EVA DIANE MAIKOTTER

v. Docket No. 96-BOT-321

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY

D E C I S I O N

Grievant, Eva Diane Maikotter, employed by the Board of Trustees at West Virginia University (Respondent) as a cashier at Jackson's Mill, filed a level one complaint in May 1996, grieving her non-selection for the position of Building Service Supervisor. The matter was denied at levels one and two; appeal to level four was made on July 22, 1996. Respondent subsequently filed a Motion to Dismiss. Following a conference call on January 13, 1997, both parties were given the opportunity to file briefs. The grievance became mature for decision on February 6, 1997, with the submission of Respondent's response to Grievant's argument.

The undisputed facts of this matter are that Grievant, a non-exempt, classified employee, applied for but did not receive promotion to Building Service Supervisor, an exempt position. The successful applicant was not employed by Respondent at the time the position was advertised and the selection made.

Grievant argues that if she meets the minimum qualifications for the position of Building Service Supervisor, she is entitled to the appointment prior to a new employee being hired, as provided by W.Va. Code §18B-7-1(d), which states:

[a] nonexempt 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, nonexempt classified employee applies, the best-qualified nonexempt classified employee shall be awarded the position. Ininstances where such classified employees are equally qualified, the nonexempt classified employee with the greatest amount of continuous seniority at that state institution of higher education shall be awarded the position. A nonexempt classified employee is one to whom the provisions of the federal Fair

Labor Standards Act, as amended, apply.

Grievant asserts that the clear and unambiguous language of this provision, which gives preference to an internal applicant over external applicants for “a job opening”, must be applied to any job opening. She argues that had the Legislature intended to limit the preferential treatment to instances involving classified, nonexempt positions, the statutory language would have so provided. Finally, Grievant suggests that the provision contains a safeguard against classified, nonexempt employees receiving preference for promotions to positions for which they are not suited, in that the employee must meet the minimum qualifications for the position. Grievant argues this safeguard is sufficient and any additional, artificial barriers suggested by Respondent, but not enacted by the Legislature, must be rejected. Respondent argues that it properly applied Board of Trustees Policy §128-31-5 which provides in pertinent part:

5.1 Pursuant to W.Va. Code §18B-7-1(d), non-exempt classified employees who apply for and meet the minimum qualifications as determined by the institutional human resources director or other designee of the president for a posted non-exempt position within an institution and are currently employed at the institution shall be hired into the posted position prior to hiring someone from outside the institution.

Respondent asserts that this policy has been evenly applied to all similarly situated employees and argues that the interpretation sought by Grievant is unreasonable in that it would confer a preference for classified nonexempt employees over exempt classified and other exempt employees for exempt positions, an outcome not intended by the legislation. Neither party cites authority for its position, and apparently none exists. Grievant's interpretation of Code §18B-7-1(d) is understandable. The wording in that provision does not explicitly state that non-exempt employees are to be given preference only for non- exempt positions. On the contrary, it states that nonexempt employees who meet the minimum qualifications “for a job opening” shall be given preference, whether the job be a lateral transfer or a promotion. “[F]or a job opening” is an all-inclusive phrase which does not distinguish between exempt and nonexempt positions. The provision further states that it applies to promotions, and in many cases moving from a nonexempt to an exempt position is a promotion. However, the provision does specifically state that the preference is over new employees. To accept Grievant's interpretation and extend the statutory benefit toexempt positions, thereby giving non-

exempt employees a preference over current exempt employees goes beyond the apparent intent of the legislation.

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. Grievant is employed by the Board of Trustees at West Virginia University, and is assigned as a Cashier, at Jackson's Mill.

2. Cashier is a classified nonexempt position.

3. Grievant applied for, but did not receive the position of Building Service Supervisor.

4. Building Service Supervisor is an exempt position.

Conclusions of Law

1. In a nondisciplinary matter the grievant must prove each element of the complaint by a preponderance of the evidence. Procedural Rules of the W.Va. Educ. & State Employees Grievance Bd. 156 C.S.R. §4.19 (1996); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W.Va. Code §18-29-6.

2. Grievant has failed to prove that the limitation of a hiring preference for classified nonexempt employees to nonexempt positions is in violation of W.Va. Code §18B- 7-1(d).

Accordingly, the grievance is **DENIED**.

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Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. 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.

Date: May 30, 1997 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE