**MARILYN THIBAULT**

**v.** **Docket No. 93-RS-489**

**DIVISION OF REHABILITATION SERVICES**

**D E C I S I O N**

On October 12, 1993, Marilyn Thibault grieved her non-selection by the Division of Rehabilitation Services ("DRS") for the position of Disability Evaluation Specialist Senior ("DESS") (See footnote 1) . Grievant stated:

> I believe that I have been unfairly rejected for a Senior Disability Evaluation Specialist position. I would like to know the reasons as to why I was not chosen. I would like to be given, in writing, a copy of the criteria used to determine eligibility and suitability for this Senior Position. I would like to have, in writing, the time frame used to determine when all candidates became eligible and suitable. My relief sought is that I be given the position as a Disability Evaluation Specialist Senior with a promotional raise retroactive to October 1, 1993. (See footnote 2)

Grievant gave multiple arguments why her non-selection was discriminatory. First, she stated another candidate, Mary Ambers, was not qualified to hold the position and Grievant should be placed in this position. Second, she stated the fact she did not work overtime affected her performance evaluations negatively and resulted in her not being selected for the position. Third, she argued she was denied the position because she engaged in the protected activity of free speech, by stating her disagreement with management and championing the rights of others.

Findings of Fact

1. Grievant had worked as a Disability Evaluation Specialist for DRS for over eight years at the time she applied for the DESS position.
2. On August 3, 1993, DRS posted notice of openings for nine DESS positions.
3. Fifteen individuals applied for these positions.
4. Since all the applicants were known to the interview committee no interviews were

conducted, but applicants were asked to fill out questionnaires.

5. Grievant stated the applicants were asked to turn in the questionnaires before the stated deadline and her's was not as complete as she would have wanted. She did not ask her employer for additional time to complete this form.

6. The individuals on the selection committee were the Disability Determination Section Administrator, the DisabilityDetermination Assistant Area Administrator for the Charleston office, and five unit supervisors.

7. All the applicants had worked with the five unit supervisors in the past. The unit supervisors would be supervising the successful applicants.

8. The position of DESS typically requires the individual to work under limited supervision reviewing complex cases for disability eligibility, to function as a lead worker, and may require the individual to supervise and/or review the work of others. Witnesses at Level IV described this position as quasi-managerial.

9. The committee utilized the guidelines listed in the West Virginia DRS Administrative Manual to select the successful applicants. These guidelines stated: "[p]romotions will be based upon demonstrated performance, potential for more difficult job duties and responsibilities, overall suitability for the higher level position, and meeting the minimum Division of Personnel training and experience requirements for the job classification." W. Va. DRS Administrative Manual at §1805, "Promotions."

10. Mr. Jim Quarles, Assistant Director of Human Resources at DRS, testified the above-stated guidelines were general and a selection committee may formulate more specific ones.

11. The criteria used by the selection committee was:

1.

The most recent four years performance evaluations (1989, 1990, 1991, 1992);

2.

Projected evaluations for State Fiscal Year 1993;

3.

Assessment of potential for more difficult job duties and responsibilities;

4.

Overall suitability for the job.

12. The 1993 evaluations used in the selection process had already been completed by the supervisors at the time of the selection process. They had not been shared with the employees, although the supervisors expected to do this within a month. Due to changes in DRS' policy these evaluations were not otherwise utilized.

13. The primary, initial criteria used in evaluating the applicants were the performance evaluations from 1989 through 1993. These evaluations were looked at in terms of scores and trends. Apparently seven or eight applicants were picked on the basis of these evaluations as their scores were considerably higher than the other applicants. The successful applicants' evaluation scores in this group ranged from 4.06 to 3.8.

14. Because the next three candidate scores range from 3.7 to 3.64 and were so close, the selection committee reviewed the questionnaires submitted by these applicants and evaluated their suitability for the final positions.

15. The Grievant's average performance evaluation score was 3.7. Her overall rating for each of the five periods were: 1989 -3.9; 1990 - 3.5; 1991 - 3.6; 1992 - 4.1; 1993 - 3.4. Grievant's overall rating for 1993 was arrived at by averaging two separate scores. The first six months of her 1993 evaluation was a 4.1 received from a special unit assignment. In the second six months of this evaluation process the Grievant scored a 2.7 or a score between 2 which means weakness and 3 meaning adequate performance. This score represented a significant decrease from her prior ratings and reflected problems in case production.

16. The selection committee did not formally define suitability as a group before selecting the next two candidates based on that criteria. In examining the issue of suitability, the committee looked at demonstrated ability to work with supervisors and to support agency guidelines, the effect the individual had on others around them in a positive way, demonstrated flexibility and ability to change, and ability to adjust to the new position.

17. The focus of the suitability issue was not on what the applicants had not done, but what applicants would perform better in the DESS position.

18. The key issue in the Grievant's non-selection was her most recent performance evaluation which represented a significant drop from the prior year and a half.

19. Because the Grievant had stated she did not believe the performance standards were reasonable, the selection committee was concerned she would not support these standards in a DESS capacity.

20. Grievant at times made statements non-supportive of the agency in front of her peers. At times she approached her supervisors in a confrontational manner.

21. Grievant volunteered for a variety of committees during her tenure at DRS. She also volunteered to participate in a special unit and performed well there.

