MELISSA HASTINGS,

Grievant,

v. **Docket No. 96-HHR-405**

WEST VIRGINIA DEPARTMENT
OF HEALTH & HUMAN RESOURCES,

Respondent.

DECISION

Grievant filed this grievance on February 14, 1995, alleging that "Grievant was discriminated against in the selection of the position of Community Service Manager for Brooke/Hancock County in violation of W.Va. Code § 29-6A."[sic] For relief, Grievant requested that she be awarded the position or the pay equivalent to the position retroactive to February 1, 1995. Decisions at Levels I and III denying the grievance were rendered February 21, 1995 and September 17, 1996, respectively. A Level IV hearing was held January 10, 1997, at the Wheeling Office of the West Virginia Education and State Employees Grievance Board wherein the lower level record was supplemented. This matter became mature for decision with the receipt of the parties' proposed findings of fact and conclusions of law on February 19, 1997.

DISCUSSION

___On September 26, 1994, the West Virginia Department of Health and Human Resources (DHHR) posted a position designated as Community Service Manager (CSM). It was a new position with forty openings available statewide. The CSM position was created as part of a statewide reorganization of DHHR, designed to better provide local services. A Management Improvement Team appointed by the Governor recommended this method of creating greater accountability and responsiveness to the

local community.

The posted job description was as follows: ___

> Community Services Managers will perform complex administrative and professional work at the advanced level by planning, implementing, directing and reviewing programs, activities and operations within a District Office of the Department of Health and Human Resources. In addition, the Community Services Managers will provide leadership in the development, implementation and administration of community-based, family-centered, integrated service delivery systems and will serve in a liaison role with state and local agencies, advocacy groups, educational institutions, clients and services providers.

The qualifications required the applicant be a college graduate, have five years experience in a human resources related area and two years experience as an administrator. Level III Hearing, Respondent's Ex. No. 3 and Level IV Hearing, ALJ's Ex. No.1. (See footnote 1)

The position was posted through October 14, 1994. Although not required by the Division of Personnel, it was also advertised in local newspapers throughout the state. See Level III hearing, Respondent's Ex. No. 4.

Grievant, an employee of the West Virginia Department of Health and Human Resources, applied for the CSM position October 3, 1994, specifying Brooke/Hancock County within Region I as the only District in which she would accept employment. See Level IV Hearing, ALJ's Ex. No. 2. There were some 500 applications filed statewide. (Level III Tr., at 7). Among those was the application of Robert Clark dated September 29, 1994. (Level IV Hearing, ALJ's Ex. No. 3). Mr. Clark was offered and accepted the position in question, effective February 1, 1995. Notice of his appointment was circulated on that date. (Level IV Hearing, ALJ's Ex. # 4).

The Division of Personnel handled the initial stages of the selection process. It evaluated and scored the application forms and then administered a competitive examination. The examination was obtained by the Respondent's Steering Committee and provided to the Division of Personnel. The committee had been formed to define the duties and responsibilities of the new CSM position. (Level III Tr., at 40). The Division of Personnel graded the examinations and provided a list of qualified applicants to DHHR. The test and application scores were not provided. (Level IV Hearing, ALJ's Ex. # 4). However, applicants were ranked such that the highest scorer was listed first. Each selection was to be from among the top 10 percentile. Both Grievant and Robert Clark were on the register and certified by the Division of Personnel. (W. Va. Adm. R. 8.02, Level IV Hearing, ALJ's Ex.# 5 and

Level III Hearing, Respondent's Ex. # 2).

Grievant contends that she was better qualified than Mr. Clark, and that this was demonstrated through scores she achieved from her application rating and competitive examination. The application ratings were 100 for Grievant, 99 for Mr. Clark. The scores for the written examination were 90.18 for Ms. Hastings and 80.36 for Mr. Clark. (Level IV Hearing, Ex. No. 6). As stated above, these scores were used for no other purpose than to rank the applicants on the register. Grievant ranked higher than Mr. Clark.

The next step was to interview those certified by the Division of Personnel. This was to be done by DHHR. Interview questions were developed by the Steering Committee. Interview committee members were chosen. They were Judy Bell, an employee of DHHR; Ray Jones, a privately employed member of the local community; and Betty Barron, Assistant Administrator of the Colin Anderson Center. Ms. Barron headed the committee. She was selected because she was a personnel director and would be familiar with theinterview process. (Level III Tr., at 47). Also, she was given the necessary training and information for the interviews at Charleston and instructed the other members prior to the interviews. They appeared not to know each other prior to this assignment. (Level III Tr., at 87).

