PATRICIA ABBOTT and JUDY ANDERSON,

Grievants,

v v.

DOCKET NO. 00-DOA-342

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION/

PUBLIC EMPLOYEES INSURANCE AGENCY and

WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants, Patricia Abbott and Judy Anderson, filed grievances against their employer, the West Virginia Department of Administration/Public Employees Insurance Agency ("DOA") and the West Virginia Division of Personnel ("DOP"), on February 2, 2000, alleging:

> I feel that I have been unjustly required to take a test for an Accounting Assistant III position that has not been a practice in the past. I believe the test does not reflect the duties that I perform. I feel the test is not a fair representation of my duties, and only a formality to hold me back in my career. I have already proven my abilities through a desk audit given by the Division of Personnel. My protest is taking a test for a classification I am already qualified for.
>
> Relief sought: Receive classification of Accounting Assistant III with out prejudice.

Grievants' immediate supervisor, Joe Estep, was without authority to grant the relief sought, and denied the grievances on February 4, 2000. The grievances were again denied at level two on February 7, 2000, by Kim Covert, Chief Financial Officer. Grievantsappealed to level three, where their grievances were consolidated, and a level three hearing was held on October 18, 2000. Grievance Evaluator B. Keith Huffman denied the grievances by decision dated October 23, 2000, and Grievants timely appealed to level four on October 30, 2000. A level four hearing was held on

May 1, 2001, in the Grievance Board's Charleston, West Virginia office, and this matter became mature for decision on May 18, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. (See footnote 1) Grievants were represented by Fred Tucker, UMWA-WVSEU representative, DOA was represented by B. Keith Huffman, Esq., and DOP was represented by Robert D. Williams, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

LIII Grievants' Exhibits

Ex. 1 -

Abbott grievance forms; January 14, 2000 letter from Robert L. Ayers to Joe Smith.

Ex. 2 -

Anderson grievance forms; January 14, 2000 letter from Robert L. Ayers to Joe Smith.

DOA Exhibits

None.

LIII DOP Exhibit

Ex. 1 -

Adkins v. Civil Service Commission, 160 W. Va. 720, 240 S.E.2d 428 (1977).

LIV DOP Exhibits

Ex. 1 -

September 29, 1999 memorandum from Lowell D. Basford to Robert L. Ayers re: Classification Review - Premium Accounts.Ex. 2 -
West Virginia Division of Personnel Administrative Rule (eff. July 1, 1998).

Ex. 3 -

February 7, 1991 memorandum from Michael T. Smith to All Agency Heads/ Agency

Personnel Staff re: Revised Policy on Waiving Promotional Examinations.

Testimony

Grievants testified in their own behalf, and presented the testimony of Marie Terry, L. Denise Tyler, Bernadette Curry, Barbara Beane, and Joseph Estep. Respondents presented the testimony of Michael Campbell, Yvonne Wilhelm, and James Wells.

FINDINGS OF FACT

The material facts in this grievance are not in dispute, and are set forth in the following findings of fact.

1. Grievants are classified as Accounting Technician II's and are employed by the West Virginia Public Employees Insurance Agency (“PEIA”).

2. On or about September 1999, Grievants submitted West Virginia Division of Personnel Position Description Forms to DOP for review, seeking reallocation of their positions from Accounting Technician II to Accounting Technician III.

3. On September 28, 1999, DOP notified PEIA that its initial review of Grievants' position description forms indicated that Grievants' positions were properly allocated to the classification of Accounting Technician II.

4. In or about October, 1999, at the request of PEIA, a desk audit of Grievants' positions was conducted by DOP. The desk audit indicated that the positions should be reallocated to the classification of Accounting Technician III, and in January, 2000, the positions were reallocated. 5. Grievants have successfully been performing the duties of Accounting Technician III for several years.

6. The accounting technician classifications in question are part of a classification series which requires assembled examinations to qualify for appointment, and Grievants have not taken any assembled examination to qualify for promotion consideration.

7. On January 14, 2000, Robert L. Ayers, Director of PEIA, requested by letter that the Acting Director of the Division of Personnel waive the Accounting Technician III testing requirement for Grievants based upon their performance of audit and accounting duties since 1982.

8. DOP declined to waive the promotional testing requirement, and Grievants were afforded the opportunity to take the requisite assembled examination.

9. Grievants refused to take the assembled examination, and on January 24, 2000, DOP denied Grievants' request to be certified to the position allocated for the classification of Accounting Technician III.

10. On or about January 29, 1999, Joe Smith was appointed Acting Director of DOP. Since that date, DOP has not waived promotional testing requirements for any employees within the classified service. (See footnote 2) 11. Marie Terry, Barbara Beane, and Joe Estep qualified for promotion from the classification of Supervisor I to Supervisor II as the result of unassembled examination ratings.

12. Yolanda Tyler proposed to have been promoted from the classification of Insurance Assistant I to Insurance Assistant II without having to take any qualifying examination; however, no such classifications exist within the classification plan of the classified service, and Ms. Tyler's promotion, if indeed she received one, occurred prior to January 29, 1999.

13. Bernadette Curry proposed to have been promoted from the classification of Office Assistant II to Office Assistant III without having to take any qualifying examination; however, Ms. Curry had successfully completed the entire battery of assembled examinations for the classification series of Clerk I-V and Secretary I-III, and the clerk series became the office assistant series under the statewide reclassification project. Ms. Tyler's promotion occurred prior to January 29, 1999.

