MARK WARD and TOM LANEY,

Grievants,

v. DOCKET NO. 98-BOT-153

BOARD OF TRUSTEES/

MARSHALL UNIVERSITY,

Respondent.

DECISION

This grievance was filed by Grievants Mark Ward and Tom Laney against the Board of Trustees/Marshall University, Respondent ("Marshall"), alleging one of them should have been selected for a posted Roads and Grounds Worker position, as both were better qualified than the successful applicant. Grievants alleged the selection process was flawed, specifically that Marshall did not follow the applicable Board of Trustees policy, state law, or Marshall's policy for hiring and promotion, which they assert require that seniority and qualifications control in the selection process. Grievants also alleged that a short test which was administered to applicants "had no bearing on the basic entry level Roads and Grounds Worker." As relief, each sought instatement into the posted position. (See footnote 1) W. Va. Code §18B-7-1(d) establishes a preference for minimally qualified employees of institutions of higher education over new hires in filling vacancies. Fry v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 95-BOT-376 (Mar. 27, 1996). That Code Section provides:

> (d) A nonexempt classified employee, including a nonexempt employee who has not accumulated a minimum total of one thousand forty hours during the calendar year or whose contract does not extend over at least nine months of a calendar year, 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. In instances 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.

More simply put, an employee must be placed in a vacancy over a new hire, unless, (1) the employee is not minimally qualified, or (2) the hiring is affected by mandates in an affirmative action plan or the Americans with Disabilities Act. If two or more minimally qualified employees are competing for the position, as occurred in this case, and one of the employees is the best qualified, that employee must be placed in the vacancy. If none of the employees stands out as the best qualified, employee seniority determines who gets the position.

Marshall maintained the statutory preferences were not applicable to this hiring because it was affected by the mandates in its affirmative action plan. That proviso clearly applies only when a non-employee applicant is being considered for employment. In this case, the successful applicant was already a Marshall employee. If she was the best qualified employee, she was properly placed in the position. If either Grievant was as qualified as the successful applicant, then that Grievant should have been placed in the position as both were more senior than the successful applicant; and Grievant Laney would prevail over Grievant Ward, if all three were equally qualified, as Grievant Laney had the most seniority.

The following findings of fact have been properly made from the record developed at Levels II and IV.

Findings of Fact

1. Grievant Ward has been employed by Marshall 15 years. He is currently a Building Service Worker, a nonexempt classified staff position, pay grade 4. At some point prior to employment in his current position, he was employed as a Roads and Grounds Worker at Marshall for four years.

2. Grievant Laney has been employed by Marshall as a Building Service Worker for 18 years.

3. Marshall posted a vacancy for a Roads and Grounds Worker, pay grade 7, on September 19, 1997. The position is a classified staff position. The job posting provided as follows:

> **Qualifications:** high school diploma or GED and six months related experience. Valid driver's license preferred. Ability and willingness to work as directed; ability to follow instructions. Duties and responsibilities: perform as directed, repair and maintenance of walks, streets and parking areas; cultivate, transplant, water and maintain shrubs, trees and flowers; assist in tree transplanting and removal; snow removal; perform work incidental to lawn and planting, construction and maintenance; clean streets and catch basins; operate equipment used in the performance of assigned duties; perform related duties as assigned. University application must be received in Human

Resources by **October 6, 1997.**

4. David Harris, the Director of Equity Programs at Marshall, determined that the position was underutilized under Marshall's affirmative action plan, meaning that in this case, the requisite number of females have not been employed by Marshall in the job category, when compared to the number of females available in the job market in the geographic area to fill this job category. For purposes of making this determination, the Roads and Grounds Worker position is classified with other service and maintenance worker positions, including Building Service Worker, in category "EE06." Mr. Harris considers women and minorities separately for statistical purposes in determining whether there is underutilization based upon guidelines of the office of federal contract compliance programs, the federal agency which oversees Marshall's affirmative action program.

5. Marshall's Classified Staff Handbook defines underutilization as, "[a]n analysis conducted by the affirmative action officer to determine whether minorities and women are employed in a job group at a rate that is consistent with availability of qualified minorities and women in the job market." 6. Seventy-four people applied for the position, including Grievants and the successful applicant, Pam Messinger.

7. The Roads and Grounds Worker position reports to Andrew Sheetz. Mr. Sheetz has a Bachelor's Degree in Agriculture from Penn State University, and has ten years of experience in landscaping.

8. Mr. Sheetz was told by the Human Resources Department at Marshall that 51 of the applicants were minimally qualified. He chose 10 applicants to interview, including all 4 Marshall employees who had applied for the position.

9. On October 30, 1997, Mr. Sheetz and Russell Dorton (a Marshall employee) interviewed the 10 applicants. They used Marshall's Interview Rating Form in rating those interviewed. The interviewees were rated on the form in the areas of motivation, breadth of interests and thinking, maturity - responsibility, poise, ease of expression, interest in personal improvement, preparation - technical/educational, preparation - general knowledge of job and institution, initiative, and employment record. Ms. Messinger was rated as "outstanding" in five categories, and "above average" in five categories. Grievant Ward was rated "outstanding" in two categories, "above average" in three categories, and "average" in five categories. Grievant Laney was rated "above average" in seven categories, and "average" in three categories. Grievants acknowledged that these

ten categories were relevant to evaluating how one would perform in the job.

10. Ms. Messinger did better in the interview than either Grievant. Mr. Sheetz paid particular attention to self-confidence, interaction with others, and whether the interviewee could perform the job duties. Mr. Sheetz and Mr. Dorton narrowed the field to Grievant Laney and Ms. Messinger. They noted on the Interview Rating Form for Grievant Ward, "[w]hile Mark has great experience, other factors are holding him back." Level IV Grievants' Exhibit 2.

11. On November 19, 1997, Mr. Sheetz conducted a second interview of Grievant Laney and Ms. Messinger. He rated both in nine areas: knowledge of specific job and job-related topics, experience, ability tocommunicate, interest in position and our organization, overall motivation to succeed, appearance and habits, poise, insight and alertness, and personality. Ms. Messinger scored better than Grievant Laney on this rating form.

12. Mr. Sheetz also administered a short oral test to Grievant Laney and Ms. Messinger, to determine the extent of their knowledge of landscaping, and to assist him in determining which candidate was better qualified. The questions related to when to prune trees, when to transplant trees and shrubs, how to plant trees and bulbs, how to mulch shrubs, fertilizer content, and types of trees, and four required math calculations. (See footnote 2) Ms. Messinger answered 7 out of 11 questions correctly, and Grievant Laney answered 3 out of 11 questions correctly.

13. Mr. Sheetz noted on the rating form prepared after the second interview that, while he believed Grievant Laney could learn the job, "Thomas is not well prepared to do a lot of the landscape related tasks in the ground[s] department." Level II Grievant Exhibit 4.

14. Mr. Sheetz and Mr. Dorton recommended Ms. Messinger to fill the position, as the best qualified applicant based upon her experience, her self-confidence, how she would interact with the other employees in roads and grounds, and her score on the oral test. Mr. Sheetz believed both Grievants could ably perform the duties of the position and were good candidates, but Ms. Messinger was better.

15. At the time she applied for the posted position, Ms. Messinger had been employed by Marshall since 1996 as a Building Service Worker. She had many years of prior experience in planting flowers, shrubs and trees, cuttinggrass, and operating equipment, which she gained from working on her family's farm all her life, and from working on a horse farm three years. She made Mr. Sheetz aware of her previous experience during the interview.

16. Grievant Laney had worked part-time for 25 years at the INCO Credit Union assisting the custodian in cutting grass, weedeating, trimming hedges, planting shrubs, edging sidewalks, plowing snow, and similar work.

