SHARON JOHNSON, et al.,

Grievants,

v. **Docket No. 03-HHR-346**

DEPARTMENT OF HEALTH and HUMAN RESOURCES/PINECREST HOSPITAL,

Respondent.

D E C I S I O N

Grievants, Sharon Johnson, Penny Burleson, and Jo Anne Kirk, are employed by the Department of Health and Human Resources ("HHR" or "Agency"), at Pinecrest Hospital. They filed this grievance on September 9, 2003, alleging discrimination in filling a Housekeeping Supervisor position and a hostile work environment. The relief sought was to fill the position in question with an in-house employee. (See footnote 1)

This grievance was waived at Level I and denied at Levels II and III. Grievants appealed to Level IV on November 4, 2003, and a Level IV hearing was held on January 8, 2004. This case became mature for decision on February 6, 2004, after receipt of the Respondent's proposed findings of fact and conclusions of law. (See footnote 2)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Devona Smith, Acting Director, requested approval to post the Housekeeping Supervisor position on April 15, 2003. This position was posted as an external posting from July 9, to July 22, 2003. (See footnote 3)

2. Grievants are employed as Housekeepers at Pinecrest Hospital, and they all applied for the position of Housekeeping Supervisor.

3. Before this position was posted on, or about, June 6, 2003, Miranda Cunningham, a non-

employee, came to Pinecrest Hospital for help in completing an application for a Housekeeping Supervisor. Jean Facello, an Office Assistant who dealt with applications, assisted Ms. Cunningham in completing her application, as was her typical practice. She directed Ms. Cunningham to fill in the name of the position she was applying for as Housekeeping Supervisor. Ms. Cunningham completed the application as directed and sent the application to Charleston as required. Her application was not accepted as there is no Housekeeping Supervisor classification.

4. Ms. Cunningham returned to Pinecrest Hospital for help. Ms. Facello checked with Charleston, and then helped Ms. Cunningham correctly complete the application. A Housekeeping Supervisor position is classified as a Supervisor I by the Division of Personnel. Ms. Cunningham redated her application for July 10, 2003, and Ms. Facello either faxed the application for her, or Ms. Cunningham mailed the application herself. 5. Because Pinecrest Hospital decided to post the position as open to external candidates, it requested a register of qualified candidates from the Division of Personnel. The first register was received on, or about, July 9, 2003.

6. The Interview Committee was composed of Ross Thompson, Director of Support Services and Grievants' supervisor, Elizabeth Thewes, Director of Administrative Services, and Terri Biley, another director of an unspecified area.

7. After clarifying with the Interview Committee how they wanted to deal with the register, Ms. Facello was directed to write to the applicants on this first register requesting responses. After receiving these responses, it was concluded that none of the applicants on the list had housekeeping training and/or experience in supervising housekeepers.

8. Ms. Smith requested a second list of qualified applicants, and this register was received on, or about, August 15, 2003. Ms. Cunningham's name was on that list, and she was the only one listed who had housekeeping training and experience in supervising housekeepers. At the time of her application Ms. Cunningham had been housekeeping supervisor at a nursing home since December 1998, and was in charge of scheduling fifteen employees.

9. Ms. Cunningham and Grievants were interviewed for the position. Grievants Burleson and Kirk were interviewed in early August, and Ms. Cunningham and Grievant Johnson were interviewed on, or about, August 25, 2003. The dates on some of the candidates' assessment forms did not match the interview dates, but all of these forms were completed before the successful applicant was selected.

10. The Interview Committee asked all the applicants the questions listed on the Applicant Interview Rating Form, and each member rated the candidates individually. Ms.Cunningham was the unanimous choice. The composite averages were: Ms. Cunningham - 30.97; Grievant Johnson - 26.67; Grievant Burleson - 26.00; and Grievant Kirk - 21.00.

11. On August 26, 2003, Mr. Thompson sent a memo to Ms. Facello noting the name of the successful applicant and directing her to start the hiring process.

Issues and Arguments

Grievants make several assertions. One, since Ms. Cunningham's name was not on the first register, Respondent waited until it was there to interview for the position. In the alternative, Grievants also assert Ms. Cunningham's name was never on the register prior to the closing date on the posting. Two, the position was not posted externally, and if it were, this posting was incorrect as the position could not be externally posted if there were qualified, internal candidates. (See footnote 4) In essence, Grievants believe Ms. Cunningham was given preference for the position throughout the selection process.

Respondent asserts all of Division of Personnel's and HHR's procedures were followed, the position was always posted to include external candidates, and the Interview Committee recommended the candidate they believed to be the most qualified.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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). SeeW. 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 employer has not met its burden. Id.

Grievants' assertions will be addressed one at a time.

