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**DAVID KASTEN and  
LULA WINGROVE**

v.

**DOCKET NO. BOR1-87-241-2**

**WEST VIRGINIA UNIVERSITY and the  
WEST VIRGINIA UNIVERSITY HOSPITAL CORPORATION**

**DECISION**

Grievants, David Kasten and Lula Wingrove, are employed by the Board of Regents as a custodian and senior custodian, respectfully, and are presently leased to West Virginia University Hospital, Inc. (hereinafter "the Corporation"). These employees filed a level one grievance on May 21, 1987 in which they alleged that a Housekeeping Supervisor position had been filled through a selection process that was arbitrary, capricious, discriminatory and in violation of W.Va. Code, 18-11C-1 et seq. Following an evidentiary hearing the grievance was denied at level two on September 11, 1987 and the matter was appealed

to level four.<sup>1</sup> Both the grievants and the corporation agreed to submit the matter for decision based upon the level two record with supplementary evidence offered on December 16 and final written statements received by January 5, 1988.

In December 1986 the Corporation posted a position vacancy for Interim Housekeeping Supervisor. Jeffrey Rasco, Director of Housekeeping, and George Donovan determined that based upon interviews, input from other supervisory staff and a review of employee files that five of the twenty-five applicants were competitive for the position. These employees were invited to a second interview which consisted of eleven standard questions. (T. Level II Ex.4) Follow up interviews were conducted by Mr. Rasco, Mr. Donovan, Bill Johnson and Mike Lancaster (supervisors) who asked each candidate three standard questions. Accord-

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<sup>1</sup>The Corporation was made a party in this matter based upon its contractual agreement with the University for the services of the Board of Regents employees. It was represented at level four by David R. Brisell, Vice President and General Counsel. The Board of Regents elected not to participate.

ing to Mr. Rasco each supervisor was then requested to select two or three of the candidates for the position. As each supervisor recommended a different individual each of the five applicants were scheduled to work approximately one month in the position as a type of "trial by fire". Each candidate was assessed midway through the temporary assignment and interviewed again afterwards. When Mr. Rasco was notified in May that the position was approved to be filled he met with Mike Lancaster, Senior Operations Supervisor, and discussed each applicant's performance in the position and the department's needs. Mr. Rasco ultimately awarded Georgia Church the position. (Level II T. pp. 197-203)

The grievants argue that the appointment of Georgia Church, a Corporation employee, violates: (1) the "Memorandum of Accord" which requires that consideration be given to the ability, qualifications, length of service in the employee unit and desires of the employees in the promotion and transfer of personnel.<sup>2</sup>

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<sup>2</sup>The Memorandum of Accord was an agreement entered into by West Virginia University and the Laborers' International Union of North America, Local 814. Paragraph "D" states that the accord is not to be construed as a collective bargaining agreement or recognition of the Union as representative for the employees in the employees unit but rather it is an agreement as to procedures and practices to be followed by the parties in dealing with certain rights and privileges of employees as set forth in the document. Grievants Kasten and Wingrove were represented by Local 814 throughout the grievance procedure.

They argue that they are at least equal to Ms. Church in ability, qualifications and desires and far exceed her in length of service with the unit.

(2) The West Virginia University Employee Handbook which requires that all transfers and promotions be made in accordance with the university's affirmative action plan which requires that the employees' supervisor to provide a performance rating of the employee to determine his qualifications for promotion or transfer. The grievants argue that since they and Ms. Church fall within two or more protected classes the best qualified should have been chosen.

(3) W.Va. Code, 18-11C-4 which provides that no university employee may be required to become an employee of the Corporation as a condition of employment or promotion. The grievants argue that corporate employees are paid substantially less than state employees who hold the same position and that the economic incentive was the deciding factor in filling the position.<sup>3</sup>

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<sup>3</sup>At the time the vacancy was announced the Board of Regents position of Supervisor/Custodians was classified at paygrade 12 and received a salary approximately \$4,000 higher than a corporate supervisor.

(4) The West Virginia University Equal Opportunity Policy and Affirmative Action Plan which provides for equal opportunity for employment by prohibiting discrimination and requiring additional efforts to recruit and promote qualified members of designated groups including veterans of the Vietnam era, persons between the ages of 40 and 70, members of racial minorities and women.

(5) West Virginia University Hospital, Inc. policy regarding nondiscrimination/affirmative action which provides that no individual will be discriminated against because of age, race, religion, sex, national origin or handicap.

(6) W.Va. Code, 18-29-2(m) as the action was discriminatory as defined therein.

The grievants contend that they are better qualified, in part due to their greater seniority, that they have no record of disciplinary action as does Ms. Chruch and that their attendance record is superior to hers. They argue that they were not given fair consideration for the position and that the Corporation's decision to award the position to a lesser qualified corporate employee was arbitrary and capricious as it was based upon a salary differential between state and corporate employees.

The grievants request that the position be reopened, that the Union be informed of applied criteria and any weighting mechanism utilized and that an impartial panel objectively reevaluate the grievants and the successful applicant.

The job description for the position indicates that the individual is responsible for the overall cleanliness of the hospital through the supervision of custodial personnel. General qualifications are a high school education or its equivalent, supervisory ability, through knowledge of equipment and supplies, ability to establish harmonious work relationships with the public, students, faculty and other employees, good physical condition, good job record, ability to organize work flow and good communication skills.