DISCUSSION

Pursuant to W. Va. Code § 29-6A-6, Grievants bear the burden of proof to establish by a preponderance of the evidence that DOP's decision to require them to take a written examination to be eligible to continue in positions reallocated from the classification of Accounting Technician II to Accounting Technician III, was clearly wrong, arbitrary, capricious, contrary to regulation, or otherwise illegal and improper. Bonnett v. W. Va. Dept. of Tax and Revenue, Docket No. 99-T&R-118; Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievants allege it is arbitrary and capricious torequire them to take a written examination to qualify for positions when they have been successfully performing the duties and responsibilities of those positions. Grievants also allege discrimination, claiming other employees have been promoted without having to take

qualifying examinations.

Respondents argue that it is within the authority of DOP to require candidates for promotion to demonstrate by means of a written examination that they are qualified to hold the positions for which they are a candidate, notwithstanding the willingness of the candidates' supervisor to promote them without requiring the written examination, citing Adkins v. Civil Service Commission, 160 W. Va. 720, 241 S.E.2d 428 (1977). Respondents further deny Grievants' allegations of discrimination, contending those with whom Grievants' compare themselves are not similarly situated to Grievants.

Grievants' claim that it is arbitrary and capricious for DOP to require them to take a written examination in order to qualify for promotion to Accounting Technician IIIs must fail. Section 11.1(a) of the DOP's administrative rule, 143 C.S.R. 1, states in part that “[w]henever practical and in the best interest of the service, an appointing authority shall fill a vacancy by promotion...”. Pursuant to this rule, Grievants could qualify for promotion to the reallocated positions in question; however, the classification in question is part of a classification series which requires assembled examinations. Section 3.10 of the administrative rules defines the term “assembled examination” as “[a]n examination which, due to the testing process used, necessitates that applicants come to a testing location”, and pursuant to Section 6.1(a), assembled examinations consist, in part, of writtenexaminations “constructed to reveal the capacity of the applicant for the particular position for which he or she is competing...”.

Consequently, pursuant to Section 11.1(b) of the administrative rules, DOP has a duty to insure the qualifications of personnel appointed to positions within the classification plan of the classified service. DOP may, at the request of the appointing authority, waive the promotional testing requirement; however, DOP is not required to do so, an issue which the West Virginia Supreme Court of Appeals addressed in the matter of Adkins, supra, in which the Court held:

> The Director of Personnel of the West Virginia Civil Service Commission may require a candidate for promotion to demonstrate by means of a written examination that he is qualified to hold the position for which he is a candidate, notwithstanding the willingness of the candidate's supervisor to promote him without requiring the candidate to pass a written examination.

Id., Syl. Pt. 1, LIII DOP Ex. 1.

Further, Section 4.3 of the administrative rules provides that “[w]hen a position is reallocated to a

different class, the [State Personnel Board] shall not consider the incumbent eligible to continue in the position unless he or she would have been eligible for original appointment, promotion, transfer, or demotion, to a position of the new class while serving in the position as previously allocated." Finally, this position is set forth in DOP's Policy on Waiver of Promotional Examinations, effective January 1, 1991. Since Grievants' positions have been reallocated to the classification of Accounting Technician III, and Grievants have not taken the assembled examination to qualify for certification to a position allocated to the Accounting Technician III, DOP was justified in refusing to waive thepromotional testing requirements for Grievants. Accordingly, Grievants have failed to establish that they are entitled to have the promotion examination requirement waived, or that Respondents' actions were clearly wrong, arbitrary or capricious, or contrary to regulation.

With regard to Grievants' claim of discrimination, they have likewise failed to carry their burden of proof. 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 Grievants must show:

(a)

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

(b)

that they have, to their detriment, been treated by their 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 Grievants and/or the other employee(s) and were not agreed to by the Grievants 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 Grievants establish 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). Grievants have failed to establish they are similarly-situated to any of the employees they identified because none of those employees were required to take an assembled written examination in order to qualify for promotion into the positions sought by Grievants.

CONCLUSIONS OF LAW

1. The Director of Personnel of the West Virginia Civil Service Commission may require a candidate for promotion to demonstrate by means of a written examination that he is qualified to hold the position for which he is a candidate, notwithstanding the willingness of the candidate's supervisor to promote him without requiring the candidate to pass a written examination. Adkins v. Civil Service Commission, 160 W. Va. 720, 241 S.E.2d 428 (1977).

2. Grievants have failed to prove by a preponderance of the evidence that the decision of DOP to require written assembled examinations for the position of Accounting Technician III was clearly wrong, contrary to law, arbitrary, capricious, or a violation of any statute, regulation or policy.

3. Discrimination is defined by W. Va. Code § 29-6A-2(m) 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.”

4. Grievants have failed to establish a prima facie case of discrimination.

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. 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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: June 11, 2001

Footnote: 1 *Grievants and DOP submitted briefs, and DOA waived its right to submit a post- hearing brief.*

Footnote: 2 *Effective April 1, 2001, Nichelle Perkins was appointed Director of DOP, and Joe Smith was returned to the position of Senior Assistant Director, Employee Relations.*