I. Credibility

An issue that must be addressed is credibility. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence ornonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 5) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Grievants assert Ms. Cunningham's name was not on the list and/or Ms. Smith and the Interview Committee waited until it was on the list to interview so they could select Ms. Cunningham. The testimony of Ms. Facello, Ms. Thewes, and Ms. Smith and the exhibits clearly demonstrate the process employed in selecting Ms. Cunningham followed the Division of Personnel's rules and regulations. The testimony was plausible, consistent, and straightforward. While it was true Ms. Cunningham's name was not on the first list, no one on the first list was appropriate for the position, and a second register was requested. Ms. Cunningham's application was sent in the second time on, or about, July 10, 2003, well before the posting closed on July 22, 2003, and her name was on the second register. Nothing in this evidence appears incorrect or manufactured. (See footnote 6)

II. Merits

A. Selection In a selection case, the grievance procedure is not intended to be a “super interview,” but rather, allows a review of the legal sufficiency of the selection process. Thibault v. Div.

of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). This Grievance Board recognizes that selection decisions are largely the prerogative of management. While the individuals who are chosen for classified positions must meet the minimum qualifications and should be able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. See Skeens-Mihaliak v. Div. of Rehabilitation Serv., Docket No. 98-RS-126 (Aug. 3, 1998); Ashley v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket Nos. 89-WCF-208/209 (Aug. 7, 1989). An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault, supra.

Grievants' burden is to demonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. Surbaugh v. Dep't of Health and Human Serv., Docket No. 97-HHR-235 (Sept. 29, 1997). If the grievant can demonstrate the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion this Board can require the employer to review the qualifications of the grievant versus the successful applicant. Thibault, supra; Jones v. Bd. of Trustees/W. Va. Univ., Docket No. 90-BOT-283 (Mar. 28, 1991).

This Grievance Board has previously ruled, citing to W. Va. Code § 29-6-10(4), that "[w]hen two or more employees of the classified service make application for a position andare found to be similarly qualified, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the position. W. Va. Code § 29-6-10(4)." Napolitano v Div. of Highways, Docket No. 02-DOH-398 (May 12, 2003). See Morrison v. Dep't of Tax and Revenue, Docket No. 02-T&R-319 (dec. 30, 2003). However, an employer always retains the discretion to select a less-senior applicant with greater qualifications. Bartlett v. Div. of Highways, Docket No, 03-DOH-138 (Aug. 6, 2003); Lewis v. W. Va. Dep't of Admin., Docket No. 96-DOA-027 (June 7, 1996). Again, this discretion must be exercised reasonably, and not arbitrarily and capriciously.

Additionally, Division of Personnel Rule 11.1 (a) states:

> In filling vacancies, appointing authorities shall make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. Whenever practical and in the best interest of the service,

> an appointing authority may fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the classified service based on demonstrated capacity and quality and length of service.

"Generally, an action is considered arbitrary and capricious if the agency 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 was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State excellence rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action isrecognized 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)). " While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

No violation is seen in this hiring decision. Ms. Cunningham had experience in supervising housekeepers, presented well in the interview, and was found to be the most qualified applicant for the position. The undersigned Administrative Law Judge finds no flaw in the selection process.

B. Discrimination and favoritism

Grievants also assert they were not treated fairly during the selection process. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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." 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." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 7) of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> (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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievants have not met their burden of proof and established a prima facie case of discrimination and/or favoritism. Although they believe the successful applicant did not apply during the posting period, the evidence demonstrates that she did. Ms. Cunninghamwas considered according to Division of Personnel Rules and was selected. While it is understandable Grievants wanted this promotion, no violations occurred.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievances 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 employer has not met its burden. Id.

2. An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

3. The undersigned Administrative Law Judge finds the witnesses to be credibile.

4. In a selection case, the grievance procedure is not intended to be a “super interview,” but rather, allows a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). This Grievance Board recognizes that selection decisions are largely the prerogative of management.

5. While the individuals who are chosen for classified positions must meet the minimum qualifications and should be able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. See Skeens-Mihaliak v. Div. of Rehabilitation Serv., Docket No. 98-RS-126 (Aug. 3, 1998); Ashley v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket Nos. 89-WCF-208/209 (Aug. 7, 1989).

6. An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault, supra.

7. "Generally, an action is considered arbitrary and capricious if the agency 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 was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). 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, andin

disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

8. No violation of the rules and regulations governing the hiring process is found in the facts of this grievance.

9. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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."

10. 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."

11. A grievant, seeking to establish a prima facie case of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> (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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

12. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep'tof Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

13. Grievants have not met their burden of proof and established a prima facie case of discrimination and/or 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." 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: March 8, 2004

Footnote: 1

At Level III two grievances were combined. The other grievance was granted and was not appealed to Level IV.

Footnote: 2

Grievants were represented by Grievant Johnson, and HHR was represented by Robert Miller, Assistant Attorney General.

Footnote: 3

This decision meant both internal employees and individuals outside HHR could apply.

Footnote: 4

Grievants also asserted a hostile work environment in their original grievance. Other than the fact that Mr. Thompson may not have been as polite as they would have liked when they went to question him about the selection, there was no other evidence to support a hostile work environment. Accordingly, this issue will not be addressed further.

Footnote: 5

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 6

It is noted that had Ms. Facello told Ms. Cunningham the correct title to put on her application, Ms. Cunningham's name would have in all likelihood have been on the first register.

Footnote: 7

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).