JAMES D. STOUT,

Grievant,

v. **Docket No. 98-BOT-403**

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, employed by the Board of Trustees as a Plumber at West Virginia University (Respondent), filed a level one grievance on April 9, 1998, in which he alleged that a less qualified applicant had been awarded the position of Plumber-Lead, in violation of W. Va. Code §18B-7-1. Following denials at levels one and two, Grievant elected to bypass consideration at level three as is permitted by W. Va. Code §18-29-4(c). The grievance was advanced to level four on October 15, 1998, at which time the parties were represented by J. Bryan Edwards, Esq., and Samuel R. Spatafore, Assistant Attorney General, respectively. Counsel agreed that the matter could be decided based upon the lower-level record, supplemented with proposed findings of fact and conclusions of law, which were submitted on or before January 14, 1999.

The following findings of fact are derived from the record in its entirety, including the level two transcript and exhibits.

Findings of Fact

1. Grievant has been employed by Respondent as a Plumber in its Maintenance Department for approximately eight years.

2. In December 1997, Respondent posted the position vacancy for Plumber- Lead, in the Department of Maintenance Engineering (DME), at the Health Science Center. 3. Respondent's Department of Human Resources reviewed the applications for the position of Plumber-Lead, and determined that eight individuals, including Grievant, met the minimum qualifications for the position, a high school diploma, or equivalency, and five years of experience in general plumbing. (See footnote 1)

4. Guy Varchetto, Assistant Director of the DME, and Gary L. Roy, Supervisor of DME's

Building Trades II, conducted interviews for all eight applicants who met the minimum qualifications for the position.

5. Mr. Varchetto and Mr. Roy asked each applicant a predetermined list of questions regarding their qualifications, interest in the plumbing field, and matters of practical application.

6. Following the interviews and evaluation of the applicants, Mr. Varchetto and Mr. Roy determined that Grievant and Thomas Hussion were equally qualified in the areas of education and experience.

7. Mr. Hussion was awarded the position based upon his greater years of continuous employment at West Virginia University.

8. Grievant had been employed by Respondent eight years, Mr. Hussion had been employed by Respondent nine years.

Discussion

Grievant argues that he is entitled to the position of Plumber-Lead because he isbetter qualified than Mr. Hussion. (See footnote 2) Grievant cites his fourteen years of leadership experience as a lead plumber and crew leader, and notes the successful applicant did not claim any similar experience. Grievant also notes that he has over twenty-five years experience in the plumbing field, while the successful applicant has worked primarily in general maintenance. Grievant also asserts that he has acquired more training than Mr. Hussion, holding a journeyman plumber license in Florida and West Virginia, as well as having completed training in blueprint readings and drawings in plumbing from the Sarasota Vo-Tech School. Respondent asserts that it acted properly in selecting Mr. Hussion based upon his years of seniority, when all other factors were deemed equal.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

Both parties cite W. Va. Code §18B-7-1(d) in support of their argument. That statute provides: A nonexempt classified employee, including a nonexempt employee who had 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 currentlyemployed, 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 [42 U.S.C. §12101 et seq.]. 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.

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. Jefferson v. Bd. of Trustees/ W. Va. Univ., Docket No. 97-BOT-565 (May 21, 1998); 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 the recommendation for hiring was made. Generally, an agency's decision as to which candidate is the most qualified will be upheld unless shown to arbitrary and capricious or clearly wrong. Rumer v. Bd. of Trustees/Marshall Univ., Docket No. 95-BOT- 064 (May 31, 1995); Bourgeois v. Bd. of Trustee/Marshall Univ., Docket No. 93-BOT-268A (Mar. 29, 1994).

An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health andHuman Serv., 769 F.2d 1017 (4th Cir. 1985); Watts v. Lincoln County Bd. of Educ. Docket No. 98- 22-348 (Nov. 16, 1998), Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

A review of the level two record establishes that Respondent's determination that Grievant and Mr. Hussion were equally qualified was clearly wrong. A comparison of the two applications supports

Grievant's claims relating to his education and experience as a plumber. In addition to his eight years of experience with Respondent, Grievant's application indicates that he worked as a plumber, or lead plumber, in Florida from 1976 until 1990. Additionally, he has acquired a journey plumber license in Florida and West Virginia, and completed classes in blueprint readings and drawings from a vocational- technical school.

