SARAH V. RANKIN,

Grievant,

v. **Docket No. 98-BEP-426**

BUREAU OF EMPLOYMENT PROGRAMS,

Respondent.

D E C I S I O N

Grievant, Sarah V. Rankin, employed by the Bureau of Employment Programs as an Assessment Case Management Counselor (ACMC) at the Job Service office in Clarksburg, West Virginia, filed a level one grievance on July 6, 1998, in which she alleged, “conflicts of past & present agency practice policy & procedure career development decisions of management/supervisor positions that have become available. BEP procedure policy adhering to merit principles, classification & selection of job openings. Posting of job opening and not followed [sic].”

The grievance was denied at levels one, two, and three, and the matter was advanced to level four on October 30, 1998. The grievance was subsequently transferred to the undersigned, and a level four hearing was conducted in the Grievance Board's Elkins office on June 25, 1999. Grievant was represented by Timothy R. Miley, Esq., and Respondent was represented by Gregory G. Skinner, Assistant Attorney General. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on August 16, 1999.

Prior to the level four hearing, a conference call was conducted to clarify the complaint to be addressed. Grievant's counsel advised that the grievance was limited to Grievant's nonselection for the position of Supervisor at the Clarksburg Job Service office, and the matter proceeded on that issue. The following formal findings of fact are made based upon the record in its entirety.

Findings of Fact

1. Grievant has been employed by the Bureau of Employment Programs since approximately February 14, 1991, when she was assigned the position of counselor trainee under the federally funded Job Training Partnership Act (JTPA).

2. From October 1994 until September 1996, Grievant held the position of grants counselor. Since September 1996, Grievant has held the position of ACMC case manager. Her responsibilities

in this assignment include assessing clients' work histories and test results, coordinating with service providers for various training programs, and making referrals as needed.

3. Grievant's job evaluations have rated her “very good” throughout her period of employment.

4. On or about February 25, 1998, Respondent listed job posting #902, seeking applicants for the position of Employment Programs Office Supervisor for the Clarksburg Job Service office.

5. Five applicants, including Grievant, were determined by Respondent to be minimally qualified for the position.

6. Steve Frantz, Field Supervisor for Respondent, reviewed the applications and interviewed the candidates who were determined to be minimally qualified for the position. He considered the candidates' education, work experience (private and public sector), management and supervisory experience, references, and interview performance, prior to making his recommendation. 7. By memorandum dated June 15, 1998, Respondent's Personnel Administrator, Thomas K. Rardin, notified Grievant that she had not been selected to fill the vacancy.

8. The successful applicant, Joe Baldwin, had been employed by the W. Va. Department of Health and Human Resources as an Employment Relations Specialist and later as a Family Support Specialist immediately prior to his appointment by Respondent.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); W. Va. Code §29-6A- 6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health & Human Serv. Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met her burden of proof. Hammer, supra.

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 it provides an opportunity to review the legal sufficiency of the selection process. Shull v. Dept. of Health & Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998); Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29,

1994). This Grievance Board recognizes thatpromotion decisions are largely the prerogative of management, and the 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. Sheppard v. W. Va. Dept. of Health & Human Resources, Docket Nos. 97-HHR-186/187 (Dec. 29, 1997).

W. Va. Code §29-6-1 provides that "[a]ll appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness. . . . " Further, the West Virginia Division of Personnel's Administrative Rule, which applies to all state employees in the classified service, states 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 argues that Respondent's decision to award the position to Mr. Baldwin was arbitrary and capricious because she was better qualified, and because Mr. Frantz considered erroneous information that she had experienced some difficulty in getting along with co-workers.

Grievant holds a Bachelor of Arts degree in English with a minor in psychology, and taught school from 1967-1970. After raising her family, she returned to work in 1978 as co-owner (with her husband) of a convenience store/gas station. In this capacity, she engaged in retail sales, ordered products, completed accounting responsibilities, and managed a staff of fifteen. Since 1991 she has been employed by Respondent in anumber of assignments, in which her performance was rated "very good", giving her great familiarity with the policies and programs of the office.

The evidence establishes that Mr. Baldwin has earned a Bachelor of Science degree in Industrial Psychology, and began his career working as an Assistant Manager at Ames Department Stores where he supervised ten clerks and two department managers. After holding this position from June to December 1989, he moved to ESM Corporation, as Human Resource Manager, where he supervised six clerks and four security and maintenance personnel. In December 1991, he left the employ of ESM and was self employed as a consultant on small business start up procedures until January 1993, when he accepted employment with the Department of Health and Human Resources.

Grievant asserts that Mr. Baldwin had no experience, supervisory or otherwise, in working with

Job Service, nor is there any evidence that he was even acquainted with the policies and procedures of the office. Grievant also questions why he left ESM, and suggests that his varied work history raises “red flags”. Mr. Frantz testified that he understood Mr. Baldwin had left ESM for career advancement, and indicated that his work history caused no concern. He concluded that Mr. Baldwin had more supervisory experience than Grievant. He did not find that Grievant's familiarity with the office made her more qualified to hold the supervisory position.

Mr. Frantz stated that he had heard from the previous office manager that Grievant experienced communication problems with other staff members. This testimony is undermined; however, by the fact that any such difficulties were never put in writing, ornoted on her evaluations. Grievant additionally stated that the previous manager may bear her some ill will since she had filed a sexual harassment complaint against him.

In applying the arbitrary and capricious standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Generally, an action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered; explained or reached the 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 opinion. See Bedford County Memorial Hosp., 769F.2d 1017 (4th Cir. 1985). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of the facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

While Grievant has supervisory experience and familiarity with the Job Service office, its policies, and daily functioning, she has failed to prove that Mr. Frantz's determination that another applicant was more qualified for a supervisory position was arbitrary and capricious, or clearly wrong.

In addition to the foregoing, the following Conclusions of Law are appropriate in this matter.

Conclusions of Law

1. In a grievance which does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. &

State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89- DHS-72 (Nov. 29, 1990).

2. 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 it provides an opportunity to review the legal sufficiency of the selection process. Shull v. Dept. of Health & Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998); Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

3. While individuals selected for promotion should be qualified and able to perform the duties of their new position, promotion decisions are largely the prerogative of management, and the 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. Sheppard v. W. Va. Dept. of Health & Human Resources, Docket Nos. 97-HHR-186/187 (Dec. 29, 1997).

4. Grievant failed to prove by a preponderance of the evidence that Respondent's failure to select her for the position of Office Supervisor was in violation of any statute, policy, rule, regulation, written agreement, was arbitrary and capricious, or clearly wrong.

Accordingly, the 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 grievance occurred. Any 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. However, the appealing party is required by W. Va. Code §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: September 29, 1999 _____

Sue Keller

Senior Administrative Law Judge