DONALD ROGERS

v. Docket No. 95-BOT-074

WEST VIRGINIA UNIVERSITY,

ELIZABETH RHODES, INTERVENOR

DECISION

Grievant, Donald Rogers, employed by West Virginia University (WVU) as a Building Service Worker, filed a level four grievance on February 9, 1995, in which he complained that he was the most qualified applicant for the position of Building Service Worker - Lead. A level four hearing was conducted on April 27, 1995, supplementing the lower-level record. The matter became mature for decision with the conclusion of briefing on June 6, 1995.

The facts of this matter are not in dispute. Grievant was first employed by WVU as a Custodian I in 1975. After eleven months in that position he was promoted to Custodian II. Approximately two years ago the position title was changed to Building Service Worker. Since 1977 Grievant has "filled in" as Lead Building Service Worker, logging some six hundred forty-seven (647) hours in that role.

On April 12, 1994, a position vacancy was posted for Building Service Worker - Lead. Six individuals submitted applications for the position. Domenick Rocca, Building Service Supervisor, conducted interviews for the five applicants who appeared. Mr. Rocca filed a report with Robert Radcliff, Assistant Director/Building Services in which he summarized his conclusions regarding each applicant. In reference to Grievant he stated:

Donnie has 18 years of custodial service at WVU. He has filled in on numerous occasions for a Lead Position. He is familiar with all the buildings in my section and routinely flexes his schedule to accommodate building activities. He fills in at the Facilities Building when that Lead Worker is off and is familiar with the setups required, etc.

Based on the above, I feel Donnie Rogers best meets the overall qualifications for the position and I recommend he be offered the Lead Building Service Worker.

In reference to Elizabeth Rhodes, the Intervenor, Mr. Rocca

stated:

Elizabeth has 16 years of custodial experience at WVU. However, she has never worked in a lead capacity. She has at times carried a radio and sometimes assisted in training new employees. Other than the building she presently works in, she has only worked in one other building on the Downtown Campus. She does not have the demonstrated ability to operate and train others in the use and care of floor maintenance equipment. She has never worked midnight shift, but is willing to give it a try.

Mr. Rocca ranked Intervenor as his second choice.

Both Mr. Radcliff and Paul Walden, Assistant Director of Finance and Administration, approved Mr. Rocca's selection of Grievant and the matter was sent to the Affirmative Action/Equal Employment Opportunity Office for review. Jennifer McIntosh, Director of Affirmative Action/Equal Employment Opportunity, reported that the Physical Plant exhibited underutilization of Asians and females in this position. Because Grievant was not in a protected class, Ms. McIntosh requested that the Physical Plant review their selection since two females had applied for the position and both Grievant and Intervenor were determined to be "substantially equally qualified."

Mr. Walden testified that in compliance with Ms. McIntosh's recommendation, the applicants were reviewed. After finding Intervenor capable of performing the duties of lead worker, she was awarded the position. He stated that if Intervenor had not been found qualified, the Physical Plant's original recommendation of Grievant would not have been changed.

Grievant asserts that he is entitled to the position as the most qualified applicant. He represents that he is most qualified because he meets all of the qualification standards listed on the position description. Grievant particularly notes his ability to demonstrate the proper methods and operation of equipment, an essential function of the position. He further claims that he is competent to perform all the jobfunctions of the position, with the exception of maintaining time cards, a minor duty.

Grievant asserts that his expertise has been gained by working on a "strip, wax, and shampoo" crew for two years and his substantial experience acting as lead worker. Additionally, he has two more years seniority, and experience, than Intervenor. Grievant argues that WVU has offered no evidence to prove that Intervenor has the necessary abilities or that she meets all of the qualification

standards for the position. Grievant further notes Mr. Rocca's comment that Intervenor lacked the "demonstrated ability" to train other employees to use the floor care equipment.

Having established a basis for the conclusion that he was more qualified than Intervenor, Grievant asserts that he is entitled to the position by W.Va. Code §18B-7-1(d) which provides:

A non-exempt classified employee. . . who meets the minimum qualifications for a job opening at the institution where the employee is currently employed, whether the job be a lateral transfer or a promotion, and applies for same shall be transferred or promoted before a new person is hired unless such hiring is affected by mandates in affirmative action plans or the requirements of Public Law 101-336, the Americans with Disabilities Act. If more than one qualified, non-exempt classified employee applies, the best-qualified non-exempt classified employee shall be awarded the position. In instances where such classified employees are equally qualified, the non-exempt classified employee with the greatest amount of continuous seniority at that stateinstitution of higher education shall be awarded the position.