17. Grievant Ward had experience in maintaining sidewalks, streets and parking areas, snow removal, and planting shrubs, and he has operated a street cleaner. He has performed all the duties listed on the job posting.

18. The Human Resources Department practice was that someone in the Department should have reviewed the applications, and those sent forward as qualified should have been deemed to have at least six months of related experience. Without six months of related experience, an applicant would not be minimally qualified.

19. Ms. Messinger's employment application does not reflect any prior gardening, lawn care, landscaping, or equipment operation experience. It lists her work experience prior to her employment as a Building Service Worker at Marshall as employment as a maid, cashier, nurse's aide, and horse groomer, as her application was completed when she applied for the Building Service Worker position.

20. Ms. Messinger's sister-in-law, Carol Skaggs, is a supervisor in the Physical Plant. Mr. Sheetz was not pressured by Ms. Skaggs or any other person to hire Ms. Messinger.

Discussion

Grievants argued Ms. Messinger was not minimally qualified for the position, as she did not have six months of related experience. Grievants argued that someone at Marshall decided Ms. Messinger should be awarded the job as a favor to her sister-in-law, Carol Skaggs, a supervisor in the Physical Plant, and then manufactured a rationale to support the hiring. When it became clear Ms. Messinger had acquired the requisite experience from working on her family's farm and at Mr. Williams' farm, Grievants argued it was ridiculous to consider her work on the family farm, because it could not be verified, and everyone at Marshall would have this same experience. Marshall argued, first, that Ms. Messinger was the most qualified applicant. It also argued, as addressed previously, that even if she were not the most qualified, once it was determined that this position was underutilized, Marshall could then choose Ms. Messinger over more qualified applicants, so long as she was minimally qualified. It denied any predisposition to hire Ms. Messinger.

No evidence was presented that Ms. Skaggs had anything to do with Ms. Messinger being hired. The only evidence regarding this allegation was that Ms. Skaggs and Ms. Messinger were related; Ms. Skaggs is a supervisor in receiving, which is housed in the Physical Plant; and Ms. Messinger was awarded the job. No inference can be drawn from this.

Grievants also questioned the process used in determining Grievant was minimally qualified. Lalitha Ganesan, a Recruiting Representative for Marshall, made the determination that Ms. Messinger was minimally qualified. The application on file with Marshall for Ms. Messinger, from her application for employment as a Building Service Worker, listed a variety of work experiences as a maid, cashier, nurse's aide, and horse groomer, and she also had a little over a year of service as a Building Service Worker at Marshall. Ms. Messinger's farm experience was not listed on her employment application, and she did not tell Ms. Ganesan of this experience.

Jim Stephens, Associate Director of Human Resource Services at Marshall, explained that what is to be considered related work experience for the posted position is not set forth anywhere. He stated when they are recruiting for positions such as this one, they use the most general view possible of experience so as to admit as many candidates as possible into the pool of qualified applicants. They try not to be overly restrictive. In doing so, related work experience for this position may be broader than experience with planting trees, shrubs and flowers, and may include other types of work experience which would require similar types of work behaviors.

Regardless of whether Marshall should have considered Ms. Messinger's documented work experience to be related experience, she is clearly minimally qualified for the posted position. She testified under oath regarding herextensive experience in farming, and her score on the oral test administered by Mr. Sheetz demonstrates her general gardening knowledge.

Grievants argued that the position was not underutilized, arguing that the language of Marshall's policy required that women and minorities be counted together in determining whether a category was underutilized. Grievants presented no documentation or expert testimony to support this theory. Mr. Harris testified that federal law requires that he determine whether minorities are underutilized, and whether women are underutilized in a particular category. He stated he cannot combine the two in his analysis.

