WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

LEORA LILLY

Grievant,

v. **Docket No. 2008-0234-DOC**

WORKFORCE WEST VIRGINIA ,

Respondent.

D E C I S I O N

Grievant, Leora Lilly, filed a grievance on August 3, 2007, against Respondent challenging her non-selection for the Employment Programs Office Manager III position at the Workforce, West Virginia, ("WFWV") Beckley field office. Her grievance statement reads as follows:

> I feel that I was a more qualified candidate for this position as my record will show. I have the experience and qualifications for this position with 17 years in the unemployment field. I think I was degraded by putting a person over me with no experience in unemployment. I also think that favoritism (See footnote 1) was a major role in this appointment.

As relief she seeks "a fair hearing regarding this issue to hear why I think I am the most qualified for this position." She also seeks to be placed in the position.

Ronald Radcliff, WFWV Executive Director, conducted a Level I hearing on August 14, 2007. Director Radcliff denied the grievance by decision dated August 30, 2007. Grievant appealed. In her appeal, Grievant added to her grievance statement by stating: "I believe if my evaluations were

considered I would have been chose [sic] for the job. I feel I have been discriminated against due to my age." Parties participated in Level IImediation at the Grievance Board's Charleston Office on December 20, 2007. Mediation did not result in settlement of the Grievance.

On January 24, 2008, a Level III hearing was held at the Grievance Board's Beckley Office. Grievant appeared *pro se* and testified on her own behalf. Respondent was represented by Anthony D. Eates II, Assistant Attorney General, and called Dennis Burgess and Gail Vititoe, two of the three members of the interview panel, as witnesses. This case became mature for decision on February 22, 2008, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant applied and interviewed for a newly created Office Manager III position with consolidated functions from two previous Office Manager II positions. Grievant asserts she was more qualified for the position than the successful applicant, and alleged her non-selection was the result of age discrimination and favoritism. Respondent maintains it properly evaluated the candidates, determining that another applicant was more suited for the position. Further, Respondent provided a proper rationale for selecting the successful applicant. Grievant failed to show that the selection was the result of discrimination or favoritism, or arbitrary and capricious.

Grievance DENIED

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

Findings of Fact

1 1. Grievant is employed as an Unemployment Compensation Claims Deputy, pay grade 13, in the Beckley office of Respondent. (See footnote 2)

2 2. WFWV created an Office Manager III opening by consolidating two previous Office Manager II positions. Previously, there was one Office Manager II for Unemployment

Compensation functions and one Office Manager II for Job Service functions.

3 3. The Office Manager II positions were consolidated into the single Office Manager III position for financial reasons. The consolidated functions of the position required the recipient to focus more on managing the office, rather than performing the day-to-day functions of Unemployment Compensation and Job Service.

4 4. In mid-2007, Respondent posted a job opening for the position of Office Manager III for its Beckley office.

5 5. Two individuals applied for the newly formulated Office Manager III position, Grievant and Lisa Lilly.

6 6. A three-member interview panel comprised of Dennis Burgess, Gail Vititoe, and Jean Blankenbeckler (See footnote 3) interviewed the applicants on June 15, 2007.

7 7. The interview panel asked each applicant the same questions and rated each applicant according to the same standards. Applicants were scored from 1 (unsatisfactory) to 4 (excellent). 8 8. Grievant received an overall score of 2.5 from each interviewer. Lisa Lilly received a score of 4.0 from Ms. Vititoe and Ms. Blankenbeckler, and a 3.5 from Mr. Burgess.

9 9. Members of the the interview panel, individually and collectively, determined that applicant Lisa Lilly's management experience was superior to that of Grievant's.

10 10. It was the consensus of the interview panel that Lisa Lilly was the most qualified applicant for the Office Manager III position in the Beckley office.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 156-1-3 (2007), *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

In matters of non-selection for state employees, the grievance process is not that of a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. *McCauley v. W. Va. Div. of Corr.*, Docket No. 00-CORR-244 (Aug. 2, 2001); *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994). Unless proven arbitrary or capricious or clearly wrong, an agency decision regarding promotion will be upheld. *Ashley v. W. Va. Dep't. of Health and Human Res.*, Docket No. 94-HHR-070 (June2, 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 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).

The evidence shows that the Office Manager III position was properly posted, and two candidates timely applied. The candidates, Grievant and Lisa Lilly, were each evaluated by the same three-person interview committee, Dennis Burgess, Gail Vititoe and Jean Blankenbeckler. The applicants' qualifications were reviewed, and the applicants were asked questions (the same questions) and rated according to the same standards. Grievant believes her years of service with the agency should weigh heavily (in her favor) in the determination as to which applicant is ultimately selected. Nevertheless, the evidence demonstrates that the interview committee determined that Lisa Lilly was better suited for the newly created position.

