comports with that patient's dietary restrictions, fall within the supervision of a Food Service Supervisor. Supervising the performance of a task is not necessarily synonymous with performing the task yourself. Therefore, a Food Service Supervisor may properly assign such duties to others, instead of personally checking the food trays or the temperatures. In this case, the duties were assigned to Food Service Worker Maynor. The "Nature of Work" performed by a Food Service Worker is described as follows in DOP's classification specification:

> Under direct supervision, performs entry level work in the preparation and/or service of food to patients, employees, or customers. Has little latitude to vary work methods and procedures. May substitute for host or hostess in seating diners and receiving payment of checks. Performs related work as required.

A Food Service Worker is required to hold an approved food handler's certificate, and must be knowledgeable about "food handling and preparation health rules" and "the equipment used in the preparation and service of food." These expectations, along with requirements that a Food Service Worker be able to read, write, perform basic math, and follow written and oral instructions, are all important to performing the tasks Maynor characterizes as outside of his classification as a Food Service Worker.

Assisting the cooks in preparing food is included as one example of the work performed by a Food Service Worker. Safe food preparation includes ensuring that the ingredients and prepared foods are stored and served at appropriate temperatures. It also includes making sure that the dishes, cooking utensils, and flatware are properly cleaned and sanitized by being washed at the correct temperature. Therefore, it is not out of line for the Food Service Supervisor to assign a Food Service Worker to

check temperatures on refrigerators and dishwashers. Such tasks do not fall outside of Maynor's classification.

“Assembles and delivers trays for patients in a hospital,” is another example of work performed by a Food Service Worker. It is readily apparent that being able to correctly read, understand, and comply with the written dietary restrictions and requirements applicable to each patient would be critical to the task of assembling a food tray for apatient in a hospital. “Checking the line” to see that the trays are properly assembled falls within the ambit of “related duties” and, as such, do not fall outside of Maynor's classification.

Maynor did not establish that he worked outside of his classification. Therefore, he could not meet the burden of proving entitlement to back pay for the period from December 1, 2004, through February 12, 2005. This portion of this consolidated grievance must be denied.

Decision B: Increase in Settlement Award

There is something disingenuous about Maynor's claim that he is entitled to additional back pay in connection with the grievance he previously settled. Regardless of how the prospective settlement agreement was characterized by the Level Three grievance evaluator, Maynor admits that he was told before he signed the Settlement Agreement that the back pay award would be limited to six percent of his normal salary for the period in question. This calculation was based on three percent per pay grade for the two pay grades between a Food Service Worker and a Food Service Supervisor.

After having been advised of this limitation on the amount of back pay he could receive, Maynor still elected to sign the settlement agreement. Furthermore, the Settlement Agreement signed by Maynor expressly stated that he would receive back pay in the amount of $649.07, plus $49.28 in interest, for a total of $698.35. The interest was for the period through March 16, 2005, whereas the Settlement Order only provided for interest through September 17, 2004. Maynor signed the Settlement Agreement, accepted the money, and did not even attempt to establish that he had been induced to enter into the agreement through any misrepresentation or fraudulent actions on the part of DHHR. As compared to the Settlement Order, the Settlement Agreement was later in time, was prepared by the parties, was subject to review by all parties, and should be expected to represent the terms of their negotiated agreement. Therefore, the Settlement Agreement is the controlling document for purposes of determining the amount of back pay Maynor was to receive.

Maynor's efforts to look behind the settlement agreement and reopen the earlier grievance are improper and contrary to his agreement with DHHR. When he executed the settlement agreement, Maynor also executed a release. Because this extinguished Maynor's right to pursue that claim any further, the portion of his grievance that was addressed in Decision B, below, must be denied.

Decision C: Non-selection

Maynor brought this grievance on the theory that the selection process was corrupted. Specifically, he asserted that “it was a setup deal to bring in another person from Heartland,” which is another health care facility where CEO Booker had previously been employed. 3Tr.51. Maynor believed that CEO Booker was bringing in too many new employees who had previously worked with her at Heartland. He claimed discrimination on the grounds that he was treated differently during the selection process.

Discrimination is defined 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.” W. Va. Code § 29-6A-2(d). This same definition is foundin the statutes relating to education employees. W. Va. Code § 18-29-2(m). In discussing a discrimination claim raised by an education employee, the Supreme Court of Appeals of West Virginia noted that “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004).

The interview process itself was conducted in a fair and appropriate manner. A standard set of questions was utilized by a three-member interview committee. As previously noted, the three members of the committee were CEO Booker, Aimee Bragg, and Regina Saunders. Aimee Bragg is Pinecrest's Director of Human Resources and, as such, has extensive experience in the selection process. As the Dietary Manager at Pinecrest, it is expected that Regina Saunders would have a good working knowledge of the duties and responsibilities the successful applicant would have to undertake.

