TIMOTHY REED,

Grievant,

v. **DOCKET NO. 98-BOT-448**

BOARD OF TRUSTEES/

WEST VIRGINIA UNIVERSITY - PARKERSBURG,

Respondent.

DECISION

This grievance was filed by Grievant Timothy Reed against his employer, Board of Trustees/West Virginia University - Parkersburg, Respondent ("WVU-P"), alleging he should have been selected for a posted Trades Worker position. He alleged he was minimally qualified, and as the only employee applicant, he should have been selected. He also alleged discrimination and favoritism in the hiring of the successful applicant. As relief, Grievant sought instatement into the posted position and backpay. (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, 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. Ward and Laney v. Bd. of Trustees, Docket No. 98-BOT-153 (Sept. 18, 1998).

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

Findings of Fact

1. Grievant has been employed by WVU-P since 1993 as a Building Service Worker, a nonexempt classified staff position, pay grade 4.

2. WVU-P posted a vacancy for a Trades Worker, pay grade 12, on July 30, 1998. The position is a classified staff position. The job posting listed the qualifications and responsibilities as follows:

> Qualifications: Up to 18 months of formal technical or vocational training beyond high school diploma, Associate degree in technical or vocational field preferred, and at least one year of practical experience performing various trades within the maintenance structure of an institutional setting.

> Responsibilities: Perform a variety of tasks related to the maintenance, repair and construction of college buildings, grounds and equipment. 3. At the request of Sandy Swisher, WVU-P's Director of Human Resources, David Cunningham, Director of College Services, prepared a position information questionnaire ("PIQ") for the posted Trades Worker position. He listed the duties and responsibilities as:

> 50% Perform routine general maintenance on buildings, grounds, and equipment per established schedules or as assigned. May include assignments in the following trades: 1. Mechanical 2. Electrical 3. Low voltage electrical 4. Carpentry 5. General labor 6. Masonry 7. Grounds/landscaping 8. Plumbing/pipefitting 9. Control systems 10. Welding 11. Hydraulics 12. Small engine 13. Painting 14. Auto maintenance 15. Excavation/equipment operator 16. Utility maintenance 17. Fork truck 18. Delivery/pickup 19. Snow removal; 20% Assist other trade specialists in performing skilled maintenance tasks; 10% Perform skilled and semi-skilled trades tasks within an area of expertise on buildings, grounds, operational systems or equipment; 5% Move, arrange, construct, dismantle, etc. furniture, equipment or work areas in support of college functions or activities.

The remaining 15% of the time was listed as various duties for 1 or 2 % of the time, as follows:

> Conduct buildings, grounds, and equipment inspections to determine needed repairs and maintenance; Maintain and clean equipment and tools within area of assignment; Ensure work areas, shops and storage areas are cleaned and maintained; Perform minimal housekeeping tasks in relief of absent Trades Helper; Participate in Physical Plant and/or college-wide planning activities, advisory committees or other work groups as necessary or practical; Attend professional growth classes, seminars, training sessions or other activities as deemed necessary by the college; Other tasks as assigned.

4. The PIQ prepared by Mr. Cunningham listed the experience needed as:

> Practical experience within the maintenance structure of an institutional setting. 6 mo[nths]. Practical experience working in team structures. 6 mo[nths]. Practical experience in workplace safety. 6 mo[nths]. Practical experience in each of the 10 minimum qualifying trades fromsection IV.3. 1 y[ea]r aggregate. Total experience performing maintenance tasks. 1 y[ea]r.

5. Mr. Cunningham decided the successful applicant must have experience in 10 of the 19 skills listed in finding of fact number three. In earlier versions of PIQ's prepared for Trades Workers at WVU-P nine skill areas were listed, and the successful applicant was required to have experience in six of the skills.

6. The Job Evaluation Committee ("JEC") developed the job classification system for higher education classified staff. That classification system, commonly referred to as the Mercer system, provides a range of possible education and experience requirements. For the Job Title Trades Worker, the JEC has determined that the minimum knowledge requirement necessary for an entry level person to perform the job of a Trades Worker at an acceptable level, bearing in mind that there is a training period necessary before anyone is proficient in any position, and taking into consideration the typical educational standard for the position, is "basic knowledge in a specific area typically obtained through a business, technical or vocational school as might normally be acquired through up to 18 months of education or training beyond high school."

7. The JEC has determined that the minimum experience requirement necessary to perform the job of a Trades Worker at entry level is "over one year and up to two years of experience." The experience required is work experience relevant to the position, which in this case would be experience in what are considered, "thetrades." The JEC has not developed a list of skill areas in which it is necessary that an applicant be experienced in order to be minimally qualified to be a Trades Worker.

