DANA SURBAUGH,

Grievant,

v. DOCKET NO. 97-HHR-235

DEPARTMENT OF HEALTH AND HUMAN SERVICES/

WELCH EMERGENCY HOSPITAL,

Respondent.

DECISION

Grievant, Dana Surbaugh, grieves his non-selection for a posted, permanent position of Licensed Practical Nurse (LPN) in the Emergency Room at Welch Emergency Hospital. He alleges that Respondent engaged in gender discrimination and violated its nepotism policy, and that he is the most qualified applicant for the position. For reasons explained herein, the grievance is denied. (See footnote 1)

FINDINGS OF FACT

1 1. Grievant is employed as an LPN with Respondent, at Welch Emergency Hospital (WEH). He has worked at WEH for over three years. (L III Transcript, p. 2.)

2 2. In July 1996, Respondent posted a position for an LPN in the Emergency Room at WEH. (L III, Agency Ex. 2.)

3 3. Seven applicants responded to the posting, all of whom met the minimum criteria for the position. All or most of the applicants, including Grievant and the successful applicant, hadworked at WEH prior to applying. Grievant was the only male applicant. (L IV, R. Ex. A.)

4 4. A three-member interview team conducted interviews for the position. The team members were Cathy Addair, Human Resources Director; Eugenia Burroughs, Registered Nurse (RN) and Nursing Director of Emergency and Ambulatory Services; and Shirley Repass, RN and Head Emergency Room Nurse. Prior to conducting interviews, a list of questions was developed, and these questions were asked of each applicant. Also, applicants were given a more detailed job description prior to the interviews. (L IV, R. Exs. D and E.)

5 5. Each member of the interview team independently completed Applicant Interview Rating Forms and Applicant Comparison Charts. (L IV, R. Exs. F, H and L.) All three interviewers chose Ms. McKinney as the strongest applicant. Two of the interviewers ranked applicants, ranking Ms. McKinney first and Grievant third. Ms. Burroughs did not rank applicants on her forms, but agreed Ms. McKinney was the strongest applicant.

6 6. Each applicant's attendance record was reviewed, and the information was provided to the interview team. (L IV, R. Exs. J and K.)

7 7. The team awarded the position to Ms. McKinney.

8 8. Grievant has had more work experience than the successful applicant. His last Emergency Room experience was twenty years ago, however. Grievant's attendance record indicated attendance problems.

9 9. Ms. McKinney has had more recent Emergency Room experience, compared with Grievant's Emergency Room experience. Ms. McKinneyhas also worked for WEH, since 1995. She worked in the Emergency Room in a ninety-day temporary position, and subsequently became a permanent employee on January 1, 1996. She had used three days of sick leave in six months of permanent employment.

10 10. Mrs. McKinney's sister is also employed in the Emergency Room, as an RN and charge nurse. Ms. McKinney's sister was not a member of the interview team.

11 11. Ms. McKinney's position is a night shift position. Ms. McKinney's sister will not supervise Ms. McKinney, as they are on different shifts, and the person who schedules work in the Emergency Room is aware that she is never to place Ms. McKinney under her sister's supervision. (L III Transcript, pp. 4, 17-18)

12 12. Between June 1996 and June 1997, WEH received 99 LPN and RN applications, only 8 of which were from males. (L IV, R. Ex. N.)

13 13. WEH's affirmative action plan does not mandate quotas. (L IV, R. Ex. M.)

14 14. WEH's Emergency Room employs approximately thirteen women and one man. The man was originally employed as a Health Service Worker, and was promoted to an LPN position. (L III Transcript, pp. 2, 10-11.)

15 15. The interview team did not engage in gender discrimination.

16 16. Ms. McKinney was not given any preference due to her relationship with another Emergency

Room employee.

DISCUSSION

In non-disciplinary grievances of this nature, Grievant bears the burden of proving his case by a preponderance of the evidence. W. Va. Code §29-6A-6. "[A]n agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary and capricious or clearly wrong." Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 4, 1996), citing Thibault v. Div. of Rehab. Serv., Docket No. 93-RS-489 (July 7, 1994). "[A]bsent extenuating circumstances, promotions and the selection of individuals to fill vacant positions are management prerogative" so long as the individuals are qualified and able to perform their duties. Riffle v. Dept. of Health, Docket No. 89-H- 053 (July 21, 1989). The Grievance Board does not act as a "super interviewer" in non-selection grievances; rather, it reviews the legal sufficiency of the selection process. Thibault, citing Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Thus, Grievant's burden is to demonstrate that Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision.

Grievant first claims gender discrimination in the selection process. W. Va. Code §29-6A-2(d) 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." To establish a prima facie case of discrimination, a grievant must demonstrate:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his 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.

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Here, Grievant failed to make a prima facie case under the above standard. First, Grievant failed to show that he has been treated differently than other similarly situated employees in a significant

particular. He was the one male LPN applicant, out of seven applicants, all of whom were minimally qualified for the position. Five of the other applicants were also not selected for this position. All seven were assessed by the same interviewing team using the same criteria, were given the same information about the job, and were asked the same interview questions. Grievant did not indicate that the questions sought gender-related information, or resulted in different treatment of him. Nor did Grievant demonstrate that the selection was unrelated to actual job responsibilities and applicant qualifications. Moreover, the evidence showed that Respondent has not discriminated against males in Emergency Room employment generally. Although the number of males in the nurse applicant pool is low overall, Respondent has one male nurse already working in the Emergency Room. Respondent promoted that male to a nursing position, which suggests that Respondent encourages male nurses. Clearly, at a minimum, Respondent is not systematically excluding males from Emergency Room employment. The simple fact that one nurse out of approximately fourteen working in the Emergency Room is male, is insufficient to create a prima facie case of discrimination under the grievance statute. Indeed, that fact appears to defeat the discrimination claim.

