NANCY C. LILLY,

Grievant,

v. **DOCKET NO. 95-T&R-576**

WEST VIRGINIA DEPARTMENT OF TAX AND REVENUE,

Respondent.

D E C I S I O N

Grievant, Nancy C. Lilly, filed this grievance on September 29, 1995, protesting her non-selection for a Revenue Agent II position in Respondent's Beckley Regional Office. In her grievance statement, Grievant appears to allege that the posting for the position, as well as the selection process in general, was flawed and Respondent engaged in favoritism. Grievant seeks as relief the reposting of the Revenue Agent II position, reconsideration of her application for the position, as well as any back pay, should she be awarded the position. Following adverse decisions at the lower levels, Grievant appealed to Level IV on December 26, 1995, asking that a decision be made based upon the record developed below. This case became mature on February 23, 1996, the deadline for submission of proposed findings of fact and conclusions of law. The material facts are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievant has been employed by Respondent for approximately 25 years and is currently employed as a secretary in the Beckley Regional Office of Respondent's Compliance Division.

2. On May 12, 1995, Respondent posted a vacant Revenue Agent II position for the Beckley Regional Office. Respondent ordered a West Virginia Division of

Personnel Certification List for the position, requesting a statewide listing of candidates.

3. Grievant formally applied and was one of four applicants chosen to be interviewed for the position. Grievant's name was number 9, not counting the preference, on the June 1, 1995, certification list, provided to Respondent for the above-mentioned vacancy. G Ex. 1; Grievant Evaluator's Ex. 1.

4. Dave Weis, Office Manager, Beckley Regional Office, and Grievant's immediate supervisor, did not feel he could be objective regarding Grievant because of their close business relationship, and asked James Dixon, Director of Compliance Division, to assist him in the interview.

5. Grievant was interviewed, along with the other three candidates, on July 12, 1995. Mr. Weis recommended Grievant for the position, but Mr. Dixon recommended another candidate, Roy Lowe, for the position. Mr. Lowe was also on the certification list, at number 8, not counting the preference. 6. Mr. Dixon traveled to Beckley on July 25, 1995, specifically to inform Grievant personally that she had not been selected for the position. He told Grievant it was a close decision, but he considered Mr. Lowe more qualified.

7. Mr. Lowe was hired on July 27, 1995, and began working on August 15, 1995. Mr. Lowe resigned two days later on August 17, 1995.

8. Respondent once again ordered a certification list for the again-vacant Revenue Agent II position, this time for Raleigh County specifically. Grievant Evaluator's Ex. 2. Grievant's name did not appear on this certification list, because she had not marked Raleigh County on her preferences for the register.

9. Respondent reposted the Revenue Agent II position on August 31, 1995. This posting inadvertently stated the position was for the Huntington office. The posting was amended September 5, 1995, to indicate the vacancy was in the Beckley office.

10. The amended posting was not put up in the Beckley office until September 14 or 15, 1995. The closing date of the posting was September 20, 1995.

11. Nonetheless, Grievant resubmitted her application for the position and was

considered again for the Revenue Agent II position in Beckley.

12. In the meantime, James Davis had been interviewing in the Charleston office for several positions and had met with a number of individuals, including James Dixon. Mr. Dixon was impressed with Mr. Davis. In a meeting in Martinsburg, WestVirginia, on or about September 15, 1995, Mr. Dixon told Mr. Weis to offer Mr. Davis the Revenue Agent II position in Beckley.

13. As soon as the posting expired on September 20, 1995, Mr. Weis offered Mr. Davis the position. He accepted and began working on October 1, 1995.

14. Mr. Davis was also on the certification list, at number 11, not counting the preference. Mr. Weis had apparently tried to contact Mr. Davis during the first interviews for the position, but was unable to reach him.