Each member of the interview committee independently prepared separate scoring sheets for each of the applicants. The applicants were scored on oral expression, intelligence/reasoning process, judgment/objectivity, tact/sensitivity, appearance, poise/confidence, and leadership potential. Gr.Exh.20 at Level Four. The scoring sheets contained a description of each of the numeric, whole number scores that were available for each of the seven categories or factors.

Both CEO Booker and Aimee Bragg gave Maynor some scores that were halfway between the available whole number scores. For instance, Aimee Bragg awarded Maynor a 2.5 for intelligence and reasoning. A score of 2 on this factor would indicate that the applicant "[h]as less than average comprehension," whereas a score of 3 would indicatethat the applicant "[g]rasps things easily." Gr.Exh.20 at Level IV. Awarding a score expressed in a fraction suggests that the interview committee member had closely examined the meaning of the whole number scores and found neither to accurately reflect an applicant's abilities. As such, it appears that the interviewers were giving careful and appropriate attention to scoring the applicants fairly during the interview process.

After the interviews were concluded, a summary of the scores received by each applicant was prepared. Gr.Exh.19 at Level Four. Maynor received a total of 52. The successful applicant, Shirley Robinson-Miller received the highest score of any applicant, which was 93.

The selection process was extremely fair. The inclusion of three members on the interview committee helped to eliminate or counterbalance personal or individual bias, if any, that might be present. Similarly, the use of the same set of questions afforded each applicant a like opportunity during the interviews. Maynor's disappointment in not receiving the sought-after position arose from his failure to shine in comparison to the competition, rather than any flaw in the process itself.

Maynor has not demonstrated that he was treated any differently than any other applicant. Because there has been no showing of dissimilar treatment, there can be no finding of discrimination.

There is no doubt that Maynor believes that he should have been selected for the position in question. In a non-selection case, such as this, it falls to the grieving, unsuccessful applicant to prove, by a preponderance of the evidence, that the employer "violated the rules and regulations governing hiring, acted in an arbitrary and capriciousmanner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04- CORR-384 (Feb. 28, 2005) (citing *Surbaugh v. Dep't of Health & Human Serv.*, Docket No. 97-HHR-235 (Sept. 29, 1997)). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

It is well-established that the grievance procedure is not intended to be a "super interview," meaning the Grievance Board's job is not to second guess the employer's selection but rather to conduct a "review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv*.,

Docket No. 93-RS-489 (July 29, 1994)." *Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). In conducting such review, the Grievance Board has consistently maintained that "selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned." *Jordan*, *v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005)(citing *Skeens-Mihaliak v. Div. of Rehab. Serv*., Docket No. 98-RS-126 (Aug. 3, 1998)).

Maynor attempted to establish that there was a bias against men in the hiring process. In support of this theory he offered a list he compiled of names of people who had served as Food Service Supervisors or Dietary Department Heads at Pinecrest since 1960. Gr.Exh.22 at Level Four. Although there was only one man's name on the list, it is impossible to draw any reasoned conclusion from this isolated fact. Maynor did not offer any evidence of how many, if any, men had applied for such positions in the period from1960 through the present. Absent such additional information, the list compiled by Maynor lacks any evidentiary value.

Maynor was twelfth out of a register that only contained twelve names. As reflected in the scores awarded the interview committee member's, he did not present himself well during the interview. One of the members of the interview committee noted that Maynor did not give responsive answers during his interview. Instead, he kept repeating some phrase to the effect that he was "qualified for this job." This tendency to repeat phrases was observable during the Level Four hearing and was perceived to be an impediment to clear communication. Furthermore, Maynor's decision to wear jogging pants and a t-shirt to his interview for a supervisory position was ill-conceived, at best. (See footnote 8)

At a total of 52 points, Maynor's was the lowest interview score. By contrast, the successful applicant obtained a total interview score of 93. As previously noted, she was also sixth on the register. These two factors, standing alone, would provide an appropriate predicate for the challenged selection of Ms. Robinson-Miller.