While Grievant modified her grievance statement to include language tending to indicate an allegation of age discrimination, Grievant presented no evidence that she was not selected for the position because of her age. Grievant failed to establish the minimal facts necessary for such allegation, e.g., her age or the age of the successful applicant. It is believed that Grievant's allegation of age discrimination stems from the fact that, prior to the interview, she received an e-mail asking about retirement plans. Mr. Burgess testified that the e-mail was sent to all WFWV employees who were at, or approaching, retirement eligibility so that the agency could plan for the potential turnover. And in fact, Mr. Burgess received the very same

e-mail sent to Grievant. There is no evidence that thedecision to award Lisa Lilly the position was motivated in any way by favoritism for Ms. Lilly, or discrimination against Grievant because of age.

Respondent maintains that it followed all applicable policies for the selection of the Office Manager III position. Moreover, Respondent avers Grievant was not the most qualified candidate as she did not possess the level of management experience of the successful candidate. Both Mr. Burgess and Ms. Vititoe testified that the consensus of the interview panel was that Lisa Lilly was the most qualified applicant for the Office Manager III position because of her management experience. It is noted that Grievant's management experience consisted of supervising four cashiers and four housekeepers while employed at a ski resort from 1997-2007; she served as a manager of her husband's trucking business from 1985-1988; and she acted as back-up for the previous Unemployment Compensation Office Manager II when he was on leave or out of the office. Starting in July 2003, Lisa Lilly, served as an Office Manager II over Job Service in the Beckley, office and additionally, she had been serving in a temporary upgrade to Office Manager III since March 2007 (the very position at issue).

Lastly, Grievant highlights that she was never notified of the June 15, 2007, interview until the day of the interview. In this regard, Mr. Burgess testified that normal procedure is for the central WFWV office in Charleston to notify applicants of the interview date by mail in advance of the interview. However, due to a misunderstanding in the central office, no notification letter was sent to either applicant. Lisa Lilly was aware of the interview, because on the day before the interview (June 14), she called the central office on other business, and the subject of the interview came up. Mr. Burgess testified that itwas not intentional that the Grievant was not notified prior to June 15, and if she asked to reschedule, he would have accommodated her.

The Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *Skeens-Mihaliak v. Div. of Rehab*. Serv., Docket No. 98-RS-126 (Aug. 3, 1998). An agency's decision made by appropriate personnel 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* ; *Sloan v. W. Va.*

***Univ.*, Docket No. BOR-88-109 (Sept. 30, 1988). In the present case, the record does not support a finding that WFWV acted in an arbitrary or capricious manner, relied on improper factors, ignored important aspects of the candidates' credentials or their background, expressed their decision in a manner contrary to the findings, or reached an implausible decision. Consistent with prior Grievance Board Decisions in non-selection cases such as this, there are no grounds to overturn Respondent's decision to hire Lisa Lilly for the Office Manager III position.**

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Conclusions of Law

1. In a non-disciplinary case such as non-selection the Grievant has the burden of proof. Because this grievance does not involve a disciplinary matter, the Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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). "Thepreponderance 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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. In matters of non-selection for state employees, the grievance process is not that of a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. *McCauley v. W. Va. Div. of Corr.*, Docket No. 00-CORR-244 (Aug. 2, 2001); *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

3. An agency's decision made by appropriate personnel as to which candidate is most qualified will be upheld unless shown to be arbitrary or capricious or clearly wrong. *Thibault, supra*; *Sloan v. W. Va. University*, Docket No. BOR-88-109 (Sept. 30, 1988). 4. If the grievant can demonstrate that 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 will require the employer to review the qualifications of the grievant

versus the successful applicant. *Jones v. Bd. of Trustees/W. Va. Univ.*, Docket No. 90-BOT-283 (Mar. 28, 1991). 5. 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).

6. Grievant has not meet her burden of proof and demonstrated that the selection process was flawed or that she has been the subject of age discrimination. 7. Grievant failed to prove that her non-selection for the Office Manager III position at Respondent's Beckley Office was the result of discrimination, favoritism, or a violation of rules or policies governing selection of State employees.

Accordingly, this grievance is DENIED.

Any party 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. See W. Va. Code § 29-6A-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). 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.

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Landon R. Brown

Administrative Law Judge

Date: March 12, 2008

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Footnote: 1

Grievant did not pursue a claim of favoritism. Grievant argues that her years of service and experience was

due more deference than she received.

Footnote: 2

At the conclusion of the January 24, 2008, Level III hearing, Grievant announced that she was retiring. Grievant did in fact submit her retirement paperwork to the Public Employees Retirement Board before the Level III hearing and will most likely be retired from state employment at or near the time of this decision.

Footnote: 3

Ms. Blankenblecker has since retired from WFWV.