MICHAEL D. RITCHIE,

Grievant,

v. DOCKET NO. 96-HHR-181

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

and WEST VIRGINIA DIVISION OF PERSONNEL, **(See footnote 1)**

Respondents.

DECISION

Grievant, Michael D. Ritchie, filed this grievance against Respondents, West Virginia Department of Health and Human Resources (DHHR), and West Virginia Division of Personnel (DOP) alleging:

> Discrimination, unfair hiring and promotional practices, [and] breach of contract.
>
> Specifically, my complaint is that some employees are required to meet the educational requirement in order to be eligible for jobs in a higher pay grade, while others are given jobs or promoted to jobs without having to fulfill the educational or experience requirement.
>
> At my hire date, the agency explained to me and others that the requirement for education could be substituted with years of tenure, thus allowing employees to move up through the ranks of Economic, Social Services and now, Community Service Managers.
>
> Today that practice is limited to a select few.

As relief, Grievant seeks backpay and promotion to Protective Service Worker.

Grievant was denied relief at the lower levels of the grievance procedure. At Level IV, an evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia, on November 6,

1996. The case became mature for decision on December 17, 1996, with receipt of the parties' post-hearing submissions. (See footnote 2)

While the record in this matter is scant, the following circumstances apparently triggered the filing of this grievance. This grievance was filed after Grievant, a Social Service Worker with over twenty years of experience with Respondent, applied for a Protective Service Worker position, but was not given an interview because he did not have a baccalaureate degree.

The “Promotion Only” clause for the Protective Service Worker classification provides:

> Promotion Only: One year of full-time or equivalent part- time paid experience as a Protective Services Worker Trainee.

Gr. Ex. 7.

In response to a communication from Grievant, Lynn Schillings, Senior Personnel Specialist with DOP, responded to Grievant by a letter dated December 12, 1995. She interpreted the “Promotional Only” clause to mean that any experience in adult or children's services in a public or private health agency would substitute for

the educational requirement. Under her interpretation, Grievant,

would have been eligible for the Protective Service Worker position.

However, Ms. Schillings' interpretation was incorrect. In a memorandum to Max Farley, Assistant Director of Staffing Services, dated December 22, 1995, discussing Ms. Schillings' interpretation, Mr. Lowell Basford, Assistant Director of Classification and Compensation for DOP, explained:

> ... it has been the clear and consistent practice of the former Civil Service System and the Division of Personnel that when the minimum qualifications referenced the exact title of an existing classification in capital letters, then the interpretation was to be such that the successful applicant must have carried that specific classified payroll title. For purposes of applying the “Promotional Only” section of the Protective Service Worker classification, the employee being promoted must have had at least one year of experience <u>as a Protective Service Worker Trainee</u> in lieu of the stated training and experience requirements.

R. Ex. 2. Emphasis in original.

During the Level IV hearing, Mr. Farley testified that Mr. Basford's interpretation of the “Promotional Only” clause was correct. He also credibly testified that he only knows of two instances where people were promoted because of this type of mistake.

Grievant did not assert that he was better qualified for the Protective Service Worker position than the successful applicant, Jane Collins. Instead he asserted that Ms. Collins and other employees of

Respondent have advanced “up the career ladder” without possessing a baccalaureate degree, and that this

constitutes discrimination by Respondent against him because he has not been allowed to advance and progress through Respondent's hierarchical system. However, Grievant did not contest his non-selection for any particular position. He did not attempt to show that he was better qualified for the Adult Protective Service Worker position, nor did he seek to be instated into the position, and oust Ms. Collins.

Although Grievant also alleged unfair hiring and promotional practices, these claims were either abandoned and not pursued, or were combined with discrimination. Grievant also asserted a breach of contract claim, and that issue will be addressed first.

During the Level IV hearing, Grievant testified:

> The Agency [DHHR] told new hires, at that point, that for every year we worked would suffice for one year of the college requirement to move on into Social Services, and up the career ladder. Thus, within four years I would qualify for any job within the Agency [DHHR].

Unfortunately, such “promises” are not binding. The Supreme Court of Appeals of West Virginia, in Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W.Va. 1991), citing Freeman v. Poling, 338 S.E.2d 415 (W.Va. 1985), stated that “unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity.” Moreover, Grievant has hired by DHHR in 1972, and over twenty years have elapsed. Requirements for positions may change over the years as the duties of a position change. Grievant's breach of contract claim fails.