Discussion

Grievant is alleging that the selection process was flawed, the second posting was erroneous, and that Mr. Davis was given preferential treatment resulting in his selection for the position. (See footnote 1)

Grievant alleges the second posting of the Revenue Agent II position was erroneous because it was not posted long enough according to policy and procedure before Mr. Davis was offered the position.

West Virginia Division of Personnel Administrative Rule 9.07, regarding posting of job openings, provides, in pertinent part:

> Posting of Job Openings - Whenever a job opening occurs in the classified service, the appointing authority shall post a notice within the building, facility or work area and throughout the agency that candidates will be considered to fill the job opening. The notice shall be posted for at least ten (10) working days before making an appointment to fill thejob opening. The notice shall state that a job opening has occurred, describe the duties to be performed, and the classification to be used to fill the job opening. (Emphasis added).

. . .

(c) An established closing date, if any, for the receipt of

> applications shall allow sufficient time to ensure that the job vacancy circulation has been posted throughout the agency for ten (10) working days. The naming of an individual to fill the position is the appointment and is not altered by the fact that the individual will not assume the duties until a later date. Therefore, the agency shall not make an appointment to a position prior to the deadline for receipt of applications as listed on the posting. (Emphasis added).

Grievant alleges this section of the Administrative Rules has been violated because the second Revenue Agent II position was not posted for at least ten (10) working days in the Beckley office prior to Mr. Davis being appointed to the position. Further, Grievant alleges that Respondent violated this Rule by "naming" Mr. Davis to the position before the expiration of the closing date. Respondent acknowledges that the vacancy was not posted in the Beckley office for ten (10) working days prior to its expiration, but avers that this procedural flaw constitutes harmless error, as Grievant had already applied for the position once, re-applied the second time, and was considered for the position the second time. Further, Respondent avers that it did not "name" Mr. Davis to the position until after the expiration of the posting on September 20, 1995. The undersigned must agree with Respondent's first argument: it was harmless error, as applied to Grievant, that the second posting was not put up in the Beckley office at least ten working days prior to its expiration. There is no evidence that Grievant was not aware that the position was vacant, that Grievant somehow missed the posting and failed to apply for it, or was not considered for the position. Indeed, Grievant admits she resubmitted her application for the position, and Mr. Weis and Mr. Dixon both testified that Grievant was considered again for the position when it became available the second time. In fact, Mr. Dixon testified that he told his managers to tell those employees who had already applied for the position that it was not necessary to reapply, but that they would be considered for the position. LIII Tr., Dixon, p. 84. Therefore, the undersigned finds that the failure to post the vacancy in the Beckley office for at least ten days prior to its expiration date constitutes harmless error as applied to Grievant.

With regard to Grievant's second allegation regarding the posting, the undersigned finds that Respondent did not name Mr. Davis to the position prior to its expiration

date. Mr. Dixon testified that he told Mr. Weis at the Martinsburg meeting on September 15, 1995, to offer Mr. Davis the job. G Ex. 10; LIII Tr., Dixon, p. 90. Mr. Weis called Mr. Davis to see if he was interested in the position, and offered him the position sometime after the expiration of the posting on September 20, 1995. Mr. Davis accepted and began working on October 1, 1995. Grievant argues that Mr. Dixon's order to Mr. Weis to call and offer Mr. Davis the position was the "naming of an individual to fill the position", which constitutes the appointment according to Rule 9.07. However, merely suggesting that an individual be called to see if he is interested in a position is not "naming" the individual for appointment. Appointment to a position is effected only when the last act required of the person or body vested with the appointing authority has been performed. See Ollar v. W. Va. Dept. of Health and Human Res., Docket No. 92- HHR-186 (Jan. 22, 1993). For purposes of appointment to the State of West Virginia Civil Service, the date of the last required signature on the standardized Personnel Action form (WV-11) would be the date of the appointment. Id. The Rule merely directs that an offer of the position cannot be made until after the expiration of the posting date, in order to be fair to all potential applicants. In the instant case, there is no evidence that Mr. Davis was offered, and accepted, the position until after the close of the posting on September 20, 1995. Therefore, Grievant has failed to show any flaw in the posting requirements.

