JAMES M. DENNISON,

Grievant,

v. **Docket No. 00-HHR-139**

DEPARTMENT OF HEALTH & HUMAN RESOURCES/SHARPE HOSPITAL,

Respondent.

DECISION

James M. Dennison ("Grievant") initiated this proceeding on December 2, 1999, alleging his employer, William R. Sharpe, Jr., Hospital ("Sharpe Hospital"), used an unfair selection process in filling a Building Maintenance Supervisor position. He seeks as relief "to be made whole in every way to include but not limited to a system of interviewing that is fair to all candidates." The grievance was denied at level one on December 10, 1999, and at level two on January 10, 2000. A level three hearing was held on March 21, 2000, followed by a written decision, denying the grievance, dated March 28, 2000. Grievant appealed to level four on April 10, 2000. After several continuances granted for good cause shown, a level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on October 27, 2000. Grievant was represented by Ron Grogg, union representative, and Respondent was represented by counsel, Anthony D. Eates, II. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on December 18, 2000. (See footnote 1)

The following findings of fact are made from a preponderance of the credibleevidence of record.

Findings of Fact

1. Grievant is employed by Respondent Sharpe Hospital. (See footnote 2)

2. In early November, 1999, Sharpe Hospital posted a job vacancy for the position of Building Maintenance Supervisor II.

3. Assistant Administrator Chip Garrison formed a committee for the purpose of interviewing applicants for the position, which consisted of himself, Clinical Services Coordinator Pam Carpenter, and Charles Helmick, a building maintenance mechanic.

4. Mr. Helmick was selected to serve on the interview committee as a representative of the maintenance department of Sharpe Hospital. He has been employed by Sharpe Hospital for over 28 years and is familiar with the required duties of the Building Maintenance Supervisor II.

5. Three applicants were interviewed for the position--Kennard McHenry, Gary Rittenhouse, and Grievant.

6. The interview committee asked the applicants a series of questions which had been prepared by Mr. Garrison. Each applicant's responses were scored by the committee members as poor, average, good, or excellent. A poor response was given zero points; an average response was given two points; a good response was given three points; and an excellent response was given five points.

7. All three applicants were deemed by Mr. Garrison to be technically qualified for the position, so the interview questions focused upon their supervisory experience andskills.

8. Mr. McHenry received the highest score and was selected to fill the position. He has been employed by Sharpe Hospital for approximately 35 years, serving as Building Maintenance Supervisor I since 1988. Mr. McHenry had filled in for the former Building Maintenance Supervisor II on several occasions over the past four years, demonstrating his ability to perform the duties required of the position.

9. At the time of the interviews, Mr. McHenry was Mr. Helmick's acting supervisor.

10. Mr. McHenry did not receive his highest interview score from Mr. Helmick.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

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. W. Va. Dep't 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). See Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Moreover, an 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. of Dep't Health & Human Resources, Docket Nos. 97-HHR-186/187 (Dec. 29, 1997). See Ashleyv. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995); Thibault, supra. 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, supra; Thibault, supra.

In the instant case, Grievant has provided no information comparing his qualifications to those of Mr. McHenry. Rather, he contends that Mr. Helmick should not have been part of the interview committee. This contention appears to based upon Grievant's belief that Mr. Helmick was either unqualified to participate in selection for the position in question or that he was biased in favor of Mr. McHenry, who was his supervisor. As to Mr. Helmick's qualifications to serve on the committee, Sharpe Hospital's Assistant Administrator, Mr. Garrison, explained that he believed it would be helpful to have an employee of the maintenance department on the committee, because such an individual would be intimately familiar with the job duties of the supervisor of the department. In addition, Respondent introduced Sharpe Hospital's policy on employee selection, which provides for a selection committee and interviews during which applicants are asked similar questions with ratings of their responses. Respondent contends that this policy was followed, that the interview process was completely fair, and that there is no evidence that Mr. Helmick showed any type of bias in favor of Mr. McHenry.

Although not articulated as such, Grievant's contentions regarding Mr. Helmick's bias are tantamount to favoritism. Favoritism is defined by W. Va. Code § 29-6A-2(h), as "unfair treatment of an employee as demonstrated by preferential, exceptional oradvantageous treatment of another or other employees." In order to establish a prima facie showing of favoritism, a grievant must establish the following:

(a) that he is 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 him;

and,

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

Frantz v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999); Blake v. W. Va. Dep't 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). If grievant establishes a prima facie case of favoritism, a respondent may rebut this showing by articulating a legitimate reason for its action. However, the grievant can still prevail if he can demonstrate that the reason proffered by respondent was mere pretext. Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Grievant has failed to establish a prima facie case of favoritism. Although he is similarly situated to Mr. McHenry in that they both interviewed for the position, and Mr. McHenry received advantageous treatment by being selected, DOH has explained the reasoning behind its decision. Respondent's evidence clearly shows that Mr. McHenry was an experienced, qualified individual who had served in the position in question on numerous occasions, demonstrating his ability to perform the required job duties. Since there has been no evidence indicating that Grievant was more qualified, no favoritism has been shown. Indeed, as Mr. Garrison explained, there was no bias indicated in thisselection process, because Mr. McHenry did not even receive his highest score from Mr. Helmick, who was allegedly biased in Mr. McHenry's favor.

Moreover, Grievant has not proven that the selection process or the decision to select Mr. McHenry was arbitrary and capricious or clearly wrong. Respondent's selection policy was followed, the candidates were fairly evaluated, and the successful applicant was clearly qualified for the position. Accordingly, Grievant has failed to meet his burden of proof in this case.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In non-disciplinary matters, a grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. An 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. of Dep't Health & Human Resources, Docket Nos. 97-HHR-186/187 (Dec. 29, 1997). See Ashley v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995).

3. Favoritism is defined by W. Va. Code § 29-6A-2(h), as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

4. In order to establish a prima facie showing of favoritism, a grievant must establish the following:

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5. Grievant has failed to prove by a preponderance of the evidence that Respondent's selection of Kennard McHenry for the Building Maintenance Supervisor II position was arbitrary and capricious or clearly wrong.

6. Grievant has failed to establish a prima facie case of favoritism.

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 grievance occurred, 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. 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 appealingparty 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.

Date: January 19, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant did not file a post-hearing argument.

Footnote: 2

Grievant did not testify at either hearing in this grievance, and the record contains no information regarding his job classification or length of employment.