WILLIE D. JEFFERSON,

Grievant,

v. **Docket No. 97-BOT-565**

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent,

and,

THEODORE JACKSON,

Intervenor.

D E C I S I O N

Grievant, Willie D. Jefferson, employed by West Virginia University (WVU or Respondent) as an Asbestos Abatement Worker at the Physical Plant, filed a level four grievance appeal on or about December 19, 1997, after the position of Supervisor/Building Trades II was awarded to Theodore Jackson as the result of a level two grievance decision in a related matter. An evidentiary hearing was conducted on March 4, 1998, and the matter became mature for decision with the filing of post hearing submissions on or before April 6, 1998. (See footnote 1)

Upon review of the record in its entirety, including the level two transcript and decision, as well as evidence produced at level four, it is determined that the essential facts of this matter are undisputed and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant, Willie D. Jefferson, has been employed by Respondent since 1988, and has been classified as an Asbestos Abatement Worker since 1993. Grievant served as Temporary Lead Asbestos Abatement Worker beginning April 1996 through June 1997.

2. Intervenor, Theodore Jackson, has been employed by Respondent since May 1989as an Asbestos Abatement Worker.

3. On or about May 2, 1997, the Craft Maintenance Unit of the Physical Plant posted the position of Supervisor/Building Trades II.

4. Four applicants, including Grievant and Intervenor, were determined to meet the minimum qualifications for the position.

5. The applicants were interviewed by two committees composed of a total of eight individuals. The committee members evaluated the applicants on an evaluation form which allowed a ranking of one (poor) to five (exceptional) in the areas of education, work experience, career goals, personal qualities, and knowledge of the organization.

6. After seven of the eight evaluators determined that Grievant was the most qualified applicant, he was offered, and accepted, the supervisory position, effective June 1997.

7. Mr. Jackson initiated grievance proceedings, claiming that he was more qualified for the position than Grievant. Following a level two hearing, Mr. Jackson prevailed and was instated as Supervisor.

8. After his displacement by the level two decision issued in Mr. Jackson's grievance, Mr. Jefferson filed a level one complaint on December 16, 1997. His immediate supervisor lacked authority to resolve the matter, which was subsequently advanced to level four. (See footnote 2)

9. The position description for Supervisor/Building Trades II lists the following qualification standards:

Knowledge, Skills, Abilities:

Thorough knowledge of current and approved abatement procedures for asbestos management.

Demonstrated ability to work safely and to supervise others working on asbestos abatement projects.

Understand and demonstrate the ability to gather data, prepare reports, develop and supervise projects.

Understand and demonstrate the ability to read and interpret blueprints and technical specifications.

Knowledge of procedures involved in conducting building inspections, interpreting and assisting with plans, and implementing asbestos abatement operations.

Knowledge of various Federal, State and Local building codes.

Ability to understand, interpret, and carry out policies and procedures as outlined in the WVU

Physical Plant policies and procedures manual, and all Environmental Health and Safety standards.

Knowledge of all training requirements associated with asbestos.

Ability to obtain all future training requirements associated with hazardous material issues.

Must possess unique communication skills at all times utilizing both written and oral instructions.

Ability to operate a computer.

Demonstrated ability to operate all Physical Plant equipment associated with asbestos abatement.

Knowledge of practices, principles, and application of plaster, masonry and lagging.

Education:

Job requires broad trade knowledge or specific technical or business knowledge received from a formal registered apprentice or vocational training program or obtained through an associate's degree of over 18 months and up to 3 years beyond high school.

Experience:

Fours years of directly related experience with all aspects of asbestos management, operations, and maintenance. Experience in directing and supervising projects of a major scope. Previous supervisory experience preferred.

Licensure:

Required EPA approved asbestos abatement certification.

Valid Driver's License.

___10. The knowledge, skills, and abilities are typically acquired through the cited levels of education and experience; however, the position description states that any equivalent combination of education and/or experience is acceptable so long as they provide the applicant with the listed knowledge, skills, and abilities to perform the essential function of the job.

Discussion

___This grievance presents an interesting procedural variation in that Grievant was initially selected for the position in question, but was later determined to be not qualified for the position. At level two, the burden of proof was on then-grievant Jackson to prove that he was more qualified than Grievant. He chose to do this by attacking the qualifications of Mr. Jefferson, and with documentation of his own accomplishments. Neither Mr. Jackson nor Mr. Jefferson testified at leveltwo. The decision rendered by the grievance evaluator determined that Mr. Jefferson did not possess a valid asbestos abatement supervisor's license at the time of his application, and should have been disqualified from consideration. Additionally, Mr. Jackson was found to be “better qualified by virtue of his education, background, experience and credentials.” The selection of Grievant was attributed to subjective determinations.

At level four, Mr. Jefferson asserts that he did meet the minimum qualifications for the position at the time of his application. Respondent and Mr. Jackson argue that even with the certification, Mr. Jefferson was not the most qualified applicant for the position. Because Respondent stipulated at level four that Mr. Jefferson did possess the valid supervisor's certificate at the time of application, the issue now is whether Grievant was the most qualified applicant.

