GAIL SKEEN MIHALIAK,

Grievant,

v. **DOCKET NO. 98-RS-126**

WEST VIRGINIA DIVISION
OF REHABILITATION SERVICES,

Respondent.

DECISION

Grievant, Gail Skeen Mihaliak, challenges Respondent's decision not to promote her to the position of Area Administrator of the Disability Determination Section ("DDS"), Clarksburg office. This grievance was initiated at level one on February 2, 1998, and Grievant's immediate supervisor was without authority to grant relief. (See footnote 1) Grievant appealed to level two, where Jane Johnstone, DDS Director, denied the grievance on March 5, 1998. A level three appeal was filed on March 12, 1998, where Grievant made numerous attempts to have a hearing scheduled. Finally, on April 17, 1998, Grievant appealed to level four, as is permitted by W. Va. Code §29-6A-3(a). Respondent did not show good cause for the delay in scheduling a level three hearing; therefore, this matter proceeded at level four. A hearing was held in the Grievance Board's office in Morgantown, West Virginia, on June 29, 1998. This matter became mature for decision on July 17, 1998, upon receipt of Grievant's written argument; Respondent filed no written proposals. (See footnote 2) The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by the Division of Rehabilitation Services ("DRS") in the Disability Determination Section in Clarksburg as a Rehabilitation Program Specialist. She has been employed by DDS since 1975.

2. Prior to April of 1995, when her job was reallocated, Grievant served as assistant to the

Area Administrator, and participated in making administrative decisions. She also had supervisory authority over other employees. However, since her job title changed in 1995, she no longer has supervisory duties and has less input regarding administrative decisions.

3. In October of 1997, DRS advertised the position of Area Administrator for the Clarksburg office of DDS. Grievant and three other candidates applied.

4. Robert Granata served as interim Area Administrator before the position was posted and filled.

5. After the applicants were interviewed and their qualifications evaluated, Mr. Granata was selected to fill the Area Administrator position.

6. Mr. Granata was selected because of his demonstrated leadership abilities as a DDS employee. He also had a much better interview than the other applicants, providing specific ideas on various issues, and he seemed more prepared for the interview than the others.

7. Grievant had more seniority than Mr. Granata and the other applicants.

Discussion

In a non-disciplinary matter, Grievant must prove the allegations of her complaint by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996). The grievance procedure is not intended to be a “super interview,” but rather, allows a review of the legal sufficiency of the selection process. Thibault v. Division of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994). This Grievance Board recognizes that promotion decisions are largely the prerogative of management. While individuals selected for promotion should be qualified and able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such promotion decisions will not generally be overturned. Ashley v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR- 070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket No. 89- WCF-208/209 (Aug. 7, 1989).

The West Virginia Division of Personnel's Administrative Rule, which applies to all state employees in the classified service, provides in Section 11.01(a):

> Whenever practical and in the best interest of the service, an appointing authority will fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the career service upon the basis of the employees' demonstrated capacity and quality and length of service. In filling vacancies, appointing authorities should make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees.

Grievant contends that DRS violated this provision in its selection of Mr. Granata. She believes that, based upon “demonstrated capacity and quality and length of service,” she was unquestionably the most qualified candidate. Grievant further argues that DRS' internal policy regarding promotions, which was applied to the candidates for the Area Administrator position, is inconsistent with Section 11.01 and should not have beenapplied. Section 1805 of the DRS personnel manual states, in part:

> Promotion will be based upon demonstrated job performance, potential for more difficult job duties and responsibilities, overall suitability for the higher level position, and meeting the minimum Division of Personnel training and experience requirements for the job classification.

Because the DRS officials who selected Mr. Granata emphasized “suitability” in making their choice, Grievant believes they considered a factor not set forth in Section 11.01, rendering the selection process contrary to the legislative rule. The undersigned disagrees.

Evelyn Sutler (See footnote 3) , who was a member of the interview and selection panel, testified that “suitability” is very important in the selection process, and it involves what is known of the candidate's job performance and how it relates to the job in question. What Ms. Sutler described could also be referred to as “demonstrated capacity,” which obviously requires an assessment of past job performance and abilities. It is then necessary to apply those demonstrated abilities to projections of the employee's potential performance in a new position. Grievant further contends that it was improper for the panel to assess what the employee would be able to do in the future, which is not a factor set forth in Section 11.01. Ms. Sutler stated that the interview process is an opportunity “to hear from the candidate what they will do in the position.” This is not inappropriate or contrary to Section 11.01. It would be nonsensical to expect agency officials not to attempt to assess candidates' abilities to perform the duties of a prospective position, which necessarily involves some educated guesswork about “future” abilities. This is inherent to the job selection process, and it is certainly not prohibited by the applicable regulations. Ms. Sutler explained that the three panel members evaluated the candidates separately, and each individually reached the conclusion that Mr. Granata was, by far, the best candidate. He had demonstrated excellent leadership skills and initiative throughout his employment with DRS, which were believed to be essential qualities for an Area Administrator. He had also demonstrated his abilities to perform the job while serving as the interim

administrator. Accordingly, Respondent properly complied with Section 11.01 in the selection process.