8. Grievant was the only nonexempt classified WVU-P employee to apply for the posted Trades Worker position.

9. Mr. Cunningham interviewed the applicants in August 1998. He questioned Grievant regarding his experience in each of the 19 listed skill areas, and determined from Grievant's responses and from Grievant's application, that Grievant had some work experience in general labor, grounds/landscaping, painting, snow removal, delivery, and operation of a fork truck. Mr. Cunningham concluded he had some familiarity with small engine and auto repair, and electrical repairs. He determined that Grievant did not meet the minimum educational or experience

requirements.

10. The successful applicant was Greg Eagle. Mr. Eagle was employed by WVU-P at the time of his application as a full-time temporary worker. He was not a nonexempt classified employee.

11. Mr. Eagle's relevant work experience was gained as a temporary Trades Worker Helper at WVU-P for two summers, Saturdays, and two Christmas vacations, and as a welder for three months for D.K. Littons. His total relevant work experience totaled a little less than twelve months.

12. Mr. Eagle holds an A.A. Degree in Welding Technology and in Industrial Maintenance. He has taken courses in welding, pipe fitting, machine shop, shop math, wood technology, and shop fabrication. He listed his skills as running a towmotor, welding, and hydraulics. He noted on his resume and application that he had worked in various types of building, grounds and equipment maintenance while a Trades Worker Helper, including electrical.

13. Grievant completed post-high school training in electronics at Carver Career Center, and received a two-year diploma. He also completed a sheet metal class and a data processing course at WVU-P.

14. Grievant operated a tractor and weedeater, cut the grass, trimmed hedges, moved furniture and boxes, made deliveries, drove a fork truck, cleaned machinery, and performed snow removal while employed by Winans Service from 1986 through 1991 as a utility crew worker, although his job was primarily custodial. (See footnote 2) Grievant ran drill and tap machines, did final assembly of finished electrical products, and supervised the paint line during his employment with Walker from 1991 through 1993. He worked in landscaping for his father's business. He installed two ceiling fans, repaired a washer, dryer, and toilet for acquaintances, and has changed thermostats and heating elements in hot water tanks, and performed small engine and auto repairs for himself. His experience in carpentry consists of cutting stakes for the mines. Grievant has some knowledge of masonry from actingas a helper without pay, but the extent of this knowledge was not made a part of the record. He has no paid work experience in electrical or mechanical repairs, masonry, plumbing, welding, or hydraulics.

15. WVU-P has only two Trades Worker positions. The primary duties of the position are in maintenance of roads and grounds, although that employee also performs maintenance and repair work in other trades, including plumbing/pipefitting, carpentry, general mechanics, painting, and metals fabrication, as required.

Discussion

Grievant argued he was minimally qualified for the posted position, and therefore, by statute, WVU-P was required to select him. He argued Mr. Cunningham had no authority to determine the minimum qualifications for the positions, as that was the responsibility of the JEC in developing the Mercer classification system. (See footnote 3) Respondent argued Grievant did not meet either the minimum educational requirements or the minimum experience requirements. The main issues in this case are what the minimum educational and experience requirements are, as the parties had differing views, and whether Grievant possessed the minimum qualifications. If he did, Respondent was required by law to place him in the Trades Worker position,regardless of the qualifications of the successful applicant. The burden of proof is upon Grievant to demonstrate that he was minimally qualified for the posted position. Booth v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994).

Grievant also argued he was discriminated against, and favoritism was shown in the selection of Mr. Eagle.

The minimum educational requirements set by the JEC for the Trades Worker Job Title are:

> Job requires basic knowledge in a specific area typically obtained through a business, technical or vocational school as might normally be acquired through up to 18 months of education or training beyond high school.

Mr. Cunningham testified this meant Grievant had to have at least 18 months of post- high school technical training, and Respondent argued this interpretation is correct. However, Margaret Buttrick, Human Resources Administrator for the State College and University Systems, and Chair of the JEC, testified this definition means what it clearly says, and it says "up to 18 months," not a minimum of 18 months. The definition is clear and requires no interpretation by Mr. Cunningham. Grievant's post-high school training in electronics meets the minimum educational requirement.

As to the minimum experience requirements, while Mr. Cunningham may identify areas in which he would like the successful applicant to be skilled, the undersigned finds no authority for him to decide that an applicant must have experience in a certain number of areas in order to be minimally qualified. Further,the PIQ cannot be used to set minimum qualifications. Mrs. Buttrick explained that PIQ's are developed to reflect the duties and responsibilities of a position for classification purposes.

However, Mrs. Buttrick's testimony did support the concept that in order to be minimally qualified,

an applicant would need experience and working knowledge of a number of trades. She explained that relevant experience for a Trades Worker would necessarily mean experience in the trades. She considered the trades to include electrical repairs, plumbing, carpentry, mechanical repairs, asbestos abatement, painting, gardening and landscaping, and HVAC maintenance. She opined that in order to be minimally qualified for a Trades Worker position, the successful applicant would need a working knowledge in many of all the trade areas, and some knowledge in each trade area.

