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**WEST VIRGINIA EDUCATION AND
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SHELLY SMITH

v.

Docket No. BOR-88-079

WEST VIRGINIA UNIVERSITY

DECISION

Grievant, Shelly Smith, is employed by West Virginia University (WVU) as a Data Control Clerk/Secretary in the Department of Computer Operations. She filed a grievance in March 1988 in which she alleged sex discrimination on the part of WVU when she was not selected for a position vacancy as Computer Operator I. A level two hearing was conducted March 18 and April 27, 1988 and grievant did not prevail on the matter. A level four grievance appeal was filed May 11, 1988. Although grievant's representative indicated the issues could be decided on the record developed below, the record was not submitted until August 1988. A hearing was scheduled for September but continued until October 5, 1988 at which time counsel for WVU called one witness to supplement the record. He submitted proposed findings of fact and conclusions of law October 20, 1988 but grievant's representative elected to not submit proposals.

The facts in this case are not in dispute. Grievant was among several applicants considered for two Computer Operator I positions. The candidates were interviewed by the Manager of Computer Operations, James H. Reeves, and his assistant, Byron Tennant. Although grievant had been with the department for approximately one and one-half years, Mr. Reeves did not select her for either position.

Grievant contends that one of the successful applicants was clearly more qualified than she, but the other successful applicant, also a male, had not been previously employed by WVU and was less qualified than she. She claims that WVU policy gives present employees priority for job vacancies which would be promotional in nature. Grievant's representative readily admitted that the department regularly hired females for computer operator positions and that there was no pattern of sexual discrimination in its hiring and promoting practices. (T2.6, 3/18/88). However, he claimed that as a result of grievant's non-selection, she was sexually discriminated against as a woman in this particular instance.

WVU officials refuted grievant's allegation of sexual discrimination when grievant was not hired and presented evidence that women were routinely hired for the computer operator positions. With respect to the position at issue, Mr. Reeves admitted that each candidate was questioned as to whether the additional job responsibility of serving as a courier to the data sites would

pose a problem as there could be heavy lifting and winter driving involved. Mr. Reeves stated that his first selection for the position was a female who decided against taking the job because of family commitments that prevented her from working the shift rotations the job required. (T4.11). He determined that the alternate candidate he then selected, Robert McGuire, was more qualified than grievant. That determination was based on the successful candidate's reported extensive work experience in the field and his demonstrated familiarity, during the interview, with the particular complex computer processes utilized in the department.

Grievant did not demonstrate that Mr. McGuire was less qualified than she. She focused instead on whether his qualifications, especially his computer work experience with another employer, had been verified by WVU officials. Conversely, Mr. Reeves testified that he and his assistant, who was present during all the interviews, could discern that Mr. McGuire knew the computer field as he easily responded to questions about various computer systems and operations.

In addition to the foregoing narration, the following findings of facts and conclusions of law are appropriate.

FINDINGS OF FACT

1. Grievant is employed by West Virginia University (WVU) as a Data Control Clerk/Secretary assigned to Computer Operations. After a year's time in this position, which was primarily secretarial in nature, she applied for a promotion/transfer to a vacant Computer Operator I position. Personnel policy at WVU encourages employee movement in this manner.

2. Two Computer Operator I positions were filled by the department's manager with applicants other than grievant and she challenged the propriety of the selection of one, Robert McGuire, who had not previously held a position at WVU.

3. Grievant's qualifications included word and data processing and programming courses taken while in high school and additional computer skills training for eighteen months in Pittsburgh, Pennsylvania, at "Computer Tech." She had no on-the-job experience but when she became aware of the upcoming computer operator vacancy she approached the operator on occasion at lunch hour to learn the specifics of the job.

4. Mr. McGuire stated on his resume that he had, in a previous employment, worked his way up from a truck driver in 1981 to manager of the computer department in 1984. He claimed specialized training in digital computer equipment and experience

operating a Digital PDP 11/36 system with 3 RK07 disk drivers, a DEC LP25 Printer and a DEC Writer Printer. He noted that he hired, scheduled and trained data entry and computer operators. He was responsible for running the company's sales, accounting, profit and purchasing computer reports and programs as well as systems histories and back-ups. He installed terminals and tested and initialized various software packages. Computer Operations management officials at WVU were convinced of Mr. McGuire's superior knowledge and expertise via the interview process afforded all of the candidates.

5. Grievant did not substantiate claims that she was more qualified than Mr. McGuire for a Computer Operator I position or that WVU officials practiced sexual discrimination when Mr. McGuire was hired rather than she for the operator position vacancy.

CONCLUSIONS OF LAW

1. The exercise of administrative judgement 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. Sloan v. West Virginia University, Docket No. BOR-88-109 (September 30, 1988).

2. In the grievance procedure it is incumbent upon the grievant to prove the essential elements of the grievance by a preponderance of the evidence.

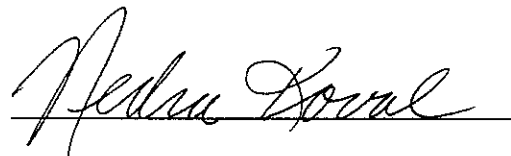
3. Grievant has failed to prove that the University violated policy or law when it employed a candidate other than her for the Computer Operator I position at issue.

Accordingly, this 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) Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

DATED:

December 7, 1988



NEDRA KOVAL
Hearing Examiner