Although Grievant's theory is unsupported, it does not matter in this instance whether the position was underutilized or not. W. Va. Code § 18B-7-1(d) provides a preference for employees. As

discussed earlier, the reference in that provision to affirmative action plans refers only to hiring a new person over an employee. It allows Marshall to hire a new person over an employee, an exception to the rule. In this case, however, a new person was not hired; therefore the exception is not applicable to the hiring process. Only if Ms. Messinger were a new hire would the exception in the statute come into play in this grievance. Thus, the determination that this position was underutilized is of no significance here. (See footnote 3)

Grievant Laney argued he should have been selected for the position because he had more seniority than either Grievant Ward or Ms. Messinger. Grievant Ward argued he was more qualified than Ms. Messinger, because he had worked four years as a Roads and Grounds Worker. Grievant Ward could be placed in the position only if he were more qualified than both Ms. Messinger and Grievant Laney. If all are equally qualified, Grievant Laney's seniority would place him in the position. The burden of proof was upon Grievants to demonstrate that Marshall acted in an arbitrary and capricious manner, or was clearly wrong in deciding Ms. Messinger was the best qualified candidate to fill the subject job opening posted at Marshall. Booth v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994). Importantly, in reviewing the actions of a decision-maker to determine whether it acted in an arbitrary and capricious manner, the undersigned cannot substitute her judgment for that of the decision-maker. Id. In an evaluation of whether the decision-maker acted in an arbitrary and capricious manner the question is not, "what are Grievants' abilities", but rather, what did the decision-maker know of Grievants' abilities when deciding Grievants were not the best qualified candidates for the position.

Grievants have not shown that Marshall acted in an arbitrary and capricious manner, or was clearly wrong in its selection. Mr. Sheetz testified he felt Ms. Messinger was the most qualified for the position. He based this upon her energetic and outgoing response during the interview, she gave the impression she was extremely capable and that she would be able to handle any job, she had the experience, and she projected a personality which would fit well and interact well with the other employees. He also relied upon Ms. Messinger's higher score on the test he administered. He testified Grievant Laney was his second choice based upon the fact that he presented himself well in the interview, he seemed capable of carrying out the duties of the posted position and getting along with the other employees in the area, and he was more qualified than Grievant Ward.

The only evidence either Grievant presented on their qualifications was the length of time each

had performed landscaping/gardening work, the tasks each had performed in this work, and the length of their employment at Marshall. Also, Mr. Stephens and Mr. Sheetz stated that both are considered to be valuable employees. While years of experience is a factor which should be considered in evaluating the candidates, "[th]e fact that a candidate has the most relevant experience or the most seniority does not necessarily entitle that candidate to a position." Rumer v. Bd. of Trustees/W. Va. Univ., Docket No. 95-BOT-064 (May 31, 1995). Quality of experience and work product is more important than yearsof experience when evaluating qualifications, and little to no evidence was presented on this. The scant evidence of quality of experience in relation to Grievant Laney demonstrated he had worked under the direction of the INCO custodian, but he apparently never gained the expertise in his 25 years as a part-time employee to take on landscaping/gardening jobs without direction. While he was capable of performing the work if told what to do, his lack of interest in the area was well demonstrated by the fact that he had never planted flowers, either on or off the job, and that he did not know the difference between a deciduous and evergreen tree. The undersigned is unaware of Grievant Ward's abilities in this area. Regarding his former employment in a Roads and Grounds position, the evidence was simply that he had performed all the tasks listed in the job posting during his four years in the position. He declined to explain why he had left that position.

Grievants pointed out that the posting only required that the successful applicant be able to work as directed and follow instructions. Mr. Sheetz essentially acknowledged this by indicating that Grievants could perform the duties of the position. However, this minimal requirement in the posting does not make Grievants as qualified as Ms. Messinger, it only makes them minimally qualified. Mr. Sheetz testified he did not have time to tell his employees how to go about performing each assigned task, such as how much mulch to use on a flower bed or shrub, or how to apply it, and expected the employee to know how to perform this task if he simply told him or her to apply mulch.

