

**RICHARD W. CROUSER,**

**Grievant,**

**v.**

**DOCKET NO. 00-T&R-239**

**WEST VIRGINIA DEPARTMENT OF**

**TAX AND REVENUE,**

**Respondent.**

## **D E C I S I O N**

Grievant, Richard W. Crouser, filed this grievance against his employer, the West Virginia Department of Tax and Revenue ("Tax") on July 6, 2000, protesting his non- selection for the position of Tax Unit Supervisor I in the Internal Auditing Division, Corporate Net/Franchise Tax Unit. Grievant alleges he is more qualified than the successful applicant, Beulah Matheney. Grievant requests instatement into the position, and any and all benefits to which he would be entitled. The grievance was denied at level one on July 6, 2000, by Grievant's immediate supervisor, Gail Kedward. The grievance was again denied at level two on July 12, 2000, by Linda Bennett, Acting Director, Internal Auditing Division. Grievant appealed to level three, but requested the matter be submitted on the record developed at levels one and two. An informal conference was held between James E. Dixon, Grievance Evaluator, Grievant, Ms. Bennett, and Tracey Henline, Esq., to discuss Grievant's request, and to inform him of his right to a level three hearing. Grievant maintained he wanted the matter decided on the record, and the grievance was denied at level three by Mr. Dixon, by decision dated July 21, 2000. Grievant appealed to level four on July 28, 2000, and a level four hearing was held on September 5, 2000, at which time this case became mature for decision. Grievant appeared pro se, and Tax was represented by Tracy L. Henline, Esq.

### **SUMMARY OF EVIDENCE**

### Level Three Grievant's Exhibits

Ex. 1 -

Grievance form with attachments, including statement of grievance, relief sought, listing of Grievant's qualifications and other information regarding Grievant's training and experience, and a written statement regarding gender discrimination.

Ex. 2 -

Levels one and two decisions.

Ex. 3 -

July 13, 2000 letter from Grievant to Tax Commissioner Joseph M. Palmer.

Ex. 4 -

Joint motion to forego level three hearing.

### Level Three Tax Exhibits

Ex. 1 -

Tax's objections to certain submissions of evidence by Grievant.

### Level Four Grievant's Exhibits

Ex. 1 -

Packet of information describing Grievant's qualifications and experience.

Ex. 2 -

Handwritten statement of Grievant regarding gender discrimination, dated July 18, 2000.

Ex. 3 -

Fortune Magazine, New Thinking on the Causes -And Costs-of Yes Men (And Women), November 28, 1994.

Ex. 4 -

Handwritten statement of Grievant regarding work-related experience and qualifications.

Ex. 5 -

Handwritten statement of Grievant regarding annualized collection statistics.

Ex. 6 -

July 27, 1998 letter agreement by George Hall, Gail Kedward, Grievant, and James E. Dixon.

#### Level Four Tax Exhibits

Ex. 1 -

Job Posting for Tax Unit Supervisor I, dated May 5, 2000.

Ex. 2 -

Classification Specification for Tax Unit Supervisor I.

Ex. 3 -

Application for Examination of Beulah Matheny.

Ex. 4 -

June 29, 2000 letter from Linda Bennett to Grievant, with attached Application for Examination of Grievant.

#### Testimony

Grievant testified in his own behalf. Tax presented the testimony of Linda Bennett.

#### FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant, at all times relevant, was employed by Tax as a Tax Audit Clerk, Senior, in the Internal Auditing Division.
2. Ms. Beulah Matheney was also employed by Tax as a Tax Audit Clerk, Senior. LIV Tax Ex.

3.

3. On May 5, 2000, a vacant Tax Unit Supervisor I position in the Internal Auditing Division, Corporate Net/Franchise Tax Unit, was posted. LIV Tax Ex. 1.

4. Ten individuals, including Grievant and Ms. Matheny, applied for the position. LIV Tax Exs. 3, 4.

5. Interviews were conducted of all of the applicants by Linda Bennett, then Acting Director of the Internal Auditing Division. She asked everyone basically the same questions, and allotted the same amount of time for each interview.

6. Ms. Bennett also spoke with the incumbent, Dana Miller, regarding the applicants. Mr. Miller recommended Ms. Matheny for the position. 7. Ms. Bennett selected Ms. Matheny for the Tax Unit Supervisor I position on or about June 12, 2000. She also had a second choice should Ms. Matheny decline the offer. The second choice was not Grievant.

8.

Ms. Matheny accepted the position of Tax Unit Supervisor I.

### DISCUSSION

As this is a non-disciplinary grievance, it is incumbent upon Grievant to prove the charges in his grievance by a preponderance of the evidence. W. Va. Code § 29-6A-6. Grievant maintains his qualifications for the Tax Unit Supervisor I position are greater than those of Ms. Matheny's. He also alleges he is a victim of favoritism and gender discrimination.