When reviewing a non-selection case, the undersigned must consider the information available to the hiring officials at the time the decision was made, and not substitute her own judgment for that of the decision maker. Bush v. Bd. of Directors/Southern W. Va. Community College, Docket No. 94-BOD-1137 (May 15, 1995). Specifically, the question is not what are the parties' abilities, but what did the decision-maker know of their abilities when he made his recommendation that Mr. Jefferson be awarded the position.

Robert Ware, Assistant Director of Craft Maintenance at the Physical Plant, testified that he considered the parties' applications, their interviews, and his personal knowledge of their work when making his hiring decision. The applications establish that Grievant has a high school diploma and worked as a brick and blocklayer, and lead laborer prior to his employment at WVU in 1988. Initially, he was classified as a maintenance worker, but has worked as an asbestos worker since May 1993. He functioned as the “Temporary Lead” worker from April 1996 through June 1997. Grievant indicated “None” when requested to list applicable computer programming languages, operating systems, and software programs with which he had work experience or training. However, Mr. Ware testified at level four that he knew Grievant was competently using the computer as necessary to

complete his duties as Temporary Lead.

Intervenor's application establishes that he has a Bachelor of Science degree in Business and Recreation and a Masters degree in Public Relations. His work experience with Consol Coal Co. was as Health and Safety Instructor from 1975 to 1978, Employee Relations Supervisor from 1978 to 1980, and Environmental Sampler from 1980 to 1981. He has performed a variety of functions for Jackson Dynamics, his own contracting business. Beginning in 1971 to the present he has been Trade Supervisor for the company. In 1976 he added the duties of Environmental Director/Consultant, and Environmental Specialist, and in 1977 he assumed the duties of Safety Training Specialist and Business Manager. Intervenor has been employed by Respondent since May 1989 as an asbestos abatement worker. Under computer skills, Intervenor listed Word Perfect, Lotus, NCSS, File Express, and Macintosh. His attached resume included a list of certifications in a number of areas, in addition to the required asbestos certification.

Grievant's description of his duties at WVU, as stated on his application, have been to instruct or assist in the removal of asbestos related material. This has required that he conduct air monitoring, record keeping, and maintaining a daily log of all jobs he oversees. He also engages in interaction with other Physical Plant shops when coordinating asbestos removal projects. Intervenor's description of his duties indicates that he engages in “[d]esign, air monitoring, and abatement of asbestos. Record keeping and supervis[ing] asbestos department in the absence of the regular supervisor.” Clearly, Mr. Jackson exceeds Mr. Jefferson in the amount of formal education he has acquired. Although higher education will generally enhance an individual in his career, the degrees which Intervenor possesses are not required for the position, and are not directly related to the duties of the position. The numerous certifications, other than asbestos, are also impressive, but not required for the position of Asbestos Supervisor. The relevance of his work experience at Consol Coal Company is not clear. Some of his duties at Jackson Dynamics are directly related to the position of Asbestos Supervisor. For example, as Environmental Director/Consultant, he has provided asbestos designs, asbestos inspections, and served as asbestos management planner.

Seven of the eight members of the selection committees ranked Mr. Jefferson higher than Intervenor, by a margin of one point. The fact that they found both applicants well qualified, but Mr. Jefferson slightly more so, is not clearly erroneous given his longer time in service as an asbestos worker at WVU, and his experience as lead worker. Even though Mr. Ware stated that he found Mr.

Jefferson to be the most impressive applicant during the interview process, it does not appear that Mr. Jackson's qualifications were not properly considered by the committee members when completing the evaluation forms. Mr. Jackson offered statistical evidence in support of his contention that the assessments by the committee members were not made independently; however, while there may have been some discussion or collaboration among the members, there is no evidence of wrongdoing in the completion of their evaluation. Because the level two decision was based on a finding that was clearly wrong; i.e., that Mr. Jefferson did not possess a valid supervisor's certification, and absent a showing the selection was arbitrary and capricious or clearly wrong, the selection committees' initial recommendation to appoint Mr. Jefferson to the position of Supervisor/Building Trades II, is reinstated. In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusion of law.

Conclusion of Law

Respondent's initial determination that Grievant was the most qualified applicant for the position of Supervisor/Building Trades II, was not clearly erroneous, arbitrary or capricious. Accordingly, the grievance is **GRANTED**, and Respondent Ordered to instate Grievant into the position of Supervisor/Building Trades II, with all backpay and benefits to which he is entitled.

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 21, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by Joe Simoni, Intervenor Jackson was represented by David Walden, and Respondent was represented by Samuel Spatafore, Esq., Assistant Attorney General.

Footnote: 2

Pursuant to W. Va. Code §18-29-3(u), which provides that, "[u]pon timely request, any employee shall be allowed to intervene and become a party to a grievance at any level when that employee claims that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties," Mr. Jefferson could have elected to intervene in Mr. Jackson's grievance. However, Mr. Jefferson had no duty or obligation to intervene until a decision adversely affecting his job had been issued in Mr. Jackson's grievance. After he was removed from the supervisory position, Mr. Jefferson correctly exercised his option to file his own grievance. State of W. Va. ex rel. Monk v. Mercer County Bd. of Educ., No. 24366 (W. Va. Sup. Ct. of Appeals Nov. 24, 1997).