Robinson-Miller

Factor	Booker	Saunders	Miller	Total
Oral expression	5	5	4.5	14.5
Intelligence, Reasoning	5	5	4.5	14.5
Judgment, Objectivity	5	4	5	14
Tact, Sensitivity	5	4	5	14
Appearance	3	4	4	11
Poise, Confidence	4	5	4	13

Leadership potential	4	4	4	12
Total	**31**	**31**	**31**	**93**

Maynor

Factor	Booker	Saunders	Bragg	Total
Oral expression	2	3	3	8
Intelligence, Reasoning	2	3	2.5	7.5
Judgment, Objectivity	2.5	3	3	8.5
Tact, Sensitivity	2.5	3	2.5	8
Appearance	2	3	1	6
Poise, Confidence	3	3	1.5	7.5
Leadership Potential	2	3	1.5	6.5
Total	**16**	**21**	**15**	**52**

Although Maynor attempts to take issue with the scoring process, he has failed to identify any particular in which it was flawed. His claim that his scores suffered because of his gender is not supported by the record. As reflected on Grievant's Exhibit 19 at Level Four, the scoring was fairly consistent. There were, of course, minor scoring variations attributable to differences in perception and emphasis among the three members of the interview committee. The evidence adduced during this grievance process reflects that the successful applicant was simply the stronger candidate. Whatever his private misgivings may be with regard to the current administration at Pinecrest Hospital, Maynor has failed to meet his burden. He has not proven that the selection process was flawed by the “presence of unlawful, unreasonable, or arbitrary and capricious behavior[.]” Therefore, the portion of this grievance relating to Decision C must be denied.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

CONCLUSIONS OF LAW

1 1. Maynor bears the burden of proving each of these non-disciplinary grievances by a preponderance of the evidence. W. Va. Code St. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. A preponderance of the evidence is generally recognized as evidence of greater weight,

or which is more convincing than the evidence which is offered in opposition to it. *Hunt v. W. Va. Bureau of Employment Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). It "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Decision A: Working Out of Classification

3 3. Assignment of duties outside an employee's classification on a frequent or long-term basis may entitle such employee to relief from those duties and to compensation, if the out-of-class duties properly fall within the ambit of a higher paid job classification. *Reed v. WV Div. of Corr*., Docket No. 97-CORR-127 (May 22, 1998); *Beer v. Div. of Highways*, Docket No. 95-DOH-161 (Feb. 27, 1996). However, Maynor failed to establish that, during the period from December 1, 2004, until February 13, 2005, he was performing duties outside of his classification as a Food Service Worker.

Decision B: Increase in Settlement Award

4 4. The "Settlement Agreement and Release" executed by Maynor on February 14, 2005, forecloses Maynor from revisiting the amount of back pay he was to receive for the period from February 15, 2004, through September 17, 2004, when he was working as an acting Food Service Supervisor.

Decision C: Non-selection

5 5. Discrimination is defined 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." W. Va. Code § 29-6A-2(d). In failing to prove differences in treatment, Maynor has failed to meet an essential element of discrimination.

6 6. Maynor has not proven that, in selecting Ms. Robinson-Miller as the successful applicant for the Food Service Supervisor position, DHHR "violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb.28, 2005) (citing *Surbaugh v. Dep't of Health & Human Serv.*, Docket No. 97-HHR-235 (Sept. 29, 1997)).

7 7. Maynor has failed to meet his burden of proof with respect to any of these consolidated grievances. Accordingly, this grievance is **DENIED**.

Any party 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 West Virginia Code section 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:

November 30, 2005

_____

JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Each of the three volumes of the Level Three transcript is separately paginated. Therefore, each will be identified by a numeral preceding the abbreviation for transcript. For example, references to pages in the second transcript of the Level Three hearing shall appear herein as "2Tr.__."

Footnote: 2

The three underlying grievances were identified at Level Three as 031105-1A through 031105-1C. For ease of reference, the parties at Level Four distinguished Maynor's claims in the same way, by adopting the A, B, and C designations from Level Three.

Footnote: 3

It does not appear that DOP ever approved a temporary classification upgrade for Maynor, as contemplated by DOP's policy. DOP Administrative Rule, Section 5.04(d). Absent such approval, the provisions of the DOP policy are deemed inapplicable.

Footnote: 4

2Tr.3-4.

Footnote: 5

It appears that the grievance evaluator relied upon a policy that was in place at the time she wrote her order rather than the policy that was in place at the time Maynor performed the work in question. 1Tr.40.

Footnote: 6

Maynor argued that the interview documents were dated February 3 because the successful candidate had been "pre-selected." 3Tr.36. He took the dates on the interview documents to be evidence that the selection process was "a set up deal." 3Tr.36.

Footnote: 7

The full-performance level "can be characterized by the performance of a full range of duties ***relative to the work in the class series****. Incumbent has some latitude for independent judgment and may vary work methods and procedures, but usually within prescribed parameters. Work is usually performed under general supervision. Work is frequently of some variety and incumbent may set priorities." Glossary of Classification Terms.*

Footnote: 8

Amazingly, Maynor persisted in asking each member of the interview committee questions about his appearance, even after he first elicited testimony that his interview attire was inappropriate.