MARCIA BOURGEOIS

v. **Docket No. 93-BOT-268A**

BOARD OF TRUSTEES/MARSHALL UNIVERSITY

D E C I S I O N

On May 28, 1993, Marcia Bourgeois ("Grievant") filed this grievance against Marshall University alleging she was "wrongfully denied the position of Director of Residence Services." (See footnote 1) The Grievant requested relief of instatement into the position. This claim was denied at all lower levels and the Grievant requested a Level IV hearing on July 7, 1993. At the parties request, a three day hearing was conducted at Marshall University on September 15, 16, and 17, 1993.

The Grievant argued she was more qualified than the successful applicant, and that the selection procedure was flawed. The Respondent argued the successful applicant was qualified and was offered the job pursuant to recommendations of the search committee and the approval of Marshall University's Equal Employment andAffirmative Action Officer. The Respondent also argued the Level IV hearing was not to be a super interview used to second guess Marshall's hiring decision.

The testimony, exhibits, and arguments of the parties have been examined and considered. They are incorporated as appropriate into the following specific findings of fact.

Findings of Fact

1. The Grievant has been employed at Marshall University for a total of twelve years, working in progressively more responsible positions. She began as a Resident Advisor in 1981 and was an Assistant Director of Residence Life when she quit in 1987 to become Manager of Ronald McDonald House. She returned to Marshall University in 1989 as Assistant Manager of Housing. In this position the Grievant dealt with the areas of meal tickets, housing, and billing. All her housing experience has been at Marshall University.

2. In May, 1992, by order of President Gilley, Marshall University merged Housing and Residence Life to form a single department called Residence Services. Although Grievant's official

title remained Assistant Manager of Housing, her working title from May, 1992 on was Assistant Director of Residence Services - Administration. At that time, the Grievant was assigned many duties associated with the residence life aspect of student housing, including direct supervision of the area coordinators. These two area coordinators were in charge of the residence halls. The Grievant indirectly supervised the people under their direct supervision.

3. In January, 1993, Mary Beth Poma, the Grievant's direct supervisor, resigned.

4. The position was upgraded and reclassified during this vacancy to a Pay Grade 18 with the title of Director of Residence Services.

5. Ray Welty, Vice-President of Administration and the Selecting Officer, appointed a search committee for the position of Director of Residence Services. He also served on this committee, which is somewhat unusual but not violative of any rules. Evidence presented demonstrated that selecting officers had served on search committees in the past.

6. The makeup of the search committee was approved by Dr. Piou, Marshall University's Affirmative Action and EEO Officer, as required by Marshall University's Rules and Regulations.

7. The procedures used by the search committee in the initial assessment of candidates, interview process, and final ranking and selection of the candidates was overseen and approved by Dr. Piou.

8. The search committee, in the advertisements for the position, stated a preference will be given to "candidates who had experience in a residence hall system which encompasses student development and administration."

9. The evaluation form (See footnote 2) reflected this preference by asking the search committee to evaluate the candidates' "experience in and understanding of a Joint Housing/Res. Life system." This section was given extra weight in the scoring.

10. The Grievant had approximately nine to ten months of experience in a joint system at the time of the interview. The successful applicant's system was not a joint one, but he stated, as a former Director of Residence Life he had much interaction with directors from other portions of the university system.

11. After the initial selection process, the search committee interviewed the top five external candidates and the three internal candidates, including the Grievant. The committee had originally planned to interview six candidates but chose this method so all three internal candidates would

receive an interview as required by the guidelines set forth on page 39 of Marshall University's Classified Staff Handbook.

12. The Grievant was ranked seventh and would not have been interviewed, but for the preference given internal candidates.

13. The search committee developed a list of interview questions to be asked each candidate during the interview and an evaluation form for each search committee member to complete.

14. After the interview process was complete and each search committee member independently ranked the candidates on the previously prepared form, the secretary of the search committee calculated their results.

15. Both the Grievant and the successful applicant were qualified for the position.

16. After this calculation, the search committee gave Mr. Welty, the selecting officer, the names of the top three candidates in order of preference by numerical ranking. The successful applicant was ranked number 2 on this list, the Grievant number 3. (See footnote 3)

17. After the search committee submitted the top candidates to Mr. Welty, he checked their references by phone.

18. Mