THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

MARGARET ALIFF,

Grievant,

v. **Docket No. 06-DOH-336**

Sue Keller

Senior Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent,

and

MARTHA GIBSON and MARIA CATALANO,

Intervenors.

D E C I S I O N

Margaret Aliff ("Grievant"), employed by the Division of Highways ("DOH") as an Accountant/Auditor III, filed a level one grievance on or about November 4, 2004, after she was not selected for an Accountant/Auditor 3 position in Accounts Receivable. Grievant filed a second grievance on February 25, 2005, after she was not selected for the position of Payroll Supervisor. For relief, Grievant requested to be made whole in both cases. The grievances were denied at levels one and two. Following consolidation and an evidentiary hearing at level three, the grievance was denied. (See footnote 1) Appeal to level four was filed on October 3, 2006. Grievant, represented by Geoffrey Ekenaski, Esq., and DOH counsel Barbara Baxter, Esq., agreed to submit the grievance for decision based on the lower-level record. The grievance became mature for decision upon receipt of proposed findings of fact andconclusions of law filed by DOH on November 13, 2006. Grievant elected not to file proposals.

The following facts have been derived from a preponderance of the credible evidence made part of the record at level three.

Findings of Fact

1. Grievant has been regularly employed by DOH since June 1976, and has been classified as an Accountant/Auditor 3 in the Finance Division at all times pertinent to this grievance.

2. On July 23, 2004, DOH posted a position vacancy for Accountant/Auditor 3 in the Accounts Receivable Division.

3. On October 29, 2004, DOH posted a position vacancy for Transportation Services Manager 1 (“TSM1").

4. Grievant applied, but was not selected for either position.

5. Intervenor Gibson was selected for the Accountant/Auditor 3 position, and held that classification title at the time the selection was made.

6. Intervenor Catalano met the minimum qualifications for the position of TSM1, and was classified as an Administrative Services Assistant 2, at the time the position was filled. Her father is an executive assistant employed by DOH, and is friends with Gaston Caperton, a former governor of West Virginia.

7. Grievant was approximately fifty-three years of age at the time the positions were filled.

8. Grievant had previously filed a grievance in 2000, and subsequently entered into a settlement agreement with DOH in 2001.

Discussion

Grievant argues that she was not selected for either position due to improper motives. She notes that she was older than either of the successful applicants, and had filed a grievance previously. Grievant also suggests that Ms. Catalano may have benefitted from her ties with her father, who is a DOH employee, and a friend of former Governor Gaston Caperton. DOH denies that improper motives determined the selections. In a selection case it is the Grievant's burden is to demonstrate the employer 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). This claim must be proven by a preponderance of the evidence, which means Grievant must provide enough evidence for the undersigned Administrative Law Judge to decide her claims are more likely valid than not. *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

In matters of non-selection for state employees, the grievance process is not intended to be a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv*., Docket No. 93-RS-489 (July 29, 1994). Unless proven arbitrary or capricious or clearly wrong, an agency's decision regarding promotion/selection will be upheld. *Ashley v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-070 (June 2, 1995). 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 tothe 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)). "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 [the employer]." *Trimboli, supra; Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

Interviews for the Accountant/Auditor 3 position were conducted by Frederick Thomas and Mindy McClure. Both testified at level three that Ms. Gibson had been their first choice for the position based on the thorough and complete information she had provided on her application and during her interview. They found her to be competent and confident, and were impressed with her “team concept” approach to work. They also believed her supervisory experience to be an asset. By comparison, Grievant had no formal supervisory experience, described herself as shy, and submitted an application containing a number of typographical errors.

Mr. Thomas and James Hash interviewed applicants for the TSM1 position. They testified that Ms. Catalano was their choice for this position based on her initiative inlearning and improving DOH procedures to the level that she was the “go-to” person for information and direction. They also considered her supervisory experience earned in private sector job. They were particularly concerned with Grievant's reliability based on her low balance of annual and sick leave.

The evidence establishes that the selection decisions were based on viable factors of

competence and reliability. Neither decision was arbitrary and capricious or clearly wrong.

Although Grievant may be several years older than either Intervenor, there is no evidence to support a finding of age 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." This definition encompasses all types of discrimination, including discrimination based upon age. It is not necessary to analyze Grievant's claims under the West Virginia Human Rights Act, as such claims are subsumed by Section 29-6A-2(d), *Clark v. Kanawha County Bd. of Educ.*, Docket No. 99-20-088 (Aug. 19, 1999). *See Vest v. Bd. of Educ*., 193 W. Va. 222, 455 S.E.2d 781 (1995).

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 Grievant must show:

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

(b) that she has, to her detriment, been treated by her 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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant was not similarly situated to Ms. Catalano who held another classification title. To the extent that she may have been similarly situated to Ms. Gibson, the difference in treatment (selection) was based on legitimate and nondiscriminatory factors. Regarding the issue of age, the record does not definitively reveal the age of Intervenors; however, information included on their applications indicate they are at least forty. Therefore, Grievant has failed to prove that her nonselection was due to her age.

The evidence also fails to support a finding that the selections were motivated by reprisal. *W. Va. Code* § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that she engaged in protected activity, e.g. filing or participating in a grievance;

2) that she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's' protected activity within such a period of time that retaliatory motivation can be inferred.

Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251(1986).

Although Grievant had filed a grievance in 2000, it was amicably resolved by the parties in 2001. In any event, the prior grievance was too far removed in time to infer retaliatory motivation.

Finally, Grievant failed to offer any evidence that Ms. Catalano was selected as a result of favoritism. *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." To prevail in a claim for favoritism under W. Va. Code § 29-6A-2(h), a grievant must show by a preponderance of the evidence that:

(a) one or more appositely similarly-situated employee(s) have been granted preferential, exceptional or advantageous treatment that the grievant has not; and,

(b) that the different treatment is not related to the actual job responsibilities of the employees;

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant did not meet his burden of proof and demonstrate Intervenor was treated more favorably because her father works for DOH as an administrator, or because her father knows former Governor Gaston Caperton. There is also no evidence that either individual made any effort to secure the position for Ms. Catalano. Again, the evidence does support a finding that Ms. Catalano was selected based on her qualifications and past performance. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In a selection case it is the Grievant's burden is to demonstrate the employer 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).

2. 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).

3. *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."

4. 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 Grievant must show:

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

(b) that she has, to her detriment, been treated by her 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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. *W. Va. Code* § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

6. To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that she engaged in protected activity, e.g. filing or participating in a grievance;

2) that she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's' protected activity within such a period of time that retaliatory motivation can be inferred.

Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251(1986).

7. *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."

8. A grievant must establish a case of favoritism by showing:

(a) one or more appositely similarly-situated employee(s) have been granted preferential, exceptional or advantageous treatment that the grievant has not; and,

(b) that the different treatment is not related to the actual job responsibilities of the employees.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

9. Grievant failed to prove that her nonselection for the positions in question was arbitrary and capricious, clearly wrong, or the result of discrimination, reprisal or favoritism.

Accordingly, the 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.

DATE: NOVEMBER 21, 2006

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SUE KELLERSENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

This information is derived from the level three decision. No documentation of these activities was included in the record forwarded to the Grievance Board.