



REPLY TO:  
401 Davis Avenue  
Suite 315  
Elkins, WV 26241  
Telephone: 636-1123

**Members**  
James Paul Geary  
Chairman  
Orton A. Jones  
David L. White

**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**  
GASTON CAPERTON  
Governor

**Offices**  
240 Capitol Street  
Suite 515  
Charleston, WV 25301  
Telephone 348-3361

**BERTHA HOWARD**

**v.**

**DOCKET NO. 89-BOR-83**

**WEST VIRGINIA UNIVERSITY**

**DECISION**

Grievant, Bertha Howard, is employed by West Virginia University (University) and is assigned to the Department of Housing and Residence Life as a food service worker II at the Towers Residence Hall. Ms. Howard filed a level one grievance on January 5, 1989 in which she alleged that due to the practice of sexual discrimination she had been denied a position of custodian at the food service unit located in the Towers Hall. The grievance was denied at levels one and two; a level four appeal was filed on March 3, 1989. An evidentiary hearing was held on April 12 at which time the level two record was supplemented; proposed findings of fact and conclusions of law were submitted by May 3.

On or about October 6, 1988 the University posted a position vacancy of custodian at the Towers Residence Hall. Eight applications were received for the position which was later awarded to Mr. Gary Riley. A letter dated November 15, 1988 advised the grievant that another candidate had been selected for the position but gave no basis for the decision. The "Job Candidate Referral Form" completed for the grievant and signed in an illegible hand was marked "Not Accepted" but stated no specific reasons why, as the form directed.

The grievant asserts that at present none of the seven custodians assigned to the food service unit are female nor has there been a female custodian assigned to that unit since the residence hall was opened in 1968.<sup>1</sup> The grievant argues that the long term practice of not hiring female custodians establishes a prima facie case of discrimination and is in violation of the University's Equal Employment Opportunity Policy and Affirmative Action Plan. She requests that she be appointed to the position of custodian in the food service unit for which she applied.

The University argues that its hiring policies have not been discriminatory as thirty-four percent of all its custodians are female while fifty-six percent of the

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<sup>1</sup>These facts are not in dispute as they were confirmed by Robert Stockett, Food Service Manager, at the level two hearing. (T. 80-81).

custodians employed by the Department of Housing and Residence Life are female. It asserts that the most qualified applicant was hired and that the grievant's failure to receive the position was not violative of either the Equal Employment Opportunity Policy or Affirmative Action Plan requirements.

The position description for custodian lists duties and responsibilities in the handling of foodstuffs and related items (receiving, verifying amount, storing, delivering, rotating stock and assisting with inventories of stock) and the custodial care of the dining room entry, dishwashing room and rest rooms. Other responsibilities include the cleaning of storerooms, freezers, coolers and delivery areas, removing garbage, replacing light bulbs and completing other minor repairs. An eighth grade education is preferred although not required if the employee can read, write and has the ability to learn custodial methods, procedures and safety principles relating to the operation of custodial equipment. The employee must operate standard electrical equipment such as floor scrubbers, strippers, sweepers and waxing machines. He or she must be able to stand or walk short distances continuously, lift heavy objects, climb ladders, stoop, bend, reach and stand for long periods of time.

The grievant has been employed as a food service worker since 1984 and lists no other work experience. The successful applicant has completed four weeks of vocational

training in the area of custodial practices and has worked in excess of nine years as a custodian for Monongalia General Hospital and the Monongalia County Board of Education. The grievant does not dispute that the successful applicant was more qualified than she nor does she assert that the explanation for why Mr. Riley was hired was actually a pretext and not the real reason for denying her the position.

The job requirements for a custodian are minimal and it appears that while the grievant would be qualified to hold the position Mr. Riley was significantly more qualified than she by virtue of his training and experience. Hiring the most qualified applicant for a position is not violative of the University's Equal Employment Opportunity Policy which does not require that a member of a protected class receive a position but only that all employees receive the benefits of employment (promotion, tenure, transfer, etc.) without regard to race, color, age, religion, sex, national origin, handicap or veteran status. Nor is hiring the most qualified applicant contrary to the Affirmative Action Plan which provides that a member of an underrepresented, protected class will be given preference for a position when candidates are assessed to be substantially equally qualified.

An allegation of discrimination triggers a specific procedure whereby the case is to be proven. First, the grievant must establish a prima facie case of sexual discrimination. She has met this initial burden by estab-

lishing that she sought the position, was qualified to hold it, would have accepted it if offered and that it was ultimately filled by someone else in conformity with the discriminatory practice of hiring only males. The burden of proof then shifts to the University to rebut the presumption of discrimination by articulating a legitimate, non-discriminatory reason for the grievant's rejection. It has done so by its showing that the successful applicant was more qualified to hold the position than the grievant. At this point the burden of going forward again shifts back to the grievant to prove that the reason given was merely a pretext for illegal discrimination. The grievant did not allege that she was either more qualified or that the use of qualifications was a pretext for hiring the successful applicant. Accordingly the grievant has failed to prove that she was wrongfully denied the position.

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

#### Findings of Fact

1. Grievant has been employed by West Virginia University since 1984 as a food service worker II assigned to Towers Residence Hall.

2. In October 1988 the grievant applied for the position of custodian in the food service unit of the Towers Residence Hall.

3. The successful candidate had completed four weeks of vocational training in custodial work and had been employed as a custodian by a board of education and a hospital for a total of nine years.

4. The food service unit of the Towers Residence Hall currently employs seven custodians all of whom are male. The unit has not retained the services of a female custodian since the residence hall opened in 1968 although approximately thirty-four percent of all custodians employed by the University are female.

#### Conclusions of Law

1. Although the University employs a significant number of females as custodians throughout the institution and within the Department of Housing and Residence Life, the grievant has established a prima facie case of discrimination within the food service unit at Towers Residence Hall which has not employed a female custodian since its opening, over twenty years ago.

2. The University's legitimate, non-discriminating basis for filling the position, i.e., qualifications, successfully rebuts the charge of discrimination.

3. The grievant has failed to prove that the stated basis for filling the position was merely a pretext for discriminatory action.

4. Hiring the most qualified applicant for a position does not violate the requirements of the University's Equal Employment Opportunity Policy or Affirmative Action Plan.

5. The position of custodian in the food service unit was properly filled with the most qualified applicant as evidenced by his training and experience.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Monongalia County or to the Circuit Court of Kanawha 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: July 31, 1989

Sue Keller  
SUE KELLER

SENIOR HEARING EXAMINER