Grievant concludes that application of the foregoing statute makes it clear that he was entitled to the position because he was the most qualified applicant. In the alternative, if both he and Intervenor are determined to be equally qualified, the provision still supports his selection for the position because he has more seniority.

WVU argues that because it is a contractor to the federal government it is required to comply with the goals and objectives in the area of affirmative action as set forth in Executive Order 11246. (See footnote 1) Further, WVU is required by Title 128, Legislative Rules of the University of West Virginia Board of Trustees, Series 45, to develop and implement an affirmative action policy consistent with Board, State and Federal Regulations. (See footnote 2) The decision to place Intervenor, rather than Grievant, in the position of lead worker was simply the application of the required Affirmative Actionpolicy.

At level four, Ms. McIntosh explained her determination regarding the personnel action. After reading the job description she ascertained that the assignment was not complicated and did not require extensive training or knowledge. She next reviewed the applications of Grievant and Intervenor, particularly noting their experience and training. Consideration was given to the Physical Plant's position. Ms. McIntosh stated that the Affirmative Action review did not require a determination of which applicant was most qualified, only a finding that they were substantially, equally qualified.

Having met that threshold, Ms. McIntosh noted that Grievant's emphasis on his experience as a substitute lead worker is not persuasive in this situation because women are traditionally not given the opportunity to substitute as a lead worker. Further, experience as a lead worker was not a requirement for the position. She also noted that no additional weight was given to Grievant's experience in more buildings because the work was the same whatever the location. Given the uncomplicated nature of the work, Intervenor's lack of experience working with floor cleaning equipment was deemed an inadequate basis for denial of the opportunity for promotion. Finally, seniority was not considered because theAffirmative Action demands were overriding in this instance. (See footnote 3)

The level two decision indicates that Grievant conceded that he and Intervenor were "substantially equally qualified." Because Grievant revisited this issue at level four, a finding is made, based upon a review of the evidence, that the applicants were indeed "substantially equally qualified." This conclusion is based upon Mr. Rocca's evaluation of the applicants and a review of the job description which states the general function of the incumbent is to "clean and maintain in an orderly condition institutional buildings and facilities. . . while overseeing the work of a crew of building service workers."

Both Grievant and Intervenor have been employed as Building Service Workers for many years. Although Grievant has had considerable experience working in a lead role, there is no evidence that Intervenor was afforded that opportunity. In regard to Intervenor's lack of demonstrated ability to operate and train others in the use of floor care equipment, it must be determined that a lack of opportunity to work extensively with a "strip, wax, and shampoo crew" does not indicate that she is incapable of performing the duties of the position. Finally, Mr. Rocca testified that some trainingwould have been necessary for either individual upon their promotion.

Notwithstanding the determination regarding qualifications, Grievant will still prevail based upon seniority if Code §18B-7-1(d) is literally applied. A review of the statute establishes that the section first provides that a current employee is entitled to a lateral transfer or promotion prior to a new person being hired, "unless such hiring is affected by mandates in affirmative action plans. . . ." Later, in the same section, it is stated that instances in which more than one qualified, non-exempt employee applies for a position and the employees are equally qualified, the employee with greatest amount of seniority at that institution shall be awarded the position. No mention of affirmative action

plans is made at this point.

The canons of statutory interpretation require that when the language is clear and unambiguous and the legislative intent is plain, a statute is not to be interpreted, but only applied. At first glance the cited statute would appear to be clear and unambiguous. However, if the provisions are literally interpreted, the affirmative action plans mandated by the Board of Trustees, and the federal government, would apply only to situations involving the hiring of new employees and would exempt those positions filled from an applicant pool consisting of current employees. This result is contrary to the affirmative action program.

A statute is enacted in its entirety with a general purpose and intent, and each part should be considered in connection with every other part to produce a harmonious whole. Board of Educ. v. Slack, 174 W.Va. 437, 327 S.E.2d 416 (1985). Further, the legislative body is presumed to act with full knowledge of the law with which it proposes to deal and, absent words specifically indicating the contrary, a statute will not be interpreted to disregard or violate pre-existing rights. See State v. Grymes, 65 W.Va. 451, 64 S.E. 728 (1909).

The need to depart from the statutory language in exceptional cases was also recognized in State ex rel. Frazier v. Meadows, 454 S.E.2d 65 (W.Va. 1994), in which the Court held that such departure is permissible when there is a clearly expressed legislative intent to the contrary, when a literal application would defeat or thwart the statutory purpose, or when a literal application would produced an absurd or unconstitutional result. Even in cases where warranted, departure from the plain meaning of the statute must be limited only to the extent necessary to advance the statutory purpose or to avoid an absurd or unconstitutional result.

