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

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TRAVIS DURRETT

v.

Docket No. 89-BOR-122

FAIRMONT STATE COLLEGE

D E C I S I O N

The grievant, Travis Durrett, a part-time building attendant employed by the respondent, Fairmont State College (the college), filed a grievance alleging his nonselection for the position of full-time Police Officer I was arbitrary and capricious and based upon improper factors.¹

The controversy in this case stems largely from the fact that when the college filled three full-time Police Officer I positions on January 12, 1989, it hired persons not currently employed by the college, rather than promoting

¹ Employees of institutions of higher learning have been afforded the option of pursuing a grievance under Board of Regents Policy No. 52 or invoking this statutory grievance procedure. W.Va. Code §18-29-1 (1985).

the grievant or the two other part-time building attendants that had applied for such position.²

According to the testimony at level two, the college advertised and filled the positions in accordance with its policy for filling vacancies and its equal opportunity policy and affirmative action plan.³ A Notice of Vacancy was advertised, applicants were interviewed and ranked on the basis of several factors, and the positions were filled with the persons believed to be most qualified.

The grievance letter alleged that the grievant and the other two part-time employees were more qualified than the individuals hired because of their experience performing a very similar job on campus, their knowledge of campus facilities and their experience working with students. It further asserted that the decision to hire from the outside was arbitrary and capricious and alleged that the past

² A grievance letter was filed at Level I on January 19, 1989, and was signed by grievant, Ernest Carpenter, and Howard Yost, all part-time security building attendants. Mr. Yost withdrew from the grievance shortly thereafter, and Mr. Carpenter was offered a Police Officer I position due to the resignation of one of the three employees selected originally. A Level II hearing was conducted by a designee of the college president on March 8, 1989, and the case was set for Level IV hearing in June 1989, but was submitted for decision on the record upon joint motion of the parties. The case was subsequently transferred to the Grievance Board's principal office in Charleston and was assigned to the undersigned on January 18, 1990.

³ The record does not reveal the grievant's race, color or national origin or that of the successful applicants, and no claim was made below of any violation of the policy and plan.

practice at the college was to overlook qualified part-time employees when filling full-time vacancies, thereby depriving them of an opportunity for advancement. Further, the letter alleged that part of the reason why they were not hired was the family connections of the individuals selected. It was also asserted that they were not selected because of their past or present involvement in union activity.

The evidence introduced at the level two hearing does not support any of these allegations. Grievant clearly did not prove he was better qualified for the position than any of the persons selected, because no evidence was introduced concerning the qualifications, experience or background of the successful candidates. Neither the job applications of the successful candidates nor the evaluation forms and related materials were introduced in evidence. In short, there is a complete absence of evidence upon which a finding can be made that grievant is more qualified than any of the persons selected.⁴ The grievant had the burden of proof on this issue and simply failed to carry it.

The evidence of record does, however, indicate that grievant was well qualified for the position, having worked eight years as a security guard at North American Phillips

⁴ No attempt was apparently made to obtain such information under the discovery provisions of W.Va. Code §18-29-6.

and served thirteen years in the military police in a reserve unit. In view of grievant's extensive experience, a favorable recommendation he received from his immediate supervisor at the college, and the absence of any negative evaluations or disciplinary incidents since he began his employment in August 1987, the grievant had good reason to question his nonselection.

As to the grievant's other allegations, the same evidentiary inadequacy is also present. No evidence was introduced to establish the allegation that his nonselection was due to anti-union animus or that the college engaged in a pattern and practice of not hiring part-time employees to fill full-time positions. The evidence did show that one of the individuals selected for a police officer position was married to an existing employee of the respondent. This fact alone, however, is not sufficient to establish that it was a factor in the selection of that particular applicant.⁵

The following findings of fact and conclusions of law are in addition to the findings and conclusions stated in the foregoing discussion and analysis of the evidence.

⁵ This contention was treated as having been abandoned at Level II.

FINDINGS OF FACT

1. The grievant has held the position of part-time building attendant at Fairmont State College since August 1987. Grievant applied for a full-time Police Officer I position at the college, went through an interview process, and was evaluated based on several factors including educational achievement, work history, physical fitness, grooming and written and oral communication skills. Grievant was not selected for a Police Officer I position.

2. Grievant did not establish that he was better qualified than any of the successful applicants for the positions.

3. The grievant did not introduce evidence of the qualifications of any of the successful applicants.

4. The grievant did not allege or attempt to prove that the college failed to adhere to its procedure for filling vacancies or its affirmative action guidelines.

5. One of the successful applicants is a member of a minority group and had previously worked for the college in a part-time position.

6. No evidence was introduced tending to show that the college gave favorable consideration to one of the successful applicants because he was married to an existing employee.

7. The grievant did not introduce any evidence that his nonselection was due to his union activity. No evidence was introduced of any prior discriminatory acts against

union members, and no evidence was introduced to prove he was not selected as the result of some discriminatory intent.

8. The grievant failed to introduce evidence which would support a finding that the college acted arbitrarily or capriciously in filling the police officer positions.

CONCLUSIONS OF LAW

1. In non-disciplinary matters, an employee in a proceeding filed pursuant to W.Va. Code §18-29-1 et seq., bears the burden of proof and must prove the allegations of the grievance by a preponderance of the evidence. Wyatt v. Marshall Univ., Docket No. BOR2-87-044-1 (Sept. 29, 1987); See also, Setzer v. W.Va. Dep't of Public Safety, Docket No. 89-DPS-476 (Nov. 24, 1989); Payne v. W.Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. The grievant failed to meet his burden of proof.

Accordingly, the grievance must be, and hereby is, DENIED.

Either party may appeal this decision to the Circuit Court of Marion 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 §29-6A-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.



C. RONALD WRIGHT
ADMINISTRATOR/HEARING EXAMINER

Dated: February 20, 1990