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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**

ARCH A. MOORE, JR.  
Governor

**ROBERT SLOAN**

**v.**

**Docket No. BOR-88-109**

**WEST VIRGINIA UNIVERSITY**

**D E C I S I O N**

Robert Sloan, grievant, is employed by West Virginia University (WVU) and classified as a painter assigned to the Physical Plant Paint Shop. He filed a level four grievance in June 1988 alleging violations of WVU's Equal Opportunity/Affirmative Action Plan when he was denied a temporary Senior Painter (paint crew leader) position for which he had applied. A level four hearing was conducted August 9, 1988.<sup>1</sup> Proposals from the grievant's representative were submitted on August 30, 1988 and proposals from the respondent's counsel were filed on September 21, 1988.

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<sup>1</sup> Grievant's representative expanded upon the testimony presented at the level two hearing (T2.\_\_) conducted May 24, 1988. Neither party proffered additional exhibits at the level four hearing and the University's counsel stated his intention to rely on the level two hearing as his case-in-chief.

Grievant has a disability for injuries received in combat in Viet Nam and has been diagnosed and treated for Post Traumatic Stress which further contributes to his disability. As a result of the stress disorder, he is prone to emotional distress at certain times of the year which coincide with the October anniversary of one particular prolonged, violent battlefield incident in which he was wounded. During those times, October through March, grievant experiences flashback and other problems which necessitate counseling treatment, drug therapy and even hospitalization at times. He stated that during those months he could not control his problem. Thus, during those months he may frequently miss work or be tardy and, at times, fail to notify University officials that he will not be able to work because of the effect of the medications which sedate him.

Grievant contends that he was qualified for the temporary position as senior painter, that he performed the job on past occasions in a satisfactory manner, and that he was the most senior candidate from among the paint crew. He claims that the University would not have had to accommodate him for his handicap had it awarded him the job in question as the position was for the months of April through June when he was able to control his health problem. Grievant argues that the University is obligated to fill position vacancies on the basis of qualifications and he, as a member of a protected class of employees, should be given preference for a position if the qualifications of the applicants are equal. Grievant requested back wages for the position in question.

The respondent agreed that grievant met the minimal requirements for the temporary position. However it denies that it has treated grievant unfairly or that it has discriminated against him. The respondent contends that University officials have repeatedly accommodated grievant with respect to his disability and have provided him a "tailor made" calling off procedure. The respondent argues that because grievant has been unreliable in calling off from work, its managerial decision to select another employee more qualified by virtue of his reliable work habits for the position at issue was proper and not violative of University, Board of Regents or State rules and regulations.

Evidence in this case supports the respondent's position. A senior painter serves as a paint crew leader and must be on-the-job at all times to direct the work of several other employees, which may include temporary workers, and to make other work arrangements. While grievant's problems were intensified during the months of October through March and those were the times he was unlikely to call off a work absence, un rebutted testimony established that he does have frequent sick leave absences at other periods during the year. (T4.8,13-14). The respondent has shown that it accommodated grievant's disability to its detriment, as disciplinary policies which pertain to employee excessive use of sick leave and frequent work absences and infractions of rules in place to call off sick or absent are not applied to him. (T4.13,14). Employee work reliability is a legitimate consideration and qualification for job placement when the position entails the direct supervision of a number of other employees.

In addition to the foregoing narration, the following findings of fact and conclusions of law are made.

#### FINDINGS OF FACT

1. Grievant is a ten-year employee at West Virginia University and has at least five years seniority over other painters in the school's physical plant.

2. The grievant is a Viet Nam veteran who was wounded in combat. He suffers from a debilitating stress syndrome as a result of his experiences in Viet Nam and has a 50% rated disability for his wounds and stress disorder.

3. Due to the stress disorder, grievant has a crisis period between October and March when he must receive treatment and medication. During these periods he has much difficulty in meeting his employment obligations. Evidence indicates grievant is not totally reliable in other months as well. (T4.8,13,14).

4. The University accommodates grievant's disability as disciplinary policies and regulations to control excessive employee absences are not applied to him.

5. Grievant does not always comply with specially tailored procedures for him to call off work and his supervisor does not always officially record that grievant did not call off work. (T4.10).

6. According to grievant's supervisor, the special treatment accorded to him (grievant) sometimes causes problems with other employees who must adhere to stricter rules with respect to absences, tardiness, reporting off from work and the like.

7. Grievant was a senior painter from September through June 1985 and a temporary worker stated that grievant always had the materials, kept the guys working and knew the next move to make. (T4.5).

8. The grievant applied for a temporary position as a senior painter for the months of April through June 1988. A senior painter functions as a paint crew leader and must be on-the-job to directly supervise the work of other employees, have the materials available and schedule the work in necessary areas.

9. Another employee with more reliable work habits was selected for the position by the grievant's supervisor on the basis of the successful candidate's reliability.

### 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.

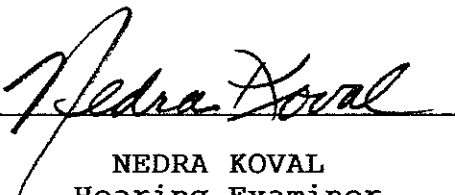
2. In the grievance procedure it is incumbent upon the grievant to prove the essential elements of the grievance by a preponderance of the evidence. Melba v. Cabell County Board of Education, Docket No. 06-87-137.

3. Grievant has failed to prove the University violated policy or law when it employed a candidate other than him for a temporary position as senior painter.

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

DATED: September 30, 1988

  
NEDRA KOVAL  
Hearing Examiner