Grievant's work experience in the trades is in a limited area. He has some knowledge in electrical, plumbing, carpentry, masonry, and small engine repair, but his work in these areas has been limited. No evidence was presented that he has any knowledge of welding, hydraulics, HVAC maintenance. Moreover, the record does not reflect that Grievant's combined experience in the various trades totals more than one year. While Grievant has worked many years, none of his jobs was solely, or even primarily, in the trades; and he did not indicate the amount of time he spent in any job performing trades type duties. The undersigned cannot find Grievant minimally qualified for the Trades Worker position. Accordingly, he is not entitled to receive the benefit of the statutory preference. Grievant correctly pointed out that Mr. Eagle also did not meet the minimum experience requirements. He argued he was discriminated against by Mr. Cunningham, and Mr. Cunningham showed favoritism, because he hired someone who did not meet the minimum experience requirements, but he would not hire Grievant because he did not meet the minimum experience requirements. W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

W. Va. Code § 18-29-2(o) defines favoritism as:

> unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

A grievant alleging discrimination or favoritism must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);

> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant did not demonstrate Mr. Eagle's selection was not related to actual job responsibilities. The evidence does not support a finding that Grievant's qualifications were so superior to Mr. Eagle's that the selection of Mr. Eagle was arbitrary and capricious. Accordingly, he was not the victim of discrimination or favoritism.

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. Dep't 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 WVU-P to hire Grievant to fill the posted position of Trades Worker, if he was minimally qualified.

3. The minimum qualifications for all classified staff positions in higher education are determined by the Job Evaluation Committee and are reflected in the data line established for each Job Title. 4. The minimum educational requirements for the Trades Worker Job Title set by the JEC of post high school training in a specific area for up to 18 months, does not mean a minimum of 18 months of training is required. Grievant met the minimum educational requirement.

5. Grievant was not minimally qualified for the position of Trades Worker, as he did not meet the minimum experience requirements.

6. A grievant alleging discrimination or favoritism must establish a prima facie case by demonstrating:

(a) that he is similarly situated in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

7. Grievant did not demonstrate Mr. Eagle's selection was not related to actual job responsibilities. He was not the victim of discrimination or favoritism.

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. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: November 18, 1999

Footnote: 1

The grievance was filed on or about September 25, 1998, and was denied at Level I on October 9, 1998. Grievant appealed to Level II on October 13, 1998, where a hearing was held on November 2, 1998. A decision denying the grievance at Level II was issued on November 5, 1998. Level III was waived by Grievant, and appeal was made to Level IV on November 9, 1998. A Level IV hearing was held on July 7, 1999, with Diane Parker representing Grievant, and Gregory Skinner, Esquire, representing Respondent. The record was left open to allow Grievant to submit asan exhibit a generic job description for the Trades Worker Job Title. Grievant then asked to submit additional evidence. After several telephonic conference calls, a second day of hearing was held on September 28, 1999. Respondent had a new

representative at this hearing, Beth Ann Rauer. This case became mature for decision upon receipt of Respondent's written argument on October 20, 1999. Grievant's representative declined to submit written argument.

Grievant submitted a written statement on October 13, 1999, in which he attempted to add factual information to the record, and accused WVU-P of altering the successful applicant's employment application, and of lying in this case. The factual information supplied in this statement cannot be considered a part of the closed record. No evidence was presented during any of the hearings to substantiate Grievant's claim of alterations of records, and Grievant's allegation that WVU-P has lied is not specific as to who lied and what the lie was, so that it cannot be further addressed. Respondent's request that the entire statement be stricken is denied.

Footnote: 2

Respondent pointed out that Grievant had listed his job at Winans as a janitor on his WVU-P employment application. However, it is clear from Mr. Cunningham's testimony that Grievant had elaborated on his duties at Winans during the interview, making him aware of the information in this finding of fact. Inasmuch as Grievant was applying for a custodial position at WVU-P when he completed the employment application, the relevant information at that time was that he had experience as a janitor.

Footnote: 3

Grievant also argued at Level II that Mr. Cunningham had no authority to prepare a new PIQ for the position, and the new PIQ had to be approved by the JEC. It appears Grievant chose not to pursue this argument once evidence was adduced that it is appropriate to prepare a new PIQ when a vacancy is posted, and the JEC does not have to approve the new PIQ. Likewise, it appears Grievant's Level II argument that a test administered to the applicants by Mr. Cunningham should be "thrown out" was not pursued once it became evident that the test results were not used by Mr. Cunningham in the selection process.