The record indicates that grievant Kasten has been employed by the Board of Regents as a custodian assigned to the West Virginia University Hospital for 7½ years and lists supervisory experience while in the military from 1957-1978. (Level II T. Ex. 8) He achieved the rank of Master Sergeant (Grade E-8 on a scale to E-9) and completed several training courses including Non-Commissioned Officers school and advanced course, Computer

User/Managers Course, Joint Military Test Administrators Course, Senior Personnel Sergeants Course and the First Sergeants Course. His duties include the supervision of numerous individuals in a variety of military settings.

Grievant Wingrove has been employed by the Board of Regents since December 1975 and since that time has earned a G.E.D. and has been promoted from custodian I to senior custodian. She served as interim housekeeping supervisor from December 1, 1984 to January 7, 1985 during the absence of another employee. She has been commended for her excellent work performance and received a cash award from the "Pride Campaign" which identified employees who performed above and beyond stated criteria.

Ms. Church has three years housekeeping experience, five years in a retail shop (some time served in a managerial capacity), three years as a shop steward, owned a janitorial service two years, worked as dispatcher/manager of a taxi company eleven years and has been involved in Avon sales and training programs three years. She has completed a vocational technical program in food management, a Human Resources Center program in office management and a two year business program at the W. Va. Career College.

In addition to the foregoing it is appropriate to make the following specific findings of fact and conclusions of law.

#### Findings of Fact

1. All employees assigned to the West Virginia University Hospital in 1984 were given the choice of remaining Board of Regents employees or becoming employees of the West Virginia University Hospital Corporation. Grievants choose to remain Board of Regents employees who are now leased to the Corporation as is permitted by W.Va. Code, 18-11C-1 et. seq.

2. In May 1987 a vacancy for the position of housekeeping supervisor at the West Virginia University Hospital Corporation was announced. Approximately twenty-five individuals, both Corporation and Board of Regents employees, submitted application for the position.

3. Jeffrey Rasco and George Donovan conducted an initial interview, reviewed personnel files and solicited input from other members of the supervisory staff. Five applicants were determined to be qualified for the position and were invited to a second interview which consisted of eleven standard questions. A third interview consisting of three standard questions was



conducted by Mr. Rasco and Mr. Donovan plus Bill Johnson and Mike Lancaster, supervisors. As no one applicant was favored each was assigned to the position for approximately one month as an evaluative tool. Mr. Rasco assessed each candidate at mid-term and following their assignment. Following completion of all five trial periods he again met with Mr. Lancaster and subsequently offered the position to Ms. Church.

4. Both of the grievants and Ms. Church possess unique qualifications for the position. Mr. Kasten has many years of military experience which included supervisory duties. Ms. Wingrove started work as a custodian at the bottom of the employment ladder and has worked her way up to senior custodian. Both have acted as supervisors in a temporary capacity and both have considerably more seniority than Ms. Church who has completed several educational programs and worked in a supervisory capacity in many organizations.

5. All of the individuals are members of classes protected in the workforce by federal legislation. Mr. Kasten is over the age of forty and is a veteran, Ms. Wingrove is a female and over forty, Ms. Church is a black female and over forty.

6. The West Virginia University Equal Opportunity Policy and Affirmative Action Plan requires that when candidates are assessed to be equally qualified for a position a member of a protected class will be given preference as long as the underrepresentation exists.

7. The "Memorandum of Accord" reached between West Virginia University and The Laborers' International Union of North America, Local 814 provides that it is within the sole discretion of the University to promote employees but that in making such determination shall consider the abilities, qualifications, seniority and desires of the employees.

8. Grievants' allegation that the decision to hire a Corporation employee was based on financial considerations due to a considerable difference of salaries is unsupported by the evidence. On the contrary, Mr. Rasco testified that his budget was adequate to meet the salary of a Board of Regents employee even at the higher classification. Reconsideration of the position classification was in progress during the period of the trial assignments and was later downgraded with a salary comparable to that of a corporate supervisor.

9. Although the decision ultimately made by Mr. Rasco was subjective in nature it appears to have been based upon a variety of information.

10. A difference of opinions stated by the supervisors as to which candidate was the most qualified does not establish that the final decision was improper or incorrect.

#### Conclusions of Law

1. The grievants have failed to prove that the vacant position was filled by a corporate employee as a result of discriminatory policy applied to Board of Regents employees.

2. The grievants have failed to prove any violation of the Memorandum of Accord, West Virginia University Handbook, the Equal Opportunity Policy or Affirmative Action Plan adopted by West Virginia University.

3. It is incumbent upon the grievants seeking relief pursuant to W.Va. Code, 18-29-1 et. seq. to prove all of the allegations constituting the grievance by a preponderance of the evidence. Marling v. Marshall County Board of Education, Docket No. 25-86-368-3; Kirk v. McDowell County Board of Education, Docket No. 03-87-178; Bulford v. Preston County Board of Education, Docket No. 39-87-203.

4. The West Virginia University Hospital Corporation has substantial discretion in personnel matters relating to Board of Regents employees so long as that discretion is exercised reasonably and not in an arbitrary or capricious manner and when those individuals are treated as university employees in all respects and are not required to become an employee of the Corporation as a condition of employment or promotion as set forth in W.Va. Code, 18-11C-4.

5. As all five of the competitive applicants were interviewed several times by numerous individuals and given a trial assignment period in the position for which they applied, it appears that the Corporation has acted properly in making its determination even though the grievants had different types of experience and more seniority than the successful candidate. Higgins v. Board of Education of Randolph County, 286 S.E. 2d 682 (W.Va. 1982), Lafayette v. Randolph County Board of Education, Docket No. 42-87-227-2.

Accordingly, the grievance is DENIED.

Either 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). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

DATED

March 14, 1988

Sue Keller

SUE KELLER

HEARING EXAMINER