DONNA SHULL,

Grievant,

v v.

DOCKET NO. 97-HHR-417

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

HUNTINGTON HOSPITAL,

Respondent.

DECISION

Donna Shull (Grievant) grieves her non-selection for a Payroll Assistant position at Huntington Hospital. The grievance was waived at Level I; was denied at Level II; and was again denied at Level III, after a hearing in which Grievant also alleged favoritism in the selection process. After advancing the grievance to Level IV, Grievant and the Department of Health and Human Resources/Huntington Hospital (Respondent) agreed to submit the matter for decision based upon the record developed below. (See footnote 1) The grievance became mature for decision on January 15, 1998, the deadline for the parties' submissions of proposed findings of fact and conclusions of law. For reasons appearing below, the grievance must be denied.

FINDINGS OF FACT

1 1.

Grievant is employed with Respondent as an Office Assistant III at Huntington Hospital. Grievant has approximately eighteen years' experience in timekeeping. She has approximately ten years' experience working in the Personnel Department, with one year of Payroll Assistant experience. She was “backup” for the Payroll Assistant position at issue here for approximately three and one-half years. Grievant is a very good employee. (Tr. pp. 23-24, and 25-30; Grievant's Exhibit 1, sub-part 1.) 2 2.

In December of 1996, Respondent posted the position of Payroll Assistant in the Fiscal Services Department. The position had been vacated through retirement of the incumbent. Todd Deal, Director of Fiscal Services, was responsible for selecting an applicant. (See footnote 2) (Tr. pp. 4-5.)

3 3.

Mr. Deal was seeking a candidate who would be very assertive and would work independently and follow up on tasks completely. (Tr. pp. 5-6.)

4 4.

Several persons applied for the position. Mr. Deal chose to interview only qualified applicants from within State employment, and interviewed four applicants, including Grievant and the successful applicant, Robin Darby. (Tr. pp. 6-7.)

5 5.

Most of the interviews lasted ten to fifteen minutes, and Mr. Deal posed the same or similar questions to candidates. He explained the position briefly, went over the applicant's qualifications, and asked if the applicant had any questions.

6 6.

Mr. Deal asked Grievant if she becomes nervous working to meet deadlines, if she can work independently, if she could operate a computer, and what her strengths were. One applicant, Wilma Harris, could not remember being asked about computer experience or payroll experience, specifically, but recalled discussing information on her application and her job experience up to that point. (Tr. pp. 6-7, 14-15, and 24.)

7 7.

Mr. Deal discussed filling the position with Michelle Runkle, Director of Health Information Management. Mr. Deal informed Ms. Runkle he was going to select Ms. Darby for the position, “a couple of weeks ” before it was officially announced. Ms. Runkle did not knowwhether this was prior to interviews being conducted or not. Mr. Deal told Ms. Runkle that he did not want to select Grievant because of her association with Kieth Ann Dressler, Director of Human Resources. He thought that Grievant would report back to Ms. Dressler about what went on in Fiscal Services, if she were hired for the position. (Tr. pp. 20-22.)

8 8.

Grievant's supervisor, Ms. Dressler, informed Mr. Deal that Grievant was qualified for the Payroll Assistant position, and that she had been cross-trained to perform it while Ms. Dressler was supervising the Payroll Assistant position. Grievant would, in Ms. Dressler's opinion, be able to perform the duties of the Payroll Assistant position without any further training. Ms. Dressler also informed Mr. Deal that Grievant had excellent attendance. Mr. Deal asked Ms. Dressler whether Grievant's overtime would be a reason he could use to not hire her. Ms. Dressler informed Mr. Deal that the overtime Grievant had worked was due to extra projects, not to Grievant's inability to get her regular tasks done in an efficient manner. (Tr. pp. 25-30.)

9 9.

Mr. Deal was familiar with Grievant and her work only in an indirect manner, as Grievant worked in another department. Ms. Darby was employed under Mr. Deal's supervision, prior to being selected for the Payroll Assistant position at issue here. (Tr. pp. 8-10.)

10 10.

Like Grievant, Ms. Darby met the minimum qualifications for the Payroll Assistant position. She had a good basic clerical background, excellent computer skills, and an assertive personality, in Mr. Deal's opinion. (Tr. pp. 7-8.)

11 11.

Mr. Deal selected Ms. Darby for the position, following interviews. (Tr. p. 10.)

12 12.

Mr. Deal did not notify Grievant by mail that she was not the successful applicant. Rather, he unsuccessfully attempted to contact Grievant by telephone, and Grievant actuallydiscovered she had not been selected through the normal course of her work as an Office Assistant III. At least one other applicant was notified through a telephone call from Mr. Deal that she had not been selected for the position. (Tr. pp. 7 and 16.)

13 13.

Mr. Deal had not previously conducted employment interviews. He did not review materials available to him regarding the interview process, or Huntington Hospital's standard interview procedures, prior to conducting interviews for this position.

14 14.

Ms. Darby's “Application for Examination” form for the Payroll Assistant position is dated February 7, 1997. (Tr. pp. 8-10; Grievant's Exhibit 1, sub-part 20.)

