THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JESSE CLARK,

Grievant,

v. DOCKET NO. 05-DMV-453

M. Paul Marteney, ALJ

DEPARTMENT OF TRANSPORTATION/

DIVISION OF MOTOR VEHICLES,

Employer.

DECISION

Procedural History

Grievant Jesse Clark, formerly employed by the Division of Motor Vehicles (DMV), filed this grievance on June 17, 2005. The Statement of Grievance alleges, he was improperly denied the position of Transportation Services Manager 1. As relief, Grievant seeks to be awarded the position in question, plus "monetary damages." After being denied at the lower levels (See footnote 1), Grievant appealed to level four on December 16, 2005.

A level four hearing was held in the Grievance Board's Beckley office on March 8 and July 21, 2006. Grievant was represented by Belinda S. Morton, Esq., (See footnote 2) and Respondent was represented by Janet James, Esq. The matter became mature for decision on August 31, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 3)

Synopsis

Grievant alleged he was the victim of age and sex discrimination, and that Respondent relied on information "not in [his] file." Respondent contends it selected the most qualified applicant and did not discriminate. Grievant failed to carry his burden of proof.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant was employed by DMV in the Beckley regional office.

2. Respondent posted a position for a Transportation Services Manager 1 in the Beckley Regional Office, and Grievant was one of several applicants. Five people applied, but only three applicants were found to be qualified. Those granted interviews were Grievant, Robert “Randy” Perdue, and Natasha White. Although Mr. Perdue was the first choice for the position after the interviews, he withdrew his application. Ms. White was then offered the position, and she accepted..

3. Grievant has almost 18 years of administrative experience, including almost ten years of supervisory experience. When he applied for the position, he was employed in the Beckley regional office as a Supervisor 2, and had been since May 2002. He was previously employed in the same office as a Customer Service Representative (CSR) for nine months. Before that, he worked in the private sector as a retail store manager for about 15 years. He does not have a college degree.

4. Ms. White has about eleven years of administrative experience, including just two years of supervisory experience. At the time she applied for the position, she was employed by DMV in its Morgantown regional office as a Lead Customer Service Representative. She had previously been employed there as a Customer Service Representative for about two months before she was promoted to Lead CSR. She had prior customer service and supervisory experience in theprivate sector working for a bank and as owner of a retail store. She has a Bachelor of Arts degree and is a certified driver examiner and certified motorcycle examiner.

5. John Haynes is the Regional Office Operations Manager for DMV responsible for the Beckley regional office and others, including the regional office in Morgantown. Mr. Haynes conducted the interviews and made the choice. The interviews were conducted using a standard set of questions. In addition to the interviews, the candidates' applications were considered, along with Mr. Haynes' personal experience with and knowledge of the candidates.

6. Donald R. Godbey was the Director of Facilities Management for DMV, and was Mr. Haynes' supervisor. He relied on Mr. Haynes' judgment and opinion as to which candidate to hire.

7. The Beckley Regional Office had been in turmoil for an extended period of time, dating back almost to when it opened. Much of this turmoil was caused by the factions or cliques the various employees had divided themselves into, and perceived favoritism by managers. This turmoil was a major factor in selecting someone from outside the Beckley office.

8. In May, 2005, Grievant was the subject of a grievance filed by Lolita Bennett, an employee in the Beckley office, who accused him of favoritism. Grievant requested to intervene in this grievance, and his request was granted, but the matter was settled in June 2005 without Grievant's having had a chance to participate. The settlement did not impute to Grievant any wrongdoing.

9. Mr. Haynes and Mr. Godbey did not factor in the Bennett grievance as a mark against Grievant when evaluating him for this position, because they believed the grievance had no merit and their investigation into the grievance exonerated Grievant. 10. The Transportation Services Manager 1 position is the highest-level position on the Beckley regional office. The position directly supervises a Supervisor 3, Supervisor 2, and indirectly supervises the Lead Customer Service Representative and the Customer Service Representatives.

11. Grievant resigned his position effective October 14, 2005, citing the hostile work environment in the Beckley office, as well as “the failure of the Department of Motor Vehicles management to promote competent white males over the age of forty-five while allowing unqualified females to be promoted.”