Further, Mr. Sheetz took into consideration factors other than experience in making his determination as to which applicant was the best qualified. Although Grievants argued that motivation, breadth of interests and thinking, maturity - responsibility, poise, ease of expression, interest in personal improvement, preparation - technical/educational, preparation - general knowledge of job and institution, initiative, and employment record, the areas rated in the first round of interviews, had nothing to do with performance of the duties of a Roads and Grounds Worker, both

acknowledged in their testimony on cross-examination that these factors would be relevant. Mr. Stephens, who has 25 years of experience in human resources, testified that the Interview Rating Form used by Mr. Sheetz and Mr. Dorton was the form recommendedby the Human Resources Department for assistance in evaluating candidates, and it was appropriate to evaluate the applicants in these areas, although the scores on the form should not be the sole basis for a decision.

Moreover, Mr. Sheetz is a professional in landscaping, and the undersigned cannot and will not second guess his determination as to which candidate was best qualified, absent compelling evidence that he was wrong. Grievants have not demonstrated that Mr. Sheetz considered inappropriate factors in making his determination that Ms. Messinger was the best qualified candidate, nor have they demonstrated they were either equally well or better qualified than she. See Frye, supra.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In order to prevail, a grievant must prove the allegations in his complaint by a preponderance of the evidence. Vance v. Logan County Bd. of Educ., Docket No. 92-23-045 (May 21, 1992); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Under the facts of this case, W. Va. Code §18B-7-1(d) required Marshall to hire the best qualified employee applicant to fill the posted position of Roads and Grounds Worker. If the applicants were equally qualified, Marshall was required to hire the most senior of the equally qualified employee applicants.

3. "An agency's decision by 'appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or capricious or clearly wrong.' Sloane v. West Virginia Univ., Docket No. BOR-88-108 (Sept. 30, 1988), as cited in Bourgeois v. BOT/Marshall Univ., Docket No. 93-BOT-268A (Mar. 29, 1994)." Rumer v. Bd. of Trustees/Marshall Univ., Docket No. 95-BOT-064 (May 31, 1995). In reviewing the actions of a decision-maker to determine whether it acted in an arbitrary and capricious manner, the undersigned cannot substitute her judgment for that of the decision-maker. Booth v. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994). 4. Grievants failed to prove either was as qualified as or more qualified than Ms. Messinger.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: September 18, 1998

Footnote: 1

The grievance was filed on or about January 23, 1998, and was denied at Level I on February 10, 1998. Grievants appealed to Level II on February 16, 1998, where a hearing was held on April 27, 1998. A decision denying the grievance at Level II was issued on May 5, 1998. Level III was waived by Grievants, and appeal was made to Level IV on May 8, 1998. A Level IV hearing was held on August 12, 1998, with Dallas S. Elswick representing Grievants, and Michael L. Glasser, Esquire, representing Respondent. This case became mature for decision at the conclusion of the Level IV hearing.

Footnote: 2

The questions were: 1) When is the worst time of year to transplant trees and shrubs, and why? 2) How deep should a tulip bulb be planted? 3) To fill a 100 square foot bed with flowers, at 4 flowers per square foot, how many flowers will you plant? 4) How many square feet are in a flower bed measuring 125 feet by 15 feet? 5) When planting a tree, where should the top of the root ball be located? 6) How deep should mulch be spread on a newly planted shrub? 7) How much Nitrogen is in a 50 pound bag of fertilizer with a ratio of 10-10-10? 8) When is the best time to prune most shade trees? 9) When is the best time to prune most flowering trees? 10) Describe the difference between deciduous and evergreen trees. 11) To seed a lawn measuring 200 feet by 10 feet, using a seeding rate of 6 pounds of grass per 1000 square feet, how much grass seed would you need to use?

Footnote: 3

Although the underutilization label may mean something in this promotion under Marshall's affirmative action plan, it is the statutory requirement which is controlling here.