The remainder of Grievant's argument involves problems with the Clarksburg DDS office which led to an investigation in early 1997. It is Grievant's contention that the incidents which took place at that time somehow biased the interview panel against her, and that her non-selection for this position was an “informal, unofficial reprimand.” To explain briefly, complaints had been received regarding then Area Administrator Don Cross and his mismanagement of the office. One particular incident involved a party which was allegedly held to celebrate the departure of an unpopular co-worker from the Clarksburg office. Mr. Cross was ultimately removed from his position for this incident and other events, not described in the record, which involved mismanagement and creation of a hostile work environment. According to Ms. Sutler, Grievant was believed to have had some involvement in the party and had made some related inappropriate comments. Although discipline was discussed, Grievant was not reprimanded in any way and apologized for her behavior.

Ms. Sutler testified that the incident was neither discussed nor considered during the selection process for Mr. Cross' replacement, and that Mr. Granata was selected solely because of his qualifications. Although Grievant contends that Ms. Sutler's claims are “notcredible and internally inconsistent with her testimony”, this is not reflected in the record before the undersigned. In addition, no witnesses were presented to refute Ms. Sutler's statement that the “incident” was not a factor in the selection process.

Although Grievant has failed to establish that the 1997 incident was a factor in the selection of the new Area Administrator, if it had been considered, this would not have been improper. As Ms. Sutler explained to Grievant at the time of the investigation, her behavior was not appropriate for an employee in a leadership position. Accordingly, since Section 11.01 mandates selection based, in part, upon “demonstrated capacity,” conduct of this nature could also be considered to reflect negatively upon an employee's ability to serve in a management position.

Finally, Grievant has alleged that Ms. Sutler showed “favoritism” to Mr. Granata, because she saw the two of them having lunch together several times during early 1997. While the investigation was being conducted, Ms. Sutler served as interim administrator until a determination could be made as to whether or not to remove Mr. Cross from the position permanently. 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 establish a prima facie case of favoritism, a 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
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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 Corrections, Docket No. 95-CORR-002 (May 31, 1995); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant has not established favoritism in this case. Although Ms. Sutler may have had lunch with Mr. Granata, there was evidence that she and Grievant had a personal relationship, also. However, the undersigned does not find that the selection of Mr. Granata was based upon any improper considerations. The evidence shows that the hiring decision was based upon the relative qualifications of the applicants, a conclusion arrived at independently by the three panel members. "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." Shull v. Dept. of Health and Human Resources, Docket No. 97- HHR-417 (Jan. 26, 1998).

The following conclusions of law support the decision reached in this case.

Conclusions of Law

1. In a non-disciplinary matter, Grievant must prove the allegations of her complaint by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996).

2. While individuals selected for promotion should be qualified and able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such promotion decisions will not generally be overturned. Ashley v. W. Va. Dept. of Health

and Human Resources, Docket No. 94-HHR- 070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket No. 89- WCF-208/209 (Aug. 7, 1989). 3. "Whenever practical and in the best interest of the service, an appointing authority will fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the career service upon the basis of the employees' demonstrated capacity and quality and length of service." W. Va. Administrative Rule, Section 11.01(a).

4. Grievant has failed to prove by a preponderance of the evidence that the selection of Robert Granata for the position in question was unlawful, unreasonable, or arbitrary and capricious in any respect.

5. In order to establish a prima facie case of favoritism pursuant to W. Va. Code §29-6A-2(h), a 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 v. Div. of Corrections, Docket No. 95-CORR-002 (May 31, 1995); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

6. Grievant has failed to establish favoritism in this case.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievanceoccurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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.

Date: August 3, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Grievant's supervisor, Robert Granata, was also the successful applicant for the Area Administrator position at issue, and felt he could not be impartial in rendering any decision in this grievance.

Footnote: 2

Grievant was represented by Earl Langley, DDS Unit Supervisor, and Respondent was represented by attorney Robert Nunley.

Footnote: 3

The record does not indicate Ms. Sutler's title. However, her testimony indicates that she holds an administrative position with either DDS or DRS.