DISCUSSION

In a non-disciplinary grievance such as this, Grievant bears the burden of proving all of the allegations of her grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Tucci v. W. Va. Dept. of Transp., Docket No. 94-DOH- 592 (Feb. 28, 1995). See W. Va. Code §29-6A-6, paragraph 5. 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).

However, the grievance procedure in W. Va. Code §§29-6A-1, et seq., is not intended to be a "super interview" for unsuccessful job applicants. In this context, it only allows review of the legal sufficiency of the selection process. Thibault v. Div. of Rehab. Services, Docket No. 93-HRS-489

(July 29, 1994). Accord, Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Unless proven arbitrary or capricious or clearly wrong, a State agency's decision made byappropriate personnel as to which candidate is most qualified for selection or promotion will be upheld. Ashley v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-070 (June 2, 1995); Thibault, supra; Sloan v. W. Va. Univ., Docket No. BOR-88-109 (Sept. 30, 1988). 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 difference of view. Sheppard and Gregory v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-186/187 (Dec. 29, 1997); Thibault, supra.

Here, Grievant showed that she was well-qualified for the posted position, having performed at least some of the tasks of the position previously. She also proved that she is a good employee generally, and would likely have been successful in the position. However, the fact that a candidate has the most experience or the most seniority does not necessarily entitle that candidate to a position. Lunau v. Div. of Corr., Docket No. 95-CORR-002 (May 31, 1995).

The successful applicant, Ms. Darby, was also qualified for the position. Mr. Deal explained his choice by stating he believed Ms. Darby to be the most assertive applicant, and he felt she would work independently to obtain information and follow up on tasks which required the involvement of other parts of the hospital. Nothing in the policies cited by the parties prohibits an interviewer from taking such subjective factors into consideration, and indeed subjective determinations regarding an applicant's personality and other qualities are a vital part of the selection process. DHHR's Policy Memorandum 2106, §B(6) clearly recognizes the importance of the interviewer's discretionary judgments, and states that selection decisions should be based upon such judgments. Mr. Deal explained his choice in a manner which related directly to job duties of the position. Itcannot be said as a matter of law that Mr. Deal's choice was clearly wrong, or arbitrary and capricious.

Grievant alleged favoritism in Mr. Deal's selection of Ms. Darby. W. Va. Code § 29-6A-2(h) defines favoritism as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.”

In order to make a prima facie showing of favoritism, Grievant must establish:

(a) that she is similarly situated, in a pertinent way, to one or more other

employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) have not, in a significant particular; and

(c) that such differences were unrelated [to the] actual job responsibilities of the grievant and/or the other employee, and were not agreed to by the grievant in writing.

Lunau, supra; citing Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant and Ms. Darby were similary situated as qualified, in-house applicants for the position. Mr. Deal knew Ms. Darby and her work performance, which influenced his decision- making. He also knew Grievant, although they had much less, and more indirect, contact. However, there is no logical or legal reason to prohibit basing hiring decisions, in part, on personal knowledge of the applicants, so long as the considerations are not arbitrary or capricious.

Both employees' applications were considered and both were granted interviews. That one employee was chosen while another was not, does not constitute detrimental treatment in a selection case, unless the choice is unrelated to job responsibilities, is otherwise arbitrary and capricious, or is otherwise contrary to law. Mr. Deal gave a rational explanation for selecting one of severalqualified applicants, and no favoritism is found under the circumstances here.

Integrally related to her claims, Grievant has consistently alleged that Mr. Deal had pre- selected Ms. Darby, prior to interviewing the applicants. (See footnote 3) Mr. Deal specifically denied selecting Ms. Darby prior to conducting the interviews. However, other witnesses gave testimony which calls his denial into question.

Ms. Runkle testified that she knew Ms. Darby would be selected approximately two weeks before the selection was officially announced. Assuming that the “official announcement” date was the date upon which Grievant was notified of his decision, “around February the 10th” (Tr. pp. 23- 24), the selection decision was made somewhere around January 28, 1997. However, the inexact language used by Ms. Runkle, and Grievant's somewhat vague estimation of when she was notified, mean that

just a few days' discrepancy makes a vital difference. Such does not provide a convincing basis for declaring that Mr. Deal made his selection prior to interviewing Grievant on January 31, 1997. Moreover, Ms. Runkle specifically refused to say Mr. Deal had made his selection prior to conducting interviews.

Ms. Dressler's testimony regarding Grievant's overtime implied that Mr. Deal was searching for justifications for not selecting Grievant. (See footnote 4) However, Ms. Dressler failed to indicate when theconversation about Grievant's overtime took place, and it cannot be assumed that Mr. Deal called Ms. Dressler prior to conducting the interviews. This evidence is insufficient to carry Grievant's burden of proving that Ms. Darby had actually and finally been selected prior to Grievant's interview.

Grievant further implied that some violation was evidenced by the fact that Ms. Darby's Division of Personnel application form was submitted after the interviews had been conducted. However, Grievant did not cite any statute, rule, regulation, policy or other source defining an “application” for a vacancy as the “Application for Examination” form, or requiring an applicant, who already is a State employee in the agency, to submit this form prior to being considered for a vacancy. Respondent asserts that there is no such provision, and that it is perfectly acceptable for an applicant to be interviewed prior to submitting such a form.

