MARGARET L. SHEPPARD and ADA P. GREGORY,

Grievants,

v. DOCKET NOS. 97-HHR-186/187

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES,

Respondent.

D E C I S I O N

This grievance was filed by Grievants, Margaret L. Sheppard and Ada P. Gregory, against Respondent, West Virginia Department of Health and Human Resources ("HHR"), on or about November 8, 1996, alleging neither was selected for one of seven Family Support Specialist positions, because of age discrimination. They further alleged that both were unfairly evaluated in the selection process in the categories of seniority, qualifications, physical well-being, and use of leave, and that "[s]ocial activities should not have been a requirement." Both sought as relief "[t]o be promoted to Family Support Specialist position and to be made whole in every way." (See footnote 1)

Grievants amended their grievance at Level IV, withdrawing the claim that use of leave should not have been evaluated. Grievants' counsel clearly stated at the Level IV hearing that, even though seven persons were selected as Family Support Specialists over Grievants, they were challenging the selection of only two of the successful applicants, Martha Bowling and Dorothy Ellison. Accordingly, the undersigned will not evaluate whether either Grievant should have been selected instead of one of the other five successful applicants.

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievants are employed by the Department of Health and Human Resources ("HHR") as Economic Service Workers ("ESW"), in the Income Maintenance Unit, in the Lewisburg office. The Lewisburg office serves Pocahontas, Greenbrier, and Monroe Counties. At the time of the selection,

Grievant Sheppard was 49 years old, and had been employed by HHR for 22 years. Grievant Gregory was 50 years old, and had been employed by HHR for 19 years.

2. The Lewisburg office was chosen to participate in a pilot program called West Virginia Works ("WVW"), developed to implement federal welfare reform legislation. The focus of WVW is to find jobs for clients.

3. In October 1996, HHR posted seven WVW Family Support Specialist ("FSS") positions to staff the WVW pilot program. The posting informed the applicants that, among other things, these positions would conduct "job development with community employers by interacting with a variety of professionals, and community leaders," and develop "and monitor contracts withwork sites for subsidized employment, work experience activities and community volunteer programs." This information is also found in the Examples of Work in the FSS job description.

4. Both Grievants applied for the positions. There were 13 applicants, and neither Grievant was selected for a position. All the applicants were HHR employees of the Lewisburg office, and all were qualified for the positions.

5. Those selected were Martha Bowling, age 32; Patti Bell, age 38; Dorothy Ellison, age 42; Dixie Smith, age 46; Marcie Waselchalk and Phyllis Kinnison, both age 49; and Cathy Hendricks, whose age was not made a part of the record. Grievants are older and have more seniority than any of those selected.

6. All applicants were interviewed by an interview committee. The members of the interview committee were Allan Clower (Community Services Manager), Carol Groves (formerly Work and Training supervisor at the Lewisburg office, now Family Support Supervisor), and John Maloney (Employment Service Supervisor at the Nicholas County office). Mr. Maloney was involved in preparing Nicholas County's proposal to participate in WVW as a pilot site, and was on a statewide WVW task team.

7. Each applicant was asked the same 17 questions in her interview. The questions were developed by HHR Nicholas County personnel for use in selecting FSS's there. Each question was evaluated by each interviewer on a scale of one to five. The points were totalled and the applicants were ranked numerically.

8. Included among the questions were questions relating to the interviewee's community involvement and experience in public speaking. 9. The applicants were not asked their ages

during the interview, and the interviewers were not aware of the age of any applicant. Mr. Clower was aware that a number of persons in the Lewisburg office were close to his age of 51, but he was not aware that Grievants were the oldest of the applicants.

10. Grievant Gregory scored seventh overall in the interview, and Grievant Sheppard scored ninth. Of those selected, each scored in the top six in the interviews, except Ms. Hendricks, who scored eighth, and Ms. Waselchalk, who scored tenth. Ms. Bowling scored first overall in the interviews, and was ranked first both by Mr. Clower and Ms. Groves. Mr. Maloney ranked her third. Ms. Ellison ranked fourth overall in the interview, and was ranked fourth by both Ms. Groves and Mr. Maloney. Mr. Clower ranked her third.

