VERNON CATLETT,

Grievant,

v.

Docket No. 04-HHR-089

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU

FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

Vernon Catlett ("Grievant") initiated this proceeding on November 12, 2003, challenging his non-selection for the position of Child Protective Services Worker Trainee ("CPS Worker position"), alleging as follows:

> On November 5, 2003, I believe that, on the basis of my sex, that I was denied the position of child protective services worker trainee. This is in violation of Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, sex, or national origin. Also, I believe that the fairness of the interviewing process was compromised by the fact that two of the three interviewers were relatives, that the selected panel of interviewers did not include the male gender, and that one of the interviewers strongly complained that my interview answers were long.

The grievance was denied at level one on November 12, 2003, and at level two on November 24, 2003. A level three hearing was conducted on January 28, 2004, and the grievance was denied in a decision dated February 23, 2004. Grievant appealed to level four on March 2, 2004. In lieu of a level four hearing, the parties elected to submit this matter for a decision based upon the lower level record. This matter became mature for consideration on April 16, 2004, when the complete level

three record was received by the undersigned. Grievant was represented in this grievance by counsel, Christopher P.Stroech, and Respondent was represented by Ron Anderson at level three (See footnote 1) and by Senior Assistant Attorney General B. Allen Campbell at level four.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent Department of Health & Human Resources ("DHHR") as a Social Service Worker II ("SSW") since January of 1996.

2. On October 29, 2001, Grievant and DHHR signed an agreement providing him a federally-funded stipend so that Grievant could complete his master's degree. Pursuant to the stipend agreement, Grievant completed an internship as a CPS Worker. Grievant received his Master's in Social Work in August of 2003, and has continued to serve in his position as a SSW, concentrating on daycare. He is a licensed social worker.

3. DHHR's obligation under the stipend agreement is to "assign/continue [Grievant] in a full time position determined by the Department to be suitable and available in a Title IV-E eligible program administered or supervised by the Department" after the completion of Grievant's education and internship.

4. The CPS Worker position was posted in September of 2003. Grievant and two other applicants were interviewed for the position. All three applicants were minimally qualified. 5. A similar position had been posted in the summer of 2003, and Grievant and others were interviewed for the position. Grievant was ranked fifth of five candidates during that application and interview process, but he has not grieved that non-selection.

6. An interview team was selected by Kathryn Boylan, Community Services Manager for Morgan, Berkeley and Jefferson Counties. The original team consisted of Paul Denchy, an Economic and Family Support Supervisor, Leslie Allen, a CPS Supervisor, and Judy Darlington, a Support Services Supervisor.

7. Mr. Denchy had a previous obligation on the day of the scheduled interviews, so Shelley Nicewarner, an Economic Services Supervisor, was selected in his place.

8. Ms. Darlington's mother and Ms. Allen's mother-in-law are sisters, so they are "related by

marriage."

9. The same twenty-five questions were posed to all three candidates during the interviews. The team members completed an "Applicant Interview Rating" sheet on which they evaluated the applicants in the areas of oral expression, intelligence/reasoning process, judgement/objectivity, tact/sensitivity, appearance, poise/confidence, and leadership potential. When the scores were averaged, Grievant was awarded 100 total points, applicant "A-2" (See footnote 2) was awarded 105.67 points, and applicant "B-2" was awarded 98.67 points.

10. Individuals employed as CPS Workers must have excellent verbal communication skills, because they must conduct extensive interviews with children, parents, and relatives. They must also be very flexible, because CPS Workers are often"on-call," and must be available when emergency situations involving children's welfare arise. They must be assertive, due to the resistance that families often demonstrate when CPS Workers arrive at their homes to investigate alleged abuse or neglect. Very importantly, these individuals must demonstrate excellent time management and organizational skills, due to strict timeframes for filing court documents and other documentation, which sometimes may have serious consequences regarding the welfare of a particular child or children.

11. Most of DHHR's employees in the social work field are females, because these types of positions more often attract female applicants.

12. Although the successful applicant only had a bachelor's degree and did not have as much experience as Grievant, she was deemed more suitable for the position. The interviewers agreed that Grievant did not have good organizational skills, as exhibited by his evaluations while employed by DHHR, showing that he had some difficulty providing documentation as required as part of his job duties, along with problems understanding the computer system. In addition, the interviewers found his responses to questions to seem "rehearsed," and questioned how genuine his interest in children was.