Grievant's second issue is discrimination. A prima facie showing of discrimination (See footnote 3), under W. Va. Code §29-6A-2(d), consists of a grievant establishing:

> (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.

Hindman v. W.Va. Div. of Corr., Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W.Va. Bureau of Employment Programs, Docket No. 94- BEP-099 (Dec. 18, 1996); Hendricks v. W.Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

If a grievant successfully proves a prima facie case, a presumption of discrimination exists, which respondent can rebut by articulating a legitimate reason for its action. (See footnote 4) However, a grievant may still prevail if it can demonstrated the reason proffered by a respondent was pretextual. Singleton v. W.Va. Dept. of Health and Human Resources, Docket No. 95-HHR-490 (May 24, 1996). Grievant attempted to prove that he was similarly situated to Bill Wince, Community Service Manager for Harrison and Doddridge Counties. Mr. Wince attained his current position in February 1994, and did not know whether it required a baccalaureate degree. He was first hired by DHHR in November 1975 as an Eligibility Specialist, (See footnote 5) and a baccalaureate degree was not required for that position.

At Level IV, Mr. Wince testified that in 1979, he entered the “Social Service Unit” by meeting the experience requirement. At that time, the experience requirement allowed for a “year for year” substitution of one year's work experience for each year of education required. However, Grievant failed to explain what the “Social Service Unit” is or was, and to establish what the related educational requirement was for such positions in 1979. Grievant failed to elicit sufficient evidence concerning whether (and when) Mr. Wince held the Adult Protective Service Worker classification or merely performed some duties related to Adult Protective Services. Therefore, Grievant failed to elicit sufficient evidence to prove by a preponderance of the evidence that he was similarly situated to Mr. Wince.

Grievant also attempted to prove that he was similarly situated to Gary Smith. Although Mr. Smith held the Protective Service Worker classification, he left Respondent's employ in the late 1980's. In this case, time (the late 1980's) is enough to separate Grievant, and distinguish Mr. Smith's situation and Grievant's. The evidence of whether Mr. Smith possessed a baccalaureate degree was inconclusive. Grievant also failed to prove by a preponderance of the evidence that Mr. Smith was similarly situated to him in educational

attainments.

The record also fails to contain sufficient and reliable evidence to make a comparison between Grievant and “Mrs. O,” “Mr. E,” (See footnote 6) or Mr. James Morford. (See footnote 7) Therefore, Grievant failed to prove by a preponderance of the evidence that he was similarly situated to any of these three individuals.

Grievant also compared himself with Ms. Collins. Although Ms. Collins does not possess a baccalaureate degree, since she was a Child Protective Services Worker, she already held the classification title. She began working with children in protective services in the 1970's. Receiving the Adult Protective Service Worker position was not a transfer or a promotion for Ms. Collins. Her pay remained the same. Grievant failed to prove that he ever held the Protective Service Worker classification. Again, given the facts of this case, classification requirements in the 1970's cannot be compared to classification requirements in the 1990's. Therefore, Grievant failed to prove that he was similarlysituated to Ms. Collins in either time or classification.

Moreover, Grievant failed to establish the second prong of a prima facie case of discrimination - that he has been treated detrimentally by Respondent in a significant way. Grievant was denied an interview. However, Grievant did not establish that, if he had been granted an interview, he was the more qualified applicant, or he would have prevailed over Ms. Collins. Given Ms. Collins' level of experience, and that she was selected over another applicant who held a baccalaureate degree, it is doubtful, and Grievant failed to prove, by a preponderance of the evidence, that denial of an interview to Grievant caused substantial inequity to him. Grievant's claim of discrimination fails.

However, even if Grievant had established a prima facie case, Respondent articulated a legitimate reason which was not pretextual, and would rebut a presumption of discrimination. Respondent's legitimate reason was that Ms. Schillings misinterpreted the “Promotion Only” clause for the Protective Service Worker classification; she made a mistake which does not bind Respondents.

The Grievance Board has held that a mistake does not constitute discrimination. In McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996), the county board of education intended to reduce by 15% the county supplement of all professional staff. Ms. McFarland asserted a claim of discrimination because three professionals were overlooked, and their respective county supplement was not reduced. The GrievanceBoard denied her grievance because the county board of education

proved that the county supplements of the three professionals in question was the result of a mistake, which in that case was determined to be a legitimate, non-discriminatory reason.

