WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CLARENCE JOYNER,

Grievant,

v. Docket No. 07-DOE-122

DEPARTMENT OF EDUCATION/

CEDAR LAKES,

Respondent.

DECISION

___Clarence Joyner ("Grievant") initiated this proceeding on March 14, 2007, challenging his non-selection for the position of Cook III/Custodian III/Handyman at Cedar Lakes Conference Center. The grievance was denied at all lower levels and appealed to level four on April 17, 2007. Due to legislative changes affecting the grievance procedure and the Grievance Board, a hearing was not held until January 30, 2008, before Acting Chief Administrative Law Judge Janis Reynolds in Charleston, West Virginia. Grievant represented himself, and the Department of Education ("DOE") was represented by Heather Deskins, General Counsel. Respondent submitted fact/law proposals on February 19, 2008.

Due to the retirement of Judge Reynolds, this grievance was reassigned to the undersigned administrative law judge on April 19, 2008.___

Synopsis

___Grievant challenged the selection of another applicant for a Cook III/Custodian III/Handyman position for which he applied. He contended he was the most qualifiedapplicant, that the selection

process was unfair, and that it was based on favoritism and discrimination.

Evidence established that a 3-person interview committee asked each applicant identical questions and scored their answers, resulting in the successful applicant being rated the highest by all committee members. Grievant failed to prove that the process or the selection decision was arbitrary and capricious or the result of discrimination or favoritism. The grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed at Cedar Lakes Conference Center as a part-time, multi-classified employee. Part-time employees at the Center are multi-classified with the understanding that, while primarily assigned to one location or duty, they may be assigned to other areas on an as-needed basis. Grievant's primary assignment has been as a cook in the food service department.

2. In January of 2007, the Center posted a vacancy for a full-time Cook III/Custodian III/Handyman. This position's primary responsibility is preparation and meal service, along with planning and organizing banquets and other events, and would be assigned duties mainly in the dining hall, with some responsibilities related to upkeep and maintenance of other areas of the Center.

3. Three currently employed part-time employees applied: Grievant, Rich Young, and Zack Stewart. 4. Mr. Young was chiefly assigned to maintenance, and Mr. Stewart worked in the front office.

5. An interview committee was selected by Executive Director Ronald Grimes. The committee consisted of Jeanie Alfred, Coordinator of Food Services (who would be supervising the successful candidate), Jeanette Casto, Cafeteria Manager, and Karen Pitts, Coordinator of Housekeeping Services.

6. Mr. Grimes and the interview committee met prior to the interviews to discuss the duties of the position and compose an appropriate list of interview questions.

7. All three applicants were interviewed by the committee and asked a series of identical questions, using a prepared score sheet, allowing a maximum number of points for each answer.

8. Following the interviews, the score sheets were totaled, and the top rated applicant by all

interviewers was Zack Stewart with 405 points; the second highest rated was Rick Young with 349 points; and Grievant was rated the lowest by all interviewers, with a total of 337 points.

9. Mr. Stewart was rated the highest by the committee because of his demonstrated ability to deal with the public, which would be a necessary part of the successful applicant's duties, because of the need to organize banquets and events.

10. Grievant scored very low in the area of computer skills, because he had no computer training and very little experience in that area as compared to the other applicants.

11. Grievant is an African-American, and the other applicants are Caucasian.

Discussion

In non-disciplinary matters, a grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 18-29-6. (See footnote 1) "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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

As noted by the Grievance Board in *Collins v. Department of Education*, Docket No. 99-DOE-083 (June 25, 1999), the DOE is not subject to the statutory provisions governing the selection of school personnel by county boards of education. *See* W. Va. Code §§ 18A-4-17(c) and 18A-1-1(a); *See Canfield v. W. Va. Dep't of Educ.*, Docket No. 97-DOE-508 (Mar. 31, 1998). The selection process by DOE is reviewed using the same standard applicable to state agencies. Thus, the 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 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 action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d1017 (4th Cir.

1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). 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*.

In the instant case, Grievant contends that the successful applicant is not qualified because he "can't cook." He also believes that he was unfairly rated with regard to his computer skills, which he contends were not stated as a requirement in the job posting. He also raised for the first time at level four his contention that he was not selected because of his race.

As to the selection decision itself, Grievant's allegations do not prove that the selection decision was arbitrary and capricious or clearly wrong. All applicants were asked identical questions, and Mr. Stewart was the first choice of all of the committee members, by a fairly large margin. While Grievant has focused upon his own opinion that Mr. Stewartcannot cook as well as he can, the interview committee did not necessarily disagree with him on that particular factor. However, many factors were considered, specifically the applicants' abilities in dealing with the public, planning and coordinating events, and ability to use a computer. As explained by Mr. Grimes, the Center is currently converting all of its systems for all departments to computerized methods, so a candidate's abilities in that area were an important consideration. While Grievant testified at level four that he "can get what he needs" from a computer, he had ample opportunity to explain his training and experience during the interview, leading all of the committee members to conclude that he lacked skills in that area.

As to Grievant's contention of race discrimination, this Grievance Board has determined that it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act (W. Va. Code §§ 5-11-1, et seq.), such as race and gender discrimination. *See Bowman v. W. Va. Educational Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Rodak v. W. Va. Dep't of Tax and Revenue*, Docket No. 96-T&R-536 (June 23, 1997). 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 § 18-29-2], includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over race-based discrimination claims. *See Smith v. W. Va. Bureau of*

Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995). The selection of a more qualified candidate based on appropriate factors would be a racially neutral determination, andwould be upheld based upon the above cited selection law. *Robinson v. Dep't of Transp.*, Docket No. 04-DOH-328 (Feb. 4, 2005).

W. Va. Code § 18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." W. Va. Code § 18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee." In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

After mentioning at the level four hearing that he was the only black employee at the Center, Grievant presented no further evidence or information to support a claim of racial discrimination. Race alone, without additional factual evidence, does not in and of itself establish discrimination. In this case, Grievant has not established discrimination or favoritism, because Respondent has explained legitimate, job-related decisions for its choice, based upon qualifications pertinent to the position, and Grievant has presented noevidence on the issue to meet his burden of proof. The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 18-29-6.

2. The selection process by the Department of Education is reviewed using the same standard applicable to state agencies. Thus, the 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. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). 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*.

4. The Grievance Board's authority to provide relief to employees for "discrimination", "favoritism", and "harassment", as those terms are defined in [W. Va.Code § 18-29-2], includes jurisdiction to remedy discrimination that would also violate the Human Rights Act, such as race-based discrimination. *See Smith v. W. Va. Bureau of Employment Programs*, Docket No. 94-BEP-099 (Dec. 18, 1996); *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

5. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

6. Grievant has failed to establish by a preponderance of the evidence that the selection

decision at issue was arbitrary and capricious, clearly wrong, or the result of discrimination or favoritism.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed, *See Footnote 1, supra)*. Neither the West Virginia Public 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: May 16, 2008

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DENISE M. SPATAFORE

Acting Chief Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.