11. Mr. Clower and Ms. Groves decided who would be selected to fill the positions. In addition to the interview scores, Mr. Clower looked at the 1995 performance evaluations, attendance records, and talked to the employees' supervisors. He also placed emphasis on enthusiasm and community involvement. Mr. Clower used performance evaluations to eliminate applicants, rather than to compare applicants, because he believed the evaluations are typically very similar and general, and provide little information helpful to selection.

12. Ms. Groves was looking for employees who could perform the job functions, who would be comfortable working with the community in developing jobs, who could do the paperwork, and who could deal with the clients face to face and assess their service needs. She selected the successful candidates based upon the interview, experience within and outside HHR, the supervisor's recommendation, and involvement in community activities and agencies. 13. Mr. Maloney felt the important qualities of a FSS were the ability to do the case work, ability to relate to clients, familiarity with the community and the businesses in the community, and public speaking ability, because part of the FSS job would be to develop a rapport with business owners who might provide jobs for participants, and to promote the program.

14. The 1995 performance evaluations for both Grievants reflected that they both consistently performed very good work.

15. All applicants had good attendance records.

16. Once the Greenbrier office was selected as a pilot program site, task teams were formed. Ms. Bowling and Ms. Ellison volunteered to serve on statewide WVW task teams. Grievants were appointed to task teams, having failed to volunteer.

17. Ms. Bowling had worked as a temporary clerical employee in 1995, and became a permanent employee, as an ESW, on January 1, 1996. She had 131 college hours.

18. Ms. Bowling was selected because she had volunteered to participate in WVW, she was very active in social organizations, had business contacts and knowledge, had public speaking experience and was interested in the program, and was enthusiastic. She was active in her church, was past president of White Sulphur Springs Junior Woman's Club, a founding member of the Lioness's Club, a member of the White Sulphur Springs Chamber of Commerce Board and Greater Greenbrier County Chamber of Commerce, a Board member of Main Street White Sulphur, and formerly owned a retail business and was experienced in all aspects of a business operation.

19. Ms. Ellison had worked for HHR one year and three months, and had a high school education. 20. Ms. Ellison was selected because she had volunteered to serve on a WVW task team, was involved in social and business organizations, enjoys public speaking, and was enthusiastic about WVW. She is a Sunday school teacher, a member of the church session, a member of the county farm bureau, and President of the Board of Directors for Monroe County Day Care Center. She had done very little public speaking. Her supervisor (and Grievants' supervisor), Margaret Mann, thought she was a better candidate for a FSS position than Grievants, because this position would involve working with the community and job development, and a knowledge of policy.

21. Grievant Sheppard's only experience in public speaking was as the salutatorian at her high school graduation. Grievant Gregory had no experience in public speaking. In the interview, both Grievants said they would do public speaking if they knew the material.

22. Grievants are involved in church activities. They did not tell the interviewers they were involved in any other type of community organization or activity, nor did they list any such information on their applications. (See footnote 2) Both contact employers in performing their job duties to verify client information, and they refer clients to community agencies, as do all ESW's in the Lewisburg office.

23. Ms. Mann initially reported to Mr. Clower and Ms. Groves that all those she supervised who had applied were good workers. After choosing six of the seven successfulapplicants, Ms. Groves asked Ms. Mann who she would recommend for the seventh position among Grievants and Ms. Waselchalk. She recommended Ms. Waselchalk over both Grievants for the final position, because she had volunteered to go to computer training in Charleston, and enjoyed doing home visits. Ms.

Mann told Ms. Groves that Grievants would do home visits, but they were not interested in doing them. Ms. Mann recommended Ms. Waselchalk over Grievants based upon her knowledge of what was needed in the position, her willingness to do things, and her attitude. She said Grievants were less willing to volunteer.