An applicant's likelihood of meeting minimum qualifications may be generally deduced from resumes or other information typically submitted with an application, or from one's personal knowledge of an applicant's qualifications. (See footnote 5) It may be within the interviewer's discretion whether to interview and even recommend for hire a person who has not previously been determined by the Division of Personnel to meet minimum qualifications. After all, if a recommended applicant is notminimally qualified, the Division of Personnel will undoubtedly so inform the agency, and, at worst, the posting and interview process may have to be repeated. Such a post-selection review by the Division of Personnel appears to be contemplated, as DHHR Policy Memorandum 2106, §IX(A) states that, “[w]hen it is unclear whether or not an applicant meets the minimum requirements, clarification may be obtained from the Division of Personnel...” At any rate, I am unaware of any legal requirement which supports Grievant's argument, and cannot find that the selection process here was fatally flawed by allowing submission of the form after the posting and interviewing had been completed. Grievant's claim on this point must fail.

Grievant did prove that Mr. Deal failed to follow departmental policy, in notifying unsuccessful

applicants by telephone. DHHR Policy Memorandum 2106 states that unsuccessful applicants “must be informed in writing that they have not been selected.” However, Grievant did receive notification, and there was no harm suffered as a result of Mr. Deal's deviation from policy. Most importantly, the selection decision would not have been altered had Mr. Deal followed the notification procedure. In other words, had this flaw been eliminated, the outcome would have been the same. Consequently, relief based upon this minor irregularity would be inappropriate. See e.g., Bell v. W.Va. Div. of Corr., Docket No. 89-CORR-670 (Oct. 31, 1990) (relief not granted when requested relief not reasonably related to harm done).

CONCLUSIONS OF LAW

1 1.

In a non-disciplinary grievance such as this, Grievant bears the burden of proving all of the allegations of her grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Tucci v. W. Va. Dept. of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995). See W. Va. Code §29-6A-6, paragraph 5. 2 2.

> 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. Univ., Docket No. 90-BOT-283 (Mar. 28, 1991).

3 3.

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. Thibault v. Div. of Rehab. Serv., Docket No. 93-HRS- 489 (July 29, 1994). Accord, Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

4 4.

Unless proven arbitrary or capricious or clearly wrong, an agency decision made by appropriate personnel as to which candidate is most qualified for selection or promotion will be upheld. Ashley v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR- 070 (June 2, 1995); Thibault, supra; Sloan v. W. Va. Univ., Docket No. BOR-88-109 (Sept. 30, 1988).

5 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 difference of view. Sheppard and Gregory v. W. Va. Dept. of Health and Human Resources, Docket

No. 97-HHR-186/187 (Dec. 29, 1997); Thibault, supra.

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W. Va. Code § 29-6A-2(h) defines favoritism as “unfair treatment of an employee asdemonstrated by preferential, exceptional or advantageous treatment of another or other employees.”

7 7.

In order to make a prima facie showing of favoritism, Grievant must establish:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

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(c) that such differences were unrelated [to the] actual job responsibilities of the grievant and/or the other employee, and were not agreed to by the grievant in writing.

Lunau v. Div. of Corr., Docket No. 95-CORR-002 (May 31, 1995); citing Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

8 8.

In this case, the agency was neither clearly wrong nor arbitrary or capricious.

9 9.

Grievant has not met her burden of proving that the selection process was fatally flawed, or that Respondent engaged in unlawful favoritism.

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.

Dated: January 26,1998 _____

JENNIFER J. MEEKS

Administrative Law Judge

Footnote: 1

Consequently, all references herein are to the Level III transcript ("Tr.") and exhibits.

Footnote: 2

Although Mr. Deal's name is printed as "Diehl" in the Level III Transcript, both Grievant and Respondent spell the name "Deal" in their proposed findings and conclusions.

Footnote: 3

Grievant did not cite any prohibition on pre-selection of a candidate for a position. However, basic notions of fairness dictate that all qualified applicants be given at least some minimal consideration for a position, when the law requires that position to be posted. Although the employer may have a good idea that a known applicant may ultimately be judged the most qualified, it must still act in good faith, allowing for the possibility that another applicant might prevail. Otherwise, the posting and selection process becomes a meaningless exercise which is, at best, a farce and a pretense.

Footnote: 4

Other testimony also implied Mr. Deal was searching for such justification, and that he was concerned that Grievant might disclose information about the position or Fiscal Services to Ms.Dressler. Basing a selection decision on the identity of an applicant's current supervisor would be manifestly invalid, being unrelated to the applicant's qualifications and beyond the applicant's control. However, the testimony may also be interpreted as showing Mr. Deal's concern with Grievant's trustworthiness and ability to keep confidences, which would be a valid consideration. Moreover, Mr. Deal himself testified to having an entirely different, valid reason for making his selection. Under these circumstances, Mr. Deal will not be required to reevaluate the qualifications of Grievant and Ms. Darby. However, he is cautioned to guard against giving weight to invalid considerations.

Footnote: 5