Had Grievant established a prima facie case of discrimination, Respondent rebutted it by providing legitimate, job-related reasons for its selection decision. Respondent proved that Ms. McKinney had more recent Emergency Room experience, and that her experience was in its own facility, where it had had the opportunity to observe her performance for several months. Respondent also proved that Ms. McKinney had a better attendance record than Grievant. (See footnote 2) Also, Ms. McKinney better impressed the interview team, through her interpersonal skills. The interview team felt that Ms. McKinney was a better fit for the position than Grievant, both for objective and subjective reasons. However, the reasons did not have anythingto do with the applicants' genders. Grievant's discrimination claim must fail.

Nor did Grievant prove his case with regard to Ms. McKinney's familial relationship with another Emergency Room employee, either in terms of discrimination or violation of Respondent's anti-nepotism policy. The anti-nepotism policy for state agencies is found in 143 C.S.R 1, §18.02, and provides:

> No appointing authority shall influence or attempt to influence the employment or working conditions of his/her immediate family. It is the responsibility of the appointing authority to administer the employment of relatives of any agency employee in a consistent and impartial manner.

> No employee shall directly supervise a member of his/her immediate family. More specifically, no employee shall review or audit the work of a member of his/her immediate family, or take part in discussions concerning employment, assignment, compensation, discipline or related matters involving a member of his/her immediate family. In the event that an individual, through marriage, adoption, etc. is placed in a prohibited business relationship with a member of his/her immediate family, the situation must be resolved within thirty calendar days. Resolution may be made by transfer, reassignment, resignation, etc. of one of the involved employees or by other accommodation which protects the interests of the public.

Notably, this provision does not prohibit an agency from employing members of the same immediate family. Indeed, the language contemplates that related employees may possibly work in the same work unit. The policy is couched in terms of how one can "administer the employment of relatives" by preventing one employee from supervising, reviewing the work of, or having input on disciplinary or other actions regarding a relative.

Although Grievant proved that Ms. McKinney's sister worked in the emergency room, there was no evidence presented that the sisterhad in any way influenced, or sought to influence, the selection process. Indeed, the only evidence that the familial relationship was considered at all showed that it only became a consideration after Ms. McKinney was selected for the position. At that point, it was determined that, because they work different shifts and can be scheduled so as not to work at the same time, it was permissible for Ms. McKinney and her sister to be employed in the Emergency Room. Cf. Pierson v. Kanawha County Bd. of Educ., Docket No. 93- 20-484 (Mar. 17, 1994) (employment application appropriately rejected, where grievant would have been required to supervise her mother). The evidence showed that the prohibition on supervision had not been violated, and that Respondent had taken steps to prevent violation of this provision. Grievant did not prove that such steps were, or would be, inadequate. Grievant merely speculated that it was possible that Ms. McKinney might some day be supervised by her sister. However, this bald speculation, without some evidence of the probability of its occurrence, is insufficient to prove Grievant's case.

Contrary to Grievant's assertions, the selection process in this instance was manifestly fair and equitable, by design. A selection team was used, so that one person's potentially flawed determination did not dictate the outcome. A list of interview questions was developed, to encourage objective and conscientious consideration of all applicants. The evidence supported the team's reasoned assessment of the applicants. Clearly, the procedure used here was neither arbitrary nor capricious, and the team's selection was not clearly wrong.

CONCLUSIONS OF LAW

1 1. In non-disciplinary grievances, Grievant bears the burden of proving his case by a preponderance of the evidence. W. Va. Code §29-6A-6.

2 2. "[A]n agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary and capricious or clearly wrong." Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 4, 1996), citing Thibault v. Div. of Rehab. Serv., Docket No. 93-RS-489 (July 7, 1994).

3 3. The Grievance Board does not act as a "super interviewer" in non-selection grievances; rather, it reviews the legal sufficiency of the selection process. Thibault, citing Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

4 4. W. Va. Code §29-6A-2(d) 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."

5 5. The anti-nepotism policy for state agencies, found at 143 C.S.R. 1, §18.02, does not absolutely prohibit an agency from employing more than one member of an immediate family, or from employing more than one member of an immediate family in the same work unit.

6 6. Grievant failed to prove that Respondent discriminated against him in selecting another individual for the Emergency Room LPN position. 7 7. Grievant failed to prove that Respondent's selection of another individual for the Emergency Room LPN position was arbitrary and capricious or clearly wrong.

8 8. Grievant failed to prove that Respondent violated the State anti-nepotism policy found in 143 C.S.R 1, §18.02.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of the county in which the grievance occurred. 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.

Dated: September 29, 1997

JENNIFER J.MEEKS **Administrative Law Judge**

Footnote: 1

The grievance was denied at all lower levels. A Level IV hearing was held, and the matter became mature on August 15, 1997, the deadline for submission of Proposed Findings of Fact and Conclusions of Law. References to the transcript and exhibits submitted at Level III are identified as "L III", while exhibits submitted at Level IV are identified as "L IV."

Footnote: 2

It was permissible for Respondent to consider the attendance records of all applicants in its selection process. United States Equal Employment Opportunity Commission, ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, p. 8.