24. Had either Grievant been selected for a FSS position, she would have received a pay increase of ten percent.

Discussion

Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dept. of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997). An agency's 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). Grievants' claims lie in three general areas: whether the agency's decision to select Ms. Bowling and Ms. Ellison rather than Grievants was arbitrary and capricious; whether the agency violated W. Va. Code § 29-6-10(4); and, whether Grievants were victims of discrimination. Their claims will be addressed in this order.

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, 286 S.E.2d276 (W. Va. 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 agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). 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.

Grievants asserted they should have been selected instead of Ms. Bowling and Ms. Ellison,

arguing first, that they were more qualified than those two applicants. HHR argued the successful applicants were more qualified than Grievants. While Grievants proved they had more experience at HHR than Ms. Bowling and Ms. Ellison, and they could successfully manage a very large caseload, they did not prove they were more qualified for this particular position which requires a variety of skills, some of which Grievants possess, and some of which they do not. Importantly, all three interviewers scored Ms. Bowling and Ms. Ellison significantly higher than either Grievant, and Grievants failed to demonstrate a flaw in the interview process. HHR demonstrated that business and other community contacts and experience are important to the success of the WVW program.

Ignoring Ms. Bowling's involvement in social organizations, her business and community contacts and skills far exceed Grievants'. Ms. Ellison has more contacts with community service organizations than Grievants, had volunteered for a WVW committee, and scored better in theinterview. While Grievants demonstrated that some skills developed as ESW's would be needed as a FSS, such as the ability to determine assets and eligibility, knowledge of Medicaid and Food Stamp regulations, and interviewing skills, they did not demonstrate that their experience in these areas should outweigh the interview scores and business and community experience and contacts essential to job development. Further, Ms. Bowling and Ms. Ellison were also ESW's, and were likewise trained in determining assets and eligibility, applying Medicaid and Food Stamp regulations, and interviewing.

Grievants second argued HHR was required by law to select them, because they were the most senior applicants. This argument is based upon W. Va. Code § 29-6-10(4), which provides, in pertinent part:

> The [state personnel] board shall have the authority to promulgate, amend or repeal rules, according to chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, to implement the provisions of this article:
>
> (4) For promotions within the classified service which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination, when such examination is practicable. . . . When any benefit such as a promotion, wage increase or transfer is to be awarded, . . . and a choice is required between two or more employees in the classified service as to who will receive the benefit, or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit or have the benefit withdrawn, as the case may be.

Both parties acknowledged that the Division of Personnel has put in place what was referred to as an

administrative directive implementing this provision.

The first query is whether the applicants were "substantially equal" or had "similar qualifications." Ward v. Dept. of Transp./ Div. of Highways, Docket No. 96-DOH-184 (July 24,1997). Mr. Clower stated that all applicants met the basic job qualifications and had the ability to do the job. This does not necessarily make the applicants' qualifications substantially equal or similar. Where the grievant and the successful applicant meet the minimum qualifications for the job, but one applicant, or in this case, seven applicants, are more qualified than the grievant, their qualifications are not substantially equal or similar, and seniority need not be considered. Mowery, supra. "The employer retains the discretion to discern whether one candidate has superior qualifications than another, without regard to seniority as a factor." Lewis v. W. Va. Dept. of Admin., Docket No. 96-DOA-027 (June 7, 1996).

Finally, Grievants alleged they were unlawfully discriminated against because of their age, in violation of W. Va. Code §§ 29-6A-2(d) and 5-11-1, et seq. (the Human Rights Act), and the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621, et seq. ("ADEA"). "This Grievance Board does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act . . .. 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 § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act." Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997).

W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as:

> 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.

This definition encompasses all types of discrimination, including discrimination based upon age. It is not necessary to analyze Grievants' claims under either under the Human Rights Act or theADEA, as such claims are subsumed by § 29-6A-2(d). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, W. Va. Univ., Docket No. 95-BOT-387 (Jan. 31, 1995).