13. Two female employees who had previously completed the same internship program as Grievant have been hired as CPS Worker Trainees.

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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met his burden. Id.

In a state selection case, 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. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)). A searching and careful inquiry into the facts is required; 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, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Thibault, supra.

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 that 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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). Further, 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.

Grievant contends that his superior education and experience should have entitled him to the position in question. However, it is undisputed that Grievant was given the maximum number of points possible by the interview team in these criteria. Unfortunately for Grievant, education and experience are only a small portion of the relevant qualifications for a CPS Worker Trainee, and all of the interview team members agreed that the successful applicant demonstrated superior ability in many of those areas.

DHHR Policy Memorandum 2106 provides the procedural framework for employee selection, including conducting interviews, the interview rating sheet, and the candidate comparison chart. It requires a comparison of applicants' relative strengths and weaknesses based upon similar factors. However, the Policy also states, "[t]he ultimate selection decision should be based upon the interviewer's judgement as to which candidatewould best do the job." While the selection process was conducted with much objectivity in assigning numerical scores to categories, there is nothing which prohibits an interviewer from taking subjective factors into consideration. In fact, subjective determinations regarding an applicant's personality and other qualities are a vital part of the selection process. Crouser v. W. Va. Dep't of Tax & Revenue, Docket No. 00-T&R-239 (Sept. 21, 2000); Shull v. W. Va. Dep't of Health & Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998). Based upon the evidence presented, Grievant has failed to prove the selection of the successful applicant was arbitrary, capricious, or clearly wrong.

Grievant also alleges the selection of a female for the position was the result of discrimination. 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, a 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. Dep't 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. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Thereafter, the grievant may show the offered reasons are pretextual. Id.

Grievant has established a prima facie case of discrimination by proving that he is similarly situated to other female employees who were hired as CPS Worker Trainees. However, Respondent has provided ample justification for its decision in this case, based upon specific qualifications of Grievant and the successful applicant. Moreover, Respondent has been quite forthright that it employs predominantly female employees in the social work fields, merely because most of the applicants are female. Grievant has failed to establish that DHHR has a particular bias against male social workers. Absent evidence that the selection was based on gender, Grievant failed to prove the claim of discrimination.

Along similar lines, Grievant's counsel questioned the interviewers regarding the fact that, prior to the interviews, they were provided with the applicants' entire applications, including a sheet entitled “Equal Employment Survey Questionnaire.” This questionnaire is included with every civil service job application, and it is normally given to the Division of Personnel upon completion, in order to provide them with general information regarding applicants for state employment. It contains sections regarding the applicant's age, sex, race, and whether or not they are disabled. Although DHHR admits that this portion of the applications should not have been provided to the interview team, Grievant has failed to prove how this prejudiced him in any way. Grievant is claiming gender discrimination, andthe interviewers testified that his gender was obvious from the beginning of the interviews. It is unclear how this biased the interviewers against him in their selection decision.

Additionally, Grievant has argued that the composition of the interview team also caused bias against him. Similarly, it is unclear how the gender of the interviewers or the fact that two of them

were related by marriage influenced the decision not to hire him for this particular position. Notably, the team was originally to include a male who ultimately was unavailable, so DHHR obviously did not intentionally eliminate men from the interview process.

Finally, it appears that Grievant believes that the stipend agreement entitles him to the CPS Worker position. However, the clear terms of the agreement provide DHHR with the discretion to determine what is a “suitable and available” position in which to place him, and there is no provision that requires DHHR to circumvent its normal hiring and selection policies and procedures. Absent superior qualifications over the successful applicant, Grievant has not demonstrated entitlement to the position.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his allegations 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); Howell v. W. Va. Dep't of Health and Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be provedis more probable than not." Hundley v. W. Va. Div. of Corr., Docket No. 98-CORR-218 (1998).

2. In a state selection case, 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. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

3. Grievant failed to prove that DHHR acted in an arbitrary and capricious manner, or made a decision which was clearly wrong by a failure to rely on factors that were intended to be considered, explained its 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 view.

4. 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, a 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

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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 grievanceoccurred, 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 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.

Date: May 14, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The record does not reflect Mr. Anderson's position.

Footnote: 2

The parties chose to protect the privacy of the other applicants by using these abbreviations in lieu of their names.