Discussion

In non-disciplinary matters Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. (See footnote 4)

Discrimination

___Grievant alleges the selection process was tainted by sex and age discrimination, in that a 34-year-old, less experienced female was chosen over him. For purposes of discrimination claims filed under the grievance procedure, discrimination based on protected factors such as age and sex are not cognizable by the Grievance Board. Instead, discrimination means “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.” (See footnote 5) In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” (See footnote 6) However, the basicpurpose of the selection process for posted vacancies is to choose one employee over another. Rather than evaluate this decision under a discrimination standard, the choice of the employer must be reviewed as would be any other selection case. In any event,

Respondent's first choice for the decision was a male who was at least as old as Grievant, so the basic factual allegation is invalid.

Qualifications and Experience

This Grievance Board recognizes 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. (See footnote 7) An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. (See footnote 8) 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. (See footnote 9) "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute [his] judgment for that of [the employer]." (See footnote 10) Grievant's case relies heavily on his superior length of experience, but largely ignores the subjective factors that go into selecting a higher-level management position. There is no question that Grievant possessed greater experience, by far, as a supervisor and as a DMV employee. (See footnote 11) If thatwere the only criteria for selecting the proper person to fill the position, Grievant would be the logical choice. However, the Beckley regional office, in the opinion of management, needed a change. “[W]hen a supervisory position is at stake, it is appropriate for an employer to consider factors such as the appropriate personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees.” (See footnote 12) “An employer may determine that a less senior applicant is more qualified for the position in question on the basis of particular qualities or qualifications that it determines are specifically relevant.” (See footnote 13) That is exactly what Respondent did here: it reasonably valued subjective factors higher than objective factors, granting Ms. White's status as an “outsider” more weight than her overall supervisory experience. She was at least minimally qualified, and she did have the necessary experience and knowledge of the operations. Whether Respondent's tactic in dealing with the office infighting will prover effective or not is a different matter, but it does form a rational basis for selecting a relatively less experienced person over veteran campaigner.

The following conclusions of law support this discussion:

Conclusions of Law

1. 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. *Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998). An agency's decision as to who is the best qualified applicant will be upheld unlessshown by the grievant to be arbitrary and capricious or clearly wrong. *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

2. 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. "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997)*; Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. "'Discrimination' means 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).

5. "[W]hen a supervisory position is at stake, it is appropriate for an employer to consider factors such as the appropriate personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Allen v. Dep't of Transp.*, Docket No. 05- DOH-230 (Sept. 23, 2005); *See Ball v. Dep't of Transp.*, Docket No. 04-DOH-423 (May 9, 2005)." *Pullen v. Dep't of Transp./Div. of Highways*, Docket No. 06-DOH-121 (Aug. 2, 2006). "An employer may determine that a less senior applicant is more qualified for the position in question on the basis of particular qualities or qualifications that it determines are specifically relevant." *Allen,supra* (citing *Lewis v. W. Va. Dep't of Admin.*, Docket No. 96-DOA-027 (June 7, 1996); *Ferrell v. Dep't of Transp.*, Docket No. 04-DOH-240 (Dec. 20, 2004)).

6. Grievant failed to prove Respondent's selection discrimination was discriminatory, arbitrary, unreasonable or irrational.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty 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.

January 23, 2007

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Level three was bypassed by agreement of the parties.

Footnote: 2

Ms. Morton also represents another applicant for the same position in a separate grievance over the selection. Grievant has waived any conflict of interest that may result from such representation.

Footnote: 3

No proposals were submitted by Respondent.

Footnote: 4

Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

Footnote: 5

W. Va. Code § 29-6A-2(d).

Footnote: 6

Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

Footnote: 7

Skeens-Mihaliak v. Div. of Rehab. Serv., Docket No. 98-RS-126 (Aug. 3, 1998).

Footnote: 8

Thibault v. Div. of Rehab. Serv., Docket No. 93-RS-489 (July 29, 1994).

Footnote: 9

Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105; 556 S.E.2d 72 (2001).

Footnote: 10

Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997).

Footnote: 11

The grievance filed by Ms. Bennett, alleging impropriety by Grievant, is a non-issue. DMV Management settled the grievance without giving it any credence, and it did not factor into theselection decision.

Footnote: 12

Pullen v. Dep't of Transp./Div. of Highways, Docket No. 06-DOH-121 (Aug. 2, 2006).

Footnote: 13

Allen v. Dep't of Transp./Div. of Highways, Docket No. 05-DOH-230 (Sept. 23, 2005).