A grievant alleging discrimination must establish a prima facie case by demonstrating:

(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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievants based their case of age discrimination solely upon an unfortunate remark made by Mr. Clower during a meeting in November 1996, when they met with him to discuss why they were not selected. Mr. Clower admitted he had told Grievants that "the younger ones" scored better in the interviews than "the older ones." Such a statement, while suspect, does not prove that Mr. Clower engaged in age discrimination, but does prove he chose his words unwisely. He explained that he was not referring to age, but seniority, as Grievants had asked him why the more tenured employees were not selected for the position. Grievant Gregory admitted she may have asked Mr. Clower howsomeone just off probation could have been selected over them. Grievants failed to show that age played any role in the selection process. See Aglinsky, supra.

Grievants argued that the selection of Ms. Waselchalk, who had very little community involvement, demonstrated that this was not important in the selection process, and that the reasons given for selecting Ms. Bowling and Ms. Ellison were pretextual. This argument fails. Ms. Waselchalk's community involvement was about the same as Grievants'. In fact, it appears to the undersigned that Ms. Waselchalk and Grievants were equally qualified for the position. Grievants and Ms. Waselchalk were vying for the final position; however, as noted above, Grievants specifically stated they were not challenging Ms. Waselchalk's selection. Ms. Groves went to Ms. Mann and asked her for a recommendation among the three for this particular position, Ms. Mann recommended Ms. Waselchalk over Grievants, and HHR went with that recommendation. Thus, Ms. Waselchalk's and Grievants' community involvement, or lack thereof, played no part in Ms. Waselchalk's selection, because when HHR considered all applicable factors, the three applicants' qualifications were equal or nearly so. Grievants failed to meet their burden of proving that the reasons Ms. Ellison and Ms. Bowling were selected were unrelated to job responsibilities, and thus

have failed to prove the claim of discrimination.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dept. of Nat. Resources, Docket No. 96- DNR-218 (May 30, 1997). 2. An agency's 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). Grievants failed to prove they were more qualified that Ms. Bowling or Ms. Ellison, or that HHR's decision was otherwise arbitrary and capricious or clearly wrong.

3. The seniority preference set forth in W. Va. Code § 29-6-10(4) is applicable only when the applicants' qualifications are substantially equal or similar. Grievants failed to prove by a preponderance of the evidence that their qualifications were equal to those of Ms. Bowling or Ms. Ellison. Grievants failed to prove HHR violated, misinterpreted or misapplied W. Va. Code § 29-6-10(4).

4. "This Grievance Board does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act . . .. 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 § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act." Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997).

5. The W. Va. Code § 29-6A-2 definition encompasses all types of discrimination, including discrimination based upon age. It is not necessary to analyze Grievants' claims under either the Human Rights Act or the ADEA, as such claims are subsumed by § 29-6A-2(d). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, W. Va. Univ., Docket No. 95-BOT-387 (Jan. 31, 1995). 6. A grievant alleging discrimination must establish a prima facie case by demonstrating:

(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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

7. Grievants failed to present a prima facie case of discrimination.

Accordingly, this 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: December 29, 1997

Footnote: 1

Grievants' supervisor responded on November 18, 1996, after a meeting with Grievants, that she could not grant relief at Level I. Appeal was made to Level II on that date, and the grievance was denied on December 2, 1996. Grievants appealed to Level III on December 4, 1996, and after a hearing held on March 31, 1997, the grievance was denied on April 11, 1997. Although the grievances were consolidated at Level III, Grievants filed separate appeals to Level IV on April 17, 1997. The cases were considered consolidated, and a Level IV hearing was held on July 8, 1997, before Administrative Law Judge Jerry A. Wright. This matter became mature for decision on September 9, 1997, and was subsequently reassigned to the undersigned for administrative reasons.

Footnote: 2

Grievant Gregory pointed out she is a member of the NAACP, however, she did not make the interview team aware of this. Likewise, she was not sure she had informed the interview team of her involvement in her husband's election campaign for the position of sheriff. An employee has a duty to make the employer aware of her qualifications for a position, and when she does not, she cannot then challenge the selection by placing that information into the record in a grievance proceeding and arguing this should have been a consideration. See Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996). Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989); Green v. Mason County Bd. of Educ., Docket No. 91-26-176 (July 26, 1991).