The purpose of W.Va. Code §18B-7-1(d) is to grant specific rights regarding transfer and promotion to non-exempt, classified, employees at institutions of higher learning. Generally, employees are to be given priority overnon-employees, the best qualified employee is to be selected over less qualified employees, and in cases where employee applicants are equally qualified, the selection is to be based upon seniority. Acknowledgment of exceptions to the rule, affirmative action plans and the Americans with Disabilities Act (ADA), is included.

The placement of the possible exceptions after the first clause results in their consideration only when a new employee is hired. This wording literally eliminates the application of affirmative action plans and the ADA to current employees who vie for a position. The prior reference to affirmative

action plans and the ADA indicates a legislative intent to act in compliance with their provisions. To interpret the second clause of the statute as being exempt from the programs is contrary to the legislative intent as demonstrated by the previous language, and the affirmative action plan mandated by Legislative Rule and federal requirements. Accordingly, it must be determined that affirmative action plans and the ADA are applicable to the second half of Code §18B-7-1(d) and that WVU properly awarded Intervenor the position.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. In April 1994, WVU posted a position vacancy for Building Service Worker - Lead.

2. Six individuals submitted applications for the position, including Grievant and Intervenor.

3. At the time of the posting both Grievant and Intervenor were employed by the WVU Physical Plant as Building Service Workers. Grievant had accrued eighteen years' experience and Intervenor had sixteen years' experience.

4. Grievant was determined to be the most qualified candidate and was recommended for the position.

5. Upon review by the Director of the Affirmative Action/Equal Opportunity Office, the Physical Plant was asked to reconsider the recommendation based upon an underutilization of females in this area.

6. In compliance with the request, the recommendation was reviewed. Upon concluding that Intervenor was capable of performing the duties of the position, and was substantially equally qualified, she was given the promotion.

7. Although Grievant had accrued a substantial number of hours as a substitute lead worker and experience operating floor cleaning equipment, the duties of the position are not complicated, but rather are routine and do not require extensive knowledge; therefore, this experience did not render him more qualified for the position.

CONCLUSIONS OF LAW

1. In non-disciplinary matters it is incumbent upon the Grievant to prove the elements of the grievance by apreponderance of the evidence. Napier v. Marshall University, Docket No. 91-BOT-105 (June 24, 1991); Durrett v. Fairmont State College, Docket No. 89-BOR-122 (Feb. 20, 1990).

2. Limited departure from the plain language of a statute is permissible in cases where the there is a clearly expressed legislative intent to the contrary, in which literal application would defeat or thwart statutory purpose, or in which literal application of the statute would produce an absurd or unconstitutional result. State ex rel. Frazier v. Meadows, 454 S.E.2d 65 (W.Va. 1994).

3. The provisions of the second clause in W.Va. Code §18B-7-1(d) which require that the best qualified, non-exempt, classified employee be awarded a position, and that seniority shall be the determining factor between equally qualified applicants, must be subject to the mandates of the institution's affirmative action plan and the ADA, to be consistent with the legislative intent as demonstrated in the first clause of the paragraph. 4. The selection of Intervenor for the position in question was in compliance with Respondent's Affirmative Action plan and W.Va. Code §18B-7-1(d).

4. Grievant failed to prove by a preponderance of the evidence that he was entitled to the position as a matter of law.

Accordingly, the grievance is DENIED.

DATED

8/25/95 SUE KELLER, SENIOR ADMN. LAW JUDGE

Footnote: 1Executive Order 11246 requires that federal contractor take affirmative action to ensure that applicants are hired and treated without regard to race, color, religion, sex, age, or national origin. This plan is applicable to both initial employment and promotion. Specific goals and timetables for the attainment of full and equal employment are to be utilized.

Footnote: 2Pursuant to this rule, WVU has promulgated an extensive Affirmative Action/Equal Opportunity plan in compliance with 41 CFR60-2.13(a). The documentation for the AA/EEO program, submitted as WVU Exhibit No. 4, includes the current employment data for job groups as well as the availability of Black, Hispanic, Asian, and Female employees, and whether these protected groups are underutilized.

Footnote: 3Ms. McIntosh noted that while "housekeeping" jobs such as this are traditionally female dominated, the reverse is true at WVU. Her research into the situation revealed that when the local mining industry began downsizing, displaced men began accepting these positions and now hold the majority of them.