THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

Ronnie Hicks,

Grievant,

v. DOCKET NO. 06-HE-159

M. Paul Marteney,

Administrative Law Judge

Marshall University,

Employer,

and

Billie Joe Black,

Intervenor.

DECISION

Grievant Ronnie D. Hicks filed this grievance on March 31, 2006, claiming he should have been selected for a posted Physical Plant Manager position. Intervenor Billie Joe Black was the successful applicant for the job. The Grievance was granted at level three, and Respondent was to re-evaluate the candidates based on proper procedure. Grievant appealed this decision, arguing he should also have been found most qualified and awarded the position.

A level four hearing was held in the Grievance Board's Charleston office on July 19, 2006. Grievant was represented by Amy Pitzer, Intervenor was represented by Christine Barr of AFT- West Virginia, and Respondent was represented by Jenndonnae L. Houdyschell, Senior Assistant Attorney General. The matter became mature for decision on August 21, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant alleges the interview and selection process was flawed, did not follow established law or

policy, and was tainted by favoritism. Respondent contends the process was proper and the right candidate was selected for the job. Intervenor maintains he was the best qualified applicant. A review of the selection process substantiates Grievant's claim, but does not show which candidate was the most qualified. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. In March 2006, a search was conducted for a posted Manager I position assigned to the physical plant at Marshall University (MU). Grievant and Intervenor were among the four applicants found to be minimally qualified and granted interviews. Interviews were conducted March 22, 2006, and Intervenor was selected.

2. The interviews were conducted by a panel of MU administrators, namely MU Director of Equity Programs David Harris, Evelyn Tooley, Rick Smith, and David Fenney. The interview panel was selected by Mark Cutlip, Director of the Physical Plant. The interviewers used a list of twenty-five standard questions written by Mr. Cutlip.

3. Each member of the interview panel rated the candidates' answers to the questions, and the compiled scores were provided to Mr. Cutlip, who made the final decision on hiring. These questions were designed to test a candidate's managerial, safety and situational strengths, and due to the nature of the position, Mr. Cutlip weighted the answers to the managerial questions most heavily.

4. In addition to the interview performance, Mr. Cutlip considered the applicants' applications and resumes. He did not contact the references listed by either candidate, but since both Grievant and Intervenor were internal candidates, he talked to other managers with whom they had worked. 5. The four-member interview panel rated each candidate's responses to the twenty-five questions on a scale of one to five, for a total of 500 possible points. Intervenor's overall score was 399 (79.8%), and Grievant's overall score was 398 (79.6%). The only other candidate who was interviewed scored 209 (41.8%). Overall, Intervenor scored higher than Grievant on eleven questions, and they scored the same on five questions.

6. Mr. Fenney, who at the time was Intervenor's supervisor, rated Intervenor higher than Grievant on thirteen questions, the same on ten questions, and lower than Grievant on two questions. Intervenor Evelyn Tooley changed some of her scores, only for Grievant. Some of these were raised

and others were lowered. No one told her to change the scores; she did so of her own accord during the interview committee discussions.

7. In addition to the interview scores, Mr. Curtis also considered Intervenor's experience in a leadership role as a Lieutenant and Captain at the Green Valley Volunteer Fire Department and as a small business owner. Mr. Curtis had himself been a fire fighter, and so had some general knowledge of the duties of a fire captain, but had no personal knowledge of Intervenor's duties.

8. Mr. Curtis' list of questions addressed different categories of knowledge and skill, but he did not tell the interviewers which questions assessed which subject area.

9. Grievant submitted a portfolio of documentation and supporting information to supplement his application to the interview committee. This information was not used by the interviewers and was not passed on to Mr. Curtis.

Discussion

In non-disciplinary matters Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. (See footnote 1) Grievant must prove he was the most qualified candidate for the position. West Virginia Code § 18B-7-1(d) provides that, “If more than one qualified, nonexempt classified employee applies, the best qualified nonexempt classified employee shall be awarded the position.”

In reviewing the employer's decision as to which candidate is the most qualified, the undersigned may not play the role of a “superinterviewer” and substitute his judgment for that of the Employer in determining who was the most qualified candidate. “The exercise of administrative judgment by appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or capricious or clearly wrong.” (See footnote 2) It is recognized that a determination of whom is the most qualified for a position necessarily results from a subjective decision-making process. (See footnote 3) An ALJ's subjective assessment of two individuals' qualifications is irrelevant, if both candidates, as here, are minimally qualified. (See footnote 4) “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 evidencebefore it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view.” *(See footnote 5)*

Grievant raises several issues that cast doubt on the fairness and reasonableness of the selection process. First, he alleges bias and favoritism, noting one of the interview committee members, David Fenney, was listed as a reference for Intervenor, is a close personal friend of Intervenor, and at the time was Intervenor's immediate supervisor. While these factual assertions were proven, their effect on the selection is at issue. The interviews were not the only selection criteria, and Mr. Fenney was only one of several interviewers. Mr. Cutlip testified he selected Mr. Fenney before he knew who the applicants were, because Mr. Fenney was a physical plant manager who did not supervise the position being filled.