Moreover, the Grievance Board has refused consistently to grant the type of relief Grievant seeks because of a mistake or a violation of a policy, because such actions constitute ultra vires acts, and because two wrongs do not make a right. See Guthrie v. W.Va. Dept. of Health and Human Resources, Docket No. 95-HHR-277 (Jan. 31, 1996); Earnest and Hatfield v. Southern W.Va. Community College, Docket Nos. 91-BOD-352/290 (Sept. 30, 1992), rev'd, Circuit Court of Kanawha County, Civil Action No. 92-AA-296 (Apr. 23, 1993); (See footnote 8) Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec 18, 1989). See also Roberts v. W.Va. Dept. of Transp., Docket No. 96-DOH-017 (May 2, 1996), aff'd, Circuit Court of Kanawha County, Civil Action No. 96-AA-72 (May 25, 1997); Gilliam v. W.Va. Dept. of Transp., Docket No. 96-DOH-511 (Apr. 24, 1997). "W.Va. Code §18-29-2(m) discrimination claims which are predicated upon the unauthorized award of benefits to certain employees and the denial of such benefits to others do not necessarily require, as relief, that the employer commit further similar unauthorized actions." Earnest, supra.

The following findings of fact were derived from the record.

FINDINGS OF FACT

1. Grievant has been employed by DHHR since 1972, and is currently a Social Service Worker.

2. Grievant applied for a Protective Service Worker position. He was denied an interview because he did not have the requisite education.

3. Ms. Schillings communicated a misinterpretation of the "Promotional only" clause for the Protective Service Worker classification to Grievant.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. In nondisciplinary matters Grievants must prove all of the allegations constituting their grievance by a preponderance of the evidence. Rice v. W.Va. Dept. of Tax and Revenue, Docket No. 90- ABCC-452 (Jan. 23, 1992); Owens v. W.Va. Alcohol Beverage Control Comm'n, Docket No. 90-ABCC-003 (Apr. 30, 1990).

2. "Evidence that an employer has deviated from established past practice regarding personnel matters is not, in and of itself, sufficient to demonstrate wrongdoing on the employer's part." Justice, et al. v. W.Va. Dept. of Health and Human Resources, Docket Nos. 91-HHR-255/277 (Mar. 11, 1993), citing Cowger v. Webster County Bd. of Educ., Docket No. 92-51-348 (Mar. 12, 1993).

3. "Unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, whenfunctioning in their governmental capacity." Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W.Va. 1991), citing Freeman v. Poling, 338 S.E.2d 415 (W.Va. 1985).

4. "W.Va. Code §18-29-2(m) discrimination claims which are predicated upon the unauthorized award of benefits to certain employees and the denial of such benefits to others do not necessarily require, as relief, that the employer commit further similar unauthorized actions." Earnest, supra.

5. Grievant failed to prove by a preponderance of the evidence his claim of discrimination, or breach of contract.

Accordingly, the grievance is **DENIED**.

Any party 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.

Dated: 5/30/97 _____ JEFFREY N. WEATHERHOLT ADMINISTRATIVE LAW JUDGE

Footnote: 1

The West Virginia Division of Personnel was made a party at Level IV.

Footnote: 2

DOP did not file a post-hearing submission.

Footnote: 3

W. Va. Code §29-6A-2(d) provides:

"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.

Footnote: 4

While the burden of production may shift, the overall burden of proof never does. See, Texas Dept. of Comm. Aff. v. Burdine, 450 U.S. 248 (1981).

Footnote: 5

Classifications have changed over the years, and the Eligibility Specialist currently equates to the Economic Service Worker.

Footnote: 6

The record fails to contain an explanation why initials were used in place of the names of "Mrs. O" and "Mr. E." There was no objection to the use of initials by the parties. The undersigned did not see any reason why the names of these two individuals needed to be revealed, and they are not contained in the record.

Footnote: 7

Grievant alleged that each of these three individuals, employed by Respondent, progressed "up the career ladder" without a baccalaureate degree.

Footnote: 8

Administrative Law Judges of the Grievance Board are not bound to follow Circuit Court decisions as precedent. See Waugh v. Monongalia County Bd. of Health, Docket No. 96-MCHD-163 (Dec. 23, 1996); Rogers v. Berkeley County Bd. of Educ., Docket No. 96-02- 329 (Apr. 30, 1997).