Mr. Hussion's application states that from 1969-70 he worked at Grafton City Hospital where his duties were to “maintain hospital systems.” From 1971 through 1984 he worked for the Grafton Housing Authority maintaining a high rise apartment building, performing plumbing, carpentry, electrical, masonry, and grounds keeping duties. From March through November 1985, he was employed by Trickett Construction, performing plumbing and carpentry in the construction of new homes. Beginning in 1986 to the present he has been employed by Respondent as a plumber. Mr. Hussion indicated that he has been licensed as a journeyman electrician since 1988. There is no indication thathe has acquired any formal training in plumbing. He also stated on his application, “I have had my own business for 12 yrs. I have 12 yrs experience as WVU/HSC [and] feel I can do the work necessary to do this job.” The record does not reveal the nature of this business or the years he was so employed.

Both Mr. Varchetto and Mr. Roy testified at the level two proceedings. Mr. Varchetto stated his understanding of Mr. Hussion's education and experience was the same as that on the application. He confirmed that Mr. Hussion's training as a plumber was earned while on the job. Both Mr. Varchetto and Mr. Roy testified that Grievant and Mr. Hussion had performed well during their interviews. Neither offered any insight as to why they considered the candidates equally qualified.

An objective review of the education and experience stated by Grievant and Mr. Hussion establishes that Grievant has more formal training and more work experience in the plumbing trade than Mr. Hussion. Although Mr. Hussion has four more years of continuous service at WVU as a plumber, Respondent did not claim that service was more heavily weighted than Grievant's experience. While both candidates met the minimum qualifications for the position, W. Va. Code 18B-7-1 requires that the position be awarded to the best qualified applicant. Respondent has failed to explain the determination that the applicants were equally qualified, and that decision is clearly wrong in view of the evidence presented.

In addition to the foregoing findings of fact and discussion it is appropriate to make the following

formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has theburden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. When reviewing a non-selection case, it is the information available to the hiring officials at the time the decision was made which must be considered, and the reviewer may not substitute her own judgment for that of the decision maker. Jefferson v. Bd. of Trustees/ W. Va. Univ., Docket No. 97-BOT-565 (May 21, 1998); Bush v. Bd. of Directors/Southern W. Va. Community College, Docket No. 94-BOD-1137 (May 15, 1995). 3. Generally, an agency's decision as to which candidate is the most qualified will be upheld unless shown to arbitrary and capricious or clearly wrong. Rumer v. Bd. of Trustees/Marshall Univ., Docket No. 95-BOT-064 (May 31, 1995); Bourgeois v. Bd. of Trustee/Marshall Univ., Docket No. 93-BOT-268A (Mar. 29, 1994).

4. An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp.v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Watts v. Lincoln County Bd. of Educ. Docket No. 98- 22-348 (Nov. 16, 1998); Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure toexercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

5. W. Va. Code §18B-7-1(d) provides that when two or more current employees apply for a lateral transfer or a promotion at an institution, the best-qualified nonexempt classified employee shall be awarded the position. In instances where the employees are equally qualified, the employee with the greatest amount of continuous seniority at that state institution of higher education shall be awarded the position.

6. Grievant has proven by a preponderance of the evidence that he was better qualified for the position of Plumber-Lead than the successful applicant, and that Respondent was clearly wrong in determining that he and the successful applicant were equally qualified.

Accordingly, the grievance is **GRANTED**, and Respondent Ordered to instate Grievant to the position of Plumber-Lead, effective the date the position was filled, on or about March 16, 1998, with all back pay, interest, and benefits which he is due. Grievant's request for attorney fees is **DENIED**. (See footnote 3)

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 ofthe intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

Date: January 27, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The record indicates that at some point during the application process, Human Resources revised the position description for Plumber-Lead, at which time the qualifications were revised to "training or education up to eighteen months beyond high school in a directly related field and two to three years experience in directly related fields."

Footnote: 2

The level two record reflects that Respondent's counsel at that time, Beverly Kerr, advised Mr. Hussion that the outcome of this grievance could affect his employment status, but he declined the opportunity to intervene, as is permitted by W. Va. Code §18-29-3(u).

Footnote: 3

The Grievance Board has consistently held that it lacks authority to grant attorney fees. See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-007 (Mar. 30, 1997); Chafin v. Boone County Bd. of Educ., Docket No. 95-BCHD-362R (June 21, 1996).