The candidates to be interviewed were chosen by Mike McCabe, Personnel Director for the Department of Health and Human Resources. They were the top 13 candidates from the register. The interviews were conducted at Colin Anderson Center. Grievant was interviewed on December 13, 1994, and Mr. Clark was interviewed on December 16, 1994. The three interviewers asked questions submitted to them by the Steering Committee. The results of the interviews were compiled on forms provided by Respondent. The Grievant's form indicates that she received an average rating of 2.59. (Level IV Hearing, ALJ's Ex. # 7). Mr. Clark's score was 2.64. (Level IV Hearing, ALJ's Ex. # 8). Ms. Bell gave both applicants equal scores, 2.47, while Ms. Barron gave a 2.85 to Grievant and 2.90 to Mr. Clark. Mr. Jones gave a 2.47 to Ms. Hastings and a 2.57 to Mr. Clark.

There were 18 questions asked of each applicant. Each question was graded on a scale of one to three. (Level IV Hearing, ALJ's Ex. # 7, 8, and 9). Included were such questions as, "What do you think are the two or three major problems facing your community today?" (See footnote 2) Another was, "Describe your method of communicating information to achieve work objectives." (See footnote 3) The information sought from the questioning was generally philosophical and hypothetical in

nature, concerning management and leadership style and theory. Besides the questions, there were three other evaluations made of each candidate: oral expression, appearance, and poise and confidence. Mr. Clark received three's from each interviewer in all three categories. Grievant received three's from Ms. Barron in all categories. She also received three's from Ms. Bell and Mr. Jones except forthe category of poise and confidence, where she received two's.

The results of the interviews were submitted to the regional directors, in this case Louis Palma of Region I. He reviewed the documents related to the interview and chose Mr. Clark, because of his greater experience as a second level supervisor. (Level III Tr., at 134). This choice was in the form of a recommendation to Sue H. Sergi, Commissioner of the Bureau for Children & Families. Commissioner Sergi, after discussions with Mr. Palma, made the ultimate selection.

The main thrust of this grievance is the allegation of sexual discrimination in hiring Mr. Clark. In support of this contention, Grievant provided statistical evidence at Level III, suggesting that DHHR has been discriminatory in the filling of managerial positions, favoring males. The 1995 Affirmative Action Plan for Bureau for Children and Families contains an analysis of the work force of the Bureau for April 30, 1995, to April 29, 1996. It shows that of the total work force, women make up 78.98% of the workers. (Level IV Hearing, ALJ's Ex. #10, pg. 8). This figure is based upon an analysis dated July 12, 1994. Another analysis located within Exhibit Number 10 at page 20, indicated that of the job title category "Officials/Administrators," only 32% are female. This statistic suggests that the hiring practices for this category are discriminatory and favor men in the selection process.

W.Va. Code §29-6A-2(d) defines discrimination as follows:

"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."

The test for a prima facie showing of discrimination was established by Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Although the Supreme Court of Appeals was interpreting W.Va. Code §18-29-2(m), the language is identical and has applicability here. The test consists of establishing:

(a). that she is similarly situated, in a pertinent way, to one or more to one or more other employees; (b). that she has, to her detriment, been treated by her employer in a manner that the other employee has not, in a significant particular;

and,

(c). that such differences were unrelated to Grievant's actual job responsibilities, and were not agreed to by Grievant in writing.

Once Grievant has successfully completed her prima facie case, the burden shifts to Respondent to show a legitimate or nondiscriminatory reason for its action. If Respondent is successful in establishing such a reason, Grievant then has an opportunity to overcome Respondent's showing by proving the reasons given to be mere pretext.

In this case, a prima facie showing has been made. Grievant has shown that she, as a female, was treated differently from her fellow male employees. The statistical evidence suggests that women within DHHR are not advanced to upper management positions at the same rate as men. The evidence also suggests that although Grievant was ranked higher on the register than Mr. Clark, this was not considered important at that point. The actual decision was made upon Louis Palma's recommendation. He and his recommendation, could be regarded as a product of a management system allegedly over represented by men. Grievant refers to this as the "good ole boy" system. Her implication is that women do not fare well in this system.

In addition, the interview scores could be questioned. The male member of the interview committee was one of the two members who gave her a lower score in the very subjective category of poise and confidence. There was no evidence of what was actually perceived by the interview committee which resulted in the lower score.

All this does not prove discrimination. It does shift the burden of proof to Respondent to produce evidence that its decision was based upon job related factors. Its evidence shows that the Division of Personnel and Respondent made a strong effort to treat each job applicant objectively in every aspect, from the creation of the position, to recruitment and qualifying of candidates. The posting of the positionconformed to and even exceeded the requirements. Recruitment was conducted internally through job-site posting and externally through newspaper advertisement. The competitive test was developed after a painstaking effort. Much research was conducted before the test was obtained and used. Indeed Grievant scored well on the original application and the competitive test. She does not claim that a sexual bias influenced these scores.

