DANNY W. BARTH,

Grievant,

v. **Docket No. 97-BEP-552**

BUREAU OF EMPLOYMENT PROGRAMS,

Respondent.

D E C I S I O N

Grievant, Danny W. Barth, employed by the Bureau of Employment Programs/Unemployment Compensation Division (Respondent) as an Employer Programs Interviewer, filed a level one grievance on March 11, 1997, in which he stated, "[o]n 2/27/97 I verbally found out I had been denied a promotion to Employment Program Worker, Senior for Job Opportunities Announcement #781. I feel unfair labor practices were used in the selection process." For relief, Grievant requested instatement to the position, back pay and benefits, training offered by the employer to fulfill the duties, and in any other way to be made whole.

The grievance evaluators at both levels one and two lacked authority to grant the relief requested. The grievance was denied at level three following an evidentiary hearing held on September 17, 1997, and the matter advanced to level four on December 18, 1997. An evidentiary hearing was conducted on February 20, 1998. Grievant appeared in person and was represented by Marilyn Kendall, Respondent was represented by Deputy Attorney General Barry Koerber, Esq. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on April 20, 1998.

The following findings of fact are made based upon a preponderance of the relevant evidence contained in the record developed at levels three and four.

Findings of Fact

1. Grievant, Danny W. Barth, has been employed by the Bureau of Employment Programs for approximately seventeen (17) years, and is presently classified as an Employment Programs Interviewer, at the Unemployment Compensation Division in Fairmont, West Virginia.

2. Grievant applied for the position of Employment Programs Interviewer Senior, in the

Unemployment Compensation Division's Fairmont office, pursuant to a job posting dated December 12, 1996.

3. Three applicants, including Grievant and Mary Frances Johnson, were interviewed for the position by M. Lou Taylor, Supervisor or Office Manager for the Fairmont office, Dora Elsey, Manager of the Clarksburg office, and Janice Palmieri, Manager of the Morgantown office. Following the interview process, the third applicant withdrew her name from consideration.

4. Ms. Taylor's recommendation that Ms. Johnson be appointed to the position was accepted.

Argument

Grievant argues that he was the best qualified applicant because he has greater knowledge of applicable unemployment compensation laws, rules and regulations. He notes that the classification specification for the Senior position distinguishes it from the lower classifications in the series by the incumbent's “more specialized program knowledge . . .”. In light of this provision, Grievant asserts that Respondent erred in considering interviewing skills to be more important than specialized program knowledge. Second, Grievant argues that he has more years in service at the Unemployment Compensationoffice than Ms. Johnson, and both W. Va. Code §29-6-10(4) and Division of Personnel (Personnel) Administrative Rule 11.01(a) require that seniority be considered when filling a position which is a promotion. Third, his overall performance evaluations rate his work as “very good”, and Personnel Administrative Rule 16, creates a nondiscretionary duty for the employer to consider performance evaluations when making promotions. Grievant asserts that Respondent's failure to make the decision based upon these factors, and the fact that he occasionally has filled in for the Office Manager since 1984, rendered the decision arbitrary and capricious.

Respondent asserts that its selection process was primarily based on the candidates' prior experience in conducting interviews, and Ms. Johnson's experience was found to be superior to that possessed by the Grievant, who worked primarily in data entry. Ms. Johnson was also determined to be more qualified because she performed more complex work, took fewer breaks, and was a better writer. Although Grievant's seniority and knowledge of applicable laws were considered, Respondent concluded that Ms. Johnson was the most qualified applicant. Because the decision was based on the foregoing factors, Respondent argues that the selection was not arbitrary and capricious, or clearly wrong.

Discussion

In cases of nonselection, the grievant has the burden of proving the elements of his complaint 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.

"[A]n agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary and capricious or clearly wrong." Lilly v. W. Va. Dept. of Tax andRevenue, Docket No. 95-T&R-576 (Apr. 4, 1996), citing Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 7, 1994). Further, "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." Ward v. Dept. of Transp./Div. of Highways, Docket No. 96-DOH-184 (July 24, 1996); Thibault, supra. Thus, Grievant's burden is to demonstrate that Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision.

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.2d 276 (W. Va. 1982). 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 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.

Ms. Taylor stated that she recommended Ms. Johnson for the position because the most important qualification for the position was interviewing skills, and Ms. Johnson'sassignment primarily involved interviewing, while Grievant's primary duty had been data entry. She also believed Ms. Johnson exhibited more initiative, was capable of performing more complex work, took fewer breaks, and demonstrated better writing ability than Grievant. Even if Grievant's claim that he conducted a

substantial number of interviews per month is accepted, the reasons given for the selection of Ms. Johnson are reasonably related to the duties of the Senior position. The classification description for Employment Programs Interviewer, Senior, lists under “Distinguishing Characteristics” that “work at this level is characterized by the emphasis placed on more specialized program knowledge and/or lead-work duties.” Because Ms. Taylor testified that the incumbent would primarily be interviewing and writing reports, her selection of the applicant who had demonstrated the greater strength in those areas was logical. Respondent's selection of Ms. Johnson was not arbitrary and capricious or clearly wrong.

Grievant has also failed to prove that Respondent violated the statutory and regulatory provisions upon which he relies. W. Va. Code §29-6-10(4) provides, in pertinent part:

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 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.

Personnel's Administrative Rule 11.01(a) provides, in pertinent part:[w]henever 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 . . . .

Personnel's Administrative Rule 16, addressing performance evaluations, states in part:

The appointing authority shall consider performance evaluations in determining salary advancements and in making promotions, demotions, and dismissals. . . .

Where the grievant and the successful applicant meet the minimum qualifications for the position, but one applicant is more qualified than the grievant, their qualifications are not substantially equal or

similar, and seniority need not be considered. Sheppard and Gregory v. W. Va. Dept. of Health and Human Resources, Docket Nos. 97-HHR-186/187 (Dec. 29, 1997); Mowery v. W. Va. Dept. of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997). Because Grievant and Ms. Johnson were not found to possess substantially equal or similar qualifications, Respondent was not required to use seniority as a determining factor when filling the position of Employment Programs Interviewer, Senior. While it is evident that Grievant is a knowledgeable, productive employee, Respondent reasonably determined he was not the most qualified applicant for the position.

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

Conclusions of Law

1. In cases of nonselection, the grievant has the burden of proving the elements of his complaint 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. ofEnergy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code §29-6A-6. 2. An agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary and capricious or clearly wrong. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 4, 1996), citing Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 7, 1994). Grievant failed to prove that Respondent's selection of the successful applicant was arbitrary and capricious.

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. Grievant failed to prove by a preponderance of the evidence that his qualifications were substantially equal to those of the successful applicant.

4. Grievant failed to prove that Respondent violated Personnel's Rules 11.01(a) or 16, when it did not select him for the position in question.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, 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.

DATE: May 29, 1998_____ _____

SUE KELLER

Senior Administrative Law Judge