A comparison of Mr. Fenney's scores, as evidenced by Grievant's Exhibit No. 3 at Level IV, does raise a question of whether he introduced a perceptible bias to the matrix. Of twenty-five questions, Mr. Fenney rated Grievant lower than Intervenor on thirteen, and higher on two. This ratio is much higher than the other three interviewers. All three of the other raters gave Grievant a higher overall score than intervenor, but Mr. Fenney gave Grievant 80 points compared to Intervenor's 98 points. Whether the bias was intentional or not is irrelevant. While it could have been a result of favoritism, it could just as easily been due to extra familiarity with Intervenor. Nevertheless, the bias is obvious, and Grievant has proven Mr. Fenney's presence on the search team introduced an error in the selection process. Grievant also cites as a flaw in the selection process the fact that Mr. Curtis did not check the references listed by the candidates. As grievant pointed out, one of the listed criteria for selection was “verifiable” experience, but Respondent made no attempt to verify the listed resume information beyond what it knew about the employee from their work at Marshall University. Given Mr. Cutlip made certain assumptions about Intervenor's experience without verification, this failure to check references or the verity of the applications is a flaw, although not, by itself, a significant one. Under this set of circumstances, references should have been checked. It should be noted this “flaw” affected both candidates equally, as he checked for no one.

Mr. Curtis' failure to “throw out” both the low and the high scores from the interviews is not seen by the undersigned to be a flaw. Although the testimony establishes he did this on one prior occasion, there was no policy mandating this practice, and one instance does not establish a policy. Doing so would have raised Grievant's overall score over Intervenor's, but as discussed earlier, the overall score was not a significant factor in the decision.

Overall, Grievant has proven there were significant flaws in the selection process that call into

question whether the right choice was made. Mr. Curtis was provided with highly suspect guidance by his interview team, was denied important information about Grievant's qualifications, ignored relevant information in the form of proffered references, and based part of his decision on his unfounded assumptions about Intervenor's experience. Grievant has not shown he was more qualified than Intervenor. This was also the finding at level three, where the Grievance Evaluator ordered Respondent to conduct a new search and selection for the position. This appeal was made by Grievant because he felt he should have automatically been placed in the position, but I find the level three decision to be a sound solution. The following conclusions of law support this discussion:

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. 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).

3. “An agency's decision by 'appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or capricious or clearly wrong.' *Sloane v. West Virginia Univ.*, Docket No. BOR-88-108 (Sept. 30, 1988), as cited in *Bourgeois v. BOT/Marshall Univ.*, Docket No. 93-BOT-268A (Mar. 29, 1994).” *Wingrove v. W. Va. Univ.*, Docket No. 04-HE-230 (Sep. 30, 2004); *Reynolds v. Higher Educ. Policy Comm'n/W. Va. Univ. Institute of Tech.*, Docket No. 03-HEPC-294 (Jan. 16, 2004); *Burchell v. Higher Educ. Policy Comm'n/Marshall Univ.*, Docket No. 02-HEPC-139 (Sept. 30, 2002); *Rumer v. Bd. of Trustees/Marshall Univ.*, Docket No. 95-BOT-064 (May 31, 1995).

3. Grievant has met his burden of proving significant flaws in the selection process that rendered the final decision arbitrary and capricious. 4. Grievant has not met his burden of

proving he was the most qualified candidate for the position.

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is **ordered** to repeat the selection process for this position in a fair and impartial manner, following all applicable rules, polices and procedures, and after considering all relevant information about the candidates.

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 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.

October 10, 2006

_____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (1996).

Footnote: 2

Sloan v. W. Va. Univ., Docket No. BOR-88-109 (1989).

Footnote: 3

See, Harper v. Mingo County Bd. Of Educ., Docket No. 93-29-064 (1993).

Footnote: 4

Bourgeois v. Bd. of Trustees, Docket No. 93-BOT-268A (1994); Fry v. Marshall Univ., Docket No. 95-BOT-376 (1996).

Footnote: 5

Harper, supra, at 3, citing, Bedford County Memorial Hosp. v. Health and Human Serv., 769 Fed 2d. 1017 (4th Cir. Va., 1985).