If a grievant can demonstrate the selection process was so significantly flawed that he or she might reasonably have been the successful applicant for a position, the Grievance 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).

However, the grievance procedure set forth 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. W. Va. 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). Unless proven arbitrary or capricious or clearly wrong, a State agency's 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). 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.

In this matter, both Grievant and the successful applicant possess the minimum basic qualifications for the position established by the Division of Personnel. Grievant has more formal education and training, while the successful applicant had more work-related experience. The job description for Tax Unit Supervisor I allows liberal substitution for educational requirements through work-related experience.

Ms. Bennett testified that, in selecting the person to fill this vacancy, she considered the Division of Personnel's criteria for the minimum requirements and the qualities needed for effective supervision. These qualities include the ability to organize and plan activities and programs for which the supervisor is responsible, and the ability to monitor and evaluate employees. Ms. Bennett testified the most important criteria for this position, were organizational skills, planning skills, the ability to keep on top of the work, and communications skills. Ms. Bennett believed Ms. Matheney possessed these qualities, while she was not convinced Grievant had the ability to effectively supervise, in part because he had difficulty communicating ideas with others. There is nothing which prohibits an interviewer from taking subjective factors into consideration, and indeed, subjective determinations regarding an applicant's personality and other qualities are a vital part of the selection process. Shull v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998). Based upon the evidence presented, Grievant has failed to prove the selection of Ms. Matheney was arbitrary, capricious, or clearly wrong.

Grievant also alleges favoritism and gender discrimination in the selection of Ms. Matheney for the position. 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 establish a prima facie case of favoritism, grievants must establish the following:

(a)

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

(b)

that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded them;

and,

(c)

that the difference in treatment has caused a substantial inequity to them and that there is no known or apparent justification for this difference.

Frantz v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999); Blake v. W. Va. Dept. of Transp., Docket No. 97-DOH-416 (May 1, 1998). See McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). As with discrimination, if grievants establish a prima facie case of favoritism, a respondent may rebut this showing by articulating a legitimate reason for its action. However, the grievants can still prevail if they can demonstrate that the reason proffered by respondent was mere pretext. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

W. Va. Code § 29-6A-2(d) defines “discrimination” 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.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

With regard to his favoritism claim, Grievant has proven he is similarly situated to Ms. Matheney, another employee, who has been treated differently by his employer than he, in a significant particular, i.e., selection for the Tax Unit Supervisor I position. However, Grievant has failed to meet the third prong of the test for favoritism. Clearly, the evidence presented demonstrates there was a justification for this action in that Ms. Bennett determined Ms. Matheney was the best qualified applicant for the position. Grievant has failed to prove his claim of favoritism.

With regard to gender discrimination, Grievant testified that, since 1998, no man at his level within his department has been promoted, and believes there is a glass ceiling in place for men in his department. He testified, and Ms. Bennett confirmed, that there are thirteen (13) front line supervisors, of which only two (2) are male. Of those two men, one has been with the agency since 1966 and one since 1998.

Ms. Bennett testified that gender was not a consideration in her decision to fill the Tax Unit Supervisor I position and, in fact, her second choice for the position was a man. Further, she testified that of seventy-nine (79) total field positions in Internal Auditing, fifteen (15) were male, equaling approximately eighteen percent (18%) of the total positions. Likewise, of the thirteen (13) supervisors, two (2) were male, again equaling approximately eighteen percent (18%). Thus, the number of male supervisors was not disproportionate to the number of male employees as a whole. As Ms. Bennett pointed out, the workforce in Internal Auditing is predominantly a female workforce.

In order to prevail on this argument, Grievant must show that less qualified female applicants were selected for promotion over more qualified male applicants based on their gender. As Grievant has failed to prove that Ms. Matheney was less qualified than he, he has also failed to prove he is the

victim of gender discrimination.

### CONCLUSIONS OF LAW

1. As this is a non-disciplinary grievance, it is incumbent upon Grievant to prove the charges in his grievance by a preponderance of the evidence. W. Va. Code § 29-6A-6.

2. If a grievant can demonstrate the selection process was so significantly flawed that he or she might reasonably have been the successful applicant for a position, the Grievance 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. However, the grievance procedure set forth 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. W. Va. 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). Unless proven arbitrary or capricious or clearly wrong, a State agency's 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).

4. 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.

5. 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.”

6. W. Va. Code § 29-6A-2(d) defines “discrimination” 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.”

7. Grievant has failed to prove by a preponderance of the evidence that Tax's selection of Beulah Matheney was arbitrary, capricious, or clearly wrong.



8. Grievant has failed to prove by a preponderance of the evidence that his non- selection for the Tax Unit Supervisor I position was the result of favoritism or gender discrimination.

Accordingly, this grievance is **DENIED**.

Any party 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 § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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**MARY JO SWARTZ**

**Administrative Law Judge**

**Dated: September 21, 2000**