There is also no evidence that the interview process was flawed in any way because of a sexual bias. The interview questions were carefully drawn up and dealt strictly with duties the successful applicant could be expected to perform. The interview committee itself was headed by a female. Two

of its three members were female. The Commissioner of the Bureau for Families and Children is a female. Grievant has presented no evidence to suggest a sexual bias in their makeup. The argument could be made that Mr. Jones was biased against Grievant, scoring her lower than Mr. Clark, but there is no supporting evidence. Ms. Bell, also scored Grievant lower than Mr. Clark, with both agreeing that Grievant exhibited less poise and confidence.

Grievant relies upon statistics to show discrimination. Statistics do show that the middle level management positions are largely male, unlike the lower level positions. This would be corroborative of any actual and direct evidence of sexual discrimination. A showing that Mr. Clark was clearly the inferior candidate for the position would be such evidence. It would show that the selection was unreasonable and based upon criteria other than job related qualifications. However, the evidence indicates that Mr. Clark was qualified for the position. The decision to hire Mr. Clark over Grievant was very close but his experience at the middle management level apparently was persuasive. That he was appointed because of sexual discrimination, has not been proven by a preponderance of the evidence.

Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are appropriate.

FINDINGS OF FACT

1. On September 26, 1994, Respondent posted job notices internally and advertised externally the availability of newly created positions designated as "Community Service Representative."

2. The purpose of the position was to provide for local services more effectively by having a person in a managerial capacity familiar with the community wants and needs.

3. Statewide, some 500 people filed for the position.

4. The State was divided into four regions with Brooke/Hancock County being in Region 1.

5. Grievant and Robert Clark, both employed in supervisory positions with Respondent, applied for the Brooke/Hancock County position within Region 1, however, Mr. Clark had more extensive experience at the middle management level.

6. A Steering Committee formulated the duties of the position and selected a competitive examination for applicants to take.

7. The applications were processed and scored by the Division of Personnel. The Division of

Personnel also administered and graded the competitive examination. The Division of Personnel compiled a list, called a register, of persons found qualified for the position, and submitted to Respondent the top 10 percent. The register was ranked according to best score, combination of both application and test scores. Ranking, and not actual scores, were provided.

8. Respondent appointed four interview committees to interview the applicants within the four regions.

9. The Region 1 interview committee composed of two females and one male interviewed all Region 1 and Brooke/Hancock County applicants including the Grievant and Robert Clark.

10. Grievant ranked higher on the register than Mr. Clark indicating that she had a better combined score. 11. Mr. Clark received a higher score in the interview.

12. The results of the interviews were compiled and submitted to Louis Palma, the Regional Director, who made recommendations to Commissioner Sue H. Sergi.

13. Louis Palma recommended Robert Clark because of greater experience at the supervisory level.

14. Mr. Clark was selected by Commissioner Sergi effective February 1, 1995.

15. Statistics complied by Respondent in its 1995 Affirmative Action Plan show that although female employees make up approximately 70% of the agency wide work force, they make up only 30% of the category designated as Officials/Administrators.

16. The position of Community Service Manager is within the designation of Officials/Administrators.

17. Grievant submitted no other evidence of sexual discrimination.

CONCLUSIONS OF LAW

1. In a grievance that does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W.Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W.Va. Code §29-6A-6.

2. The West Virginia Education and State Employee Grievance Board has jurisdiction to hear matters that constitute sexual discrimination and violate discrimination statutes contained within the W.Va. Code §29-6A-2 and W.Va. Code §18-29-2.

3. Grievant made a prima facie showing of discrimination.

4. Respondent rebutted the prima facie showing.

5. Grievant did not prove by a preponderance of the evidence that the hiring of Robert Clark to the position of Community Service Manager was a result of sexual discrimination by the Respondent.

Therefore, this grievance is hereby **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 §18-29-7. 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

JAMES D. TERRY

Administrative Law Judge

DATE: September 2, 1997

Footnote: 1

All exhibits from the Level III hearing were incorporated into the Level IV record. Some are not numbered and are apparently a collection of exhibits tendered by Grievant. The undersigned ALJ has numbered them for identification purposes as needed, designating them as ALJ.'s Ex. No. .

Footnote: 2

ALJ's Ex. No. 9, question 5.

Footnote: 3

ALJ's Ex. No. 9, question 14.