22. The Division of Personnel found Ms. Ambers to be qualified for the position of DESS. This information was confirmedby Ms. Yvonne Wilhelm, Internal Employee Placement Manager, in a November 12, 1993 letter to Mr. Quarles (See footnote 3). Ms. Wilhelm also affirmed this information at hearing.

23. Overtime work is not considered in performance evaluations.

24. One of the individuals selected for the position of DESS had high performance ratings and never worked overtime.

## Discussion

Most of the information sought and questions asked by the Grievant in her original statement of grievance were answered in the Level II Grievance Evaluators' decision. Grievance Evaluator Sutler gave the Grievant the criteria for promotion specified by the W. Va. DRS Administrative Manual, a list of the specific criteria used by the selection committee, and the information on the issue of suitability -- how it was used and examples of what it meant.

At the Level IV hearing the Grievant argued one of the selected individuals, Mary Ambers, was not qualified for the position. As previously stated, Ms. Wilhelm testified at the Level IV hearing that Ms. Ambers was qualified for the position of DESS and met the guidelines established by the Division of Personnel. Based upon this testimony, the undersigned finds the Grievant's argument must fail.

Next, the Grievant argued that since she was qualified for the position and in essence tied for

ninth, the failure to select her was based on arbitrary and discriminatory reasons. The two arbitrary and discriminatory reasons given during hearing for not selecting Grievant were 1) refusal to work overtime which affected her performance evaluations and, 2) speaking when she disagreed with management's position.

Testimony at hearing revealed overtime is approved and encouraged by DES and the federal supporting agency, but it is not considered in the performance evaluations. Many of the workers frequently work overtime using the forty-five minute lunch hour to pick up an extra half hour each day. However, one of the individuals chosen for the DESS position, Mr. James Graff, never worked overtime. Additionally, Mr. Graff was one of the top four candidates for the DESS position based on his high performance evaluation scores. Level IV testimony indicated Grievant was not chosen because of the recent, significant drop in her performance, but this drop was not related to her failure to work overtime, but rather to her failure to adjust to the closure of the special unit and her reassignment to her prior duties. Testimony revealed the Grievant did not work overtime on the special unit when her evaluation scores were good. Thus, Grievant's argument that the failure to work overtime resulted in poor evaluations and resulted in her non-selection for the position must also fail.

Next, Grievant states she has been discriminated against because of her outspokenness to management, citing Graley v. W. Va.Parkways Economic Development and Tourism Authority, Docket No. 91-PEDTA-225 (Dec. 23, 1991). Discrimination is defined as "any difference in the treatment of an employee unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." W. Va. Code §29-6A-2(d). The Graley case dealt with the dismissal of an employee after he filed a complaint about his supervisor with the West Virginia Ethics Commission and joined a union. This Board reinstated Mr. Graley to his former position.

Here, the facts are quite different. Grievant's status was not changed in any way. The primary reason for Grievant's non-selection was her recent, significant decline in her performance, and failure to adjust to the reassignment to her former duties. Additionally, since Grievant had not been supportive of management's prior goals and directives and had trouble meeting these goals herself, it is logical that the selection committee would question whether Grievant would support these goals in working with others. It is also logical that the committee would question Grievant's ability to perform adequately in the quasi-managerial position of a DESS.

In addition to the above stated findings of fact and discussion the following conclusions of law are

made.

Conclusions of Law

1. The Grievant has the burden of proof in a non-disciplinary case such as non-selection. Bourgeois v. Bd. ofTrustees/Marshall University, Docket No. 93-BOT-268A (Mar. 29, 1994).

2. The grievance procedure in W. Va. Code §§29-6A-1, et seq. is not intended to be a "super interview" for unsuccessful job applicants, rather, in this context it allows review of the legal sufficiency of the selection process. Accord, Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

3. An agency's decision made by appropriate personnel as to which candidate is most qualified will be upheld unless shown to be arbitrary or capricious or clearly wrong. Sloan v. W. Va. University, Docket No. BOR-88-109 (Sept. 30, 1988).

4. If the Grievant can demonstrate that the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion this Board will require the employer to review the qualifications of the grievant versus the successful applicant. Jones v. Bd. of Trustees/W. Va. University, Docket No. 90-BOT-283 (Mar. 28, 1991).

5. "Generally, an agency's action is arbitrary and capricious if the agency did not rely on the factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a different review." Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

6. In this case the record does not support a finding that the agency acted in an arbitrary or capricious manner, relied on improper factors, ignored important aspects of the candidates' credentials or their background, expressed their decision in a manner contrary to the findings, or reached an implausible decision.

7. The Grievant has not meet her burden of proof and demonstrated that the selection process was flawed or that she has been the subject of discrimination.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court

of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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**JANIS I. REYNOLDS**

**Administrative Law Judge**

**Dated: July 29, 1994**

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Footnote: 1 *This grievance was denied at Levels I and II, and was heard at Level IV at Grievant's request when a timely hearing at Level III was not scheduled.*

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Footnote: 2 *According to Respondent, Grievant, since filing this grievance, has resigned her position. DRS filed a Motion to Dismiss on those grounds. This Motion is* ***DENIED*** *since the issue of back pay would remain if the Grievant prevailed on the non-selection issue.*

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Footnote: 3 *Since Grievant had raised this issue at Level II, Grievance Evaluator Sutler requested confirmation that Ms. Ambers met the minimal qualifications of the Division of Personnel.*