Grievant also contends that the selection process was flawed in that Respondent did not choose the successful applicant from among the top ten names on the certification list. Section 9.02 of the W. Va. Administrative Rules provides, in pertinent part:

> (a) Appointing authorities shall make all original appointments to classified positions in accordance with this rule. An appointing authority shall select for each position first from the eligibles onan appropriate preference register. Upon exhaustion of the preference register, the appointing authority shall select for each position from the top ten names on the register, including any persons scoring the same as the tenth name, or any persons scoring at or above the ninetieth percentile on the competitive examination, as provided by Section 8.02 of this rule. The appointing authority may exclude the names of those eligibles who failed to answer or who declined appointment or of those eligibles to whom the appointing

> authority offers an objection in writing based on Section 6.04 of this rule which objection is sustained by the Director. (Emphasis added).

(b)

> In selecting persons from among those certified, the appointing authority may examine their applications and reports of investigations and may interview them. Final selection shall be reported in writing by the appointing authority to the Director. (Emphasis added). (See footnote 2)

Grievant claims that Respondent violated this rule in selecting Mr. Davis, who was number 11 on the certification list provided for the Revenue Agent II position. Grievant asserts this section provides that the selection must come from the top ten names on the register. Grievant was number 9 on the certification list. Respondent argues that this section provides them the authority to select from the top ten available names on the register.

Grievant called Max Farley, Assistant Director of Staffing Services, W. Va. Division of Personnel, to testify regarding the selection procedure. Mr. Farley explained that all applicants for the classified service must take a competitive examination. Based upon their scores, applicants are ranked on the classified serviceregister. The register is the complete list of names of everyone available for a particular job classification. The certification list is issued from the register based on criteria provided by the employing agency. This certification list is also called a register. Finally, the preference register consists of all state employees who have been laid off. They are placed on a list based upon their qualifications and seniority, and have preference in hiring. Agencies are required to hire from the preference register first. If the "preference" is not available, then the agency must hire from the top ten names available on the certification list.

Mr. Farley recommends an agency send out letters to the top 15 or 20 names on the certification list because some will not be interested or will not reply. A certification list usually contains at least 20 names for this purpose. This procedure recognizes that not all persons on the list will be interested or available for a particular position. Mr. Farley stressed that the register is a "working document". An agency will contact

people based upon their experiences with hiring. Once the agency has created a field of ten names from the list after eliminating those who are not interested, then it must select from that field of ten. Thus, the agency must select from the top ten available names on the register.

Importantly, the agency does not have to contact anyone on the list, or even interview any applicants. The agency could simply look down the list, go to number 5, and offer that person the position. That is all that is required of the agency under the rules. LIII Tr., Farley, p. 229. In this instance, Mr. Weis testified he called the only name on the preference list, but received no answer. Mr. Weis considered this an attempt to contact applicants. (See footnote 3) Mr. Weis proceeded to call the names on the certification list until he had a field of ten available names. The first time Mr. Weis filled the position, he had narrowed the field to four applicants to interview, including Grievant. The second time Mr. Weis did not conduct any additional interviews, but called Mr. Davis to see if he was interested in the position. He was, and was added to the field of applicants. Following the expiration of the posting, Mr. Davis was offered the position.

Grievant has demonstrated no flaw or violation of the selection process in this regard. Respondent has demonstrated that it selected the successful candidate from among the top ten available names on the register, as is required by the rules. Of course, Grievant is disappointed that Mr. Davis was added to the list of eligible candidates the second time around, rather than being selected herself, but this does not constitute an error in the selection process or a violation of the rules.

Finally, Grievant alleges Mr. Davis was given preferential treatment in hiring by Respondent in that he was not originally considered for the position, but thenadded to the top ten available names the second time around. This claim is basically one of "favoritism". Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2. Of course, the defining factor in favoritism is preferential treatment of another or other "employees". Mr. Davis was not an employee of Respondent or even the State of West Virginia at the time of his selection

for the Revenue Agent II position. Thus, Grievant has failed to state a claim upon which relief can be granted under this provision of the grievance statute.

However, Grievant also points to the State's policy of favoring promotion of current employees before hiring new employees from outside the classified service. Specifically, Grievant points to the results of the Governor's Blue Ribbon Personnel Commission, which recommend that policies and procedures be applied to all state agencies to establish, among other things,

> . . . guidelines to ensure that employees who perform well, as measured by objective standards, receive preference for transfer or promotion, . . .

G. Ex. 8.

In addition, Section 11 of the W. Va. Administrative Rules provides, in pertinent part, that:

> . . . Whenever practical and in the best interest of the service, an appointing authority will fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the career service upon the basis of the employees' demonstrated capacity and quality and length of service. In filling vacancies, appointing authoritiesshould make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees.

Mr. Dixon testified that there is a tension between promoting in-house versus bringing quality people into state government. He acknowledged that an outside applicant has to be much more qualified than an in-house applicant to be considered for the classified service. LIII Tr., Dixon, p. 112. Mr. Dixon testified that he had some doubts about whether Grievant would be successful doing the type of work required of a Revenue Agent II. LIII Tr., Dixon, p. 113. Even Mr. Weis, who recommended Grievant for the position based upon their longstanding working relationship, testified that he had some questions about Grievant's ability to do the Revenue Agent II work. LIII Tr., Weis, p. 160.

Mr. Dixon testified Mr. Davis was an outstanding candidate, with a Bachelor's Degree in Accounting, experience as a controller for several companies in Wheeling, and good communication ability. Mr. Dixon testified that Grievant was a highly valued

employee with many years of state experience, but he believed Mr. Davis to be the most qualified applicant.

Based upon Mr. Davis' qualifications and doubts about Grievant's ability to the job of Revenue Agent II, Mr. Dixon recommended Mr. Davis for the position.

Conclusions of Law

1. In a non-disciplinary matter, it is incumbent on the Grievant to prove her allegations by a preponderance of the evidence. Ward v. W. Va. Regional Jail and Correctional Facility Authority, Docket No. 95-RJA-410 (Feb. 20, 1996).

2. The grievance procedure set forth in W. Va. Code §§ 29-6A-1, et seq., is not intended to be a "super interview," but rather, allows for a review of the legal sufficiency of the selection process. Furthermore, an agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994).

3. Grievant has shown that Respondent violated Section 9.07 of the W. Va. Administrative Rules in failing to post the second vacancy notice in the Beckley Regional Office for ten (10) working days. However, as Grievant was aware of the vacancy, submitted an application, and was considered for the position, this defect is deemed harmless error as it applies to Grievant.

4. Grievant has failed to show any other violation, misapplication or misinterpretation of statute, policy, rule, regulation or written agreement.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the “circuit court of the county in which the grievance occurred,” and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A- 7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate

court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: April 5, 1996

Footnote: 1

Grievant is not grieving her non-selection the first time, when Mr. Lowe was given the position, but only the second selection of Mr. Davis.

Footnote: 2

The appointing authority for the Department of Tax and Revenue is Lydia McKee, Assistant Secretary and Deputy Tax Commissioner. Mr. Dixon makes recommendations to Ms. McKee, who has the signing authority. LIII Tr., Dixon, pp. 94-95.

Footnote: 3

There is some question whether an agency is required to actually send out letters or make direct contact with individuals before determining they are unavailable, as opposed to simply attempting to reach them by telephone. Even it were determined to be inappropriate to omit candidates by their failure to answer the telephone, this would not alter the result in this grievance. In fact, it would merely serve to possibly enlarge the field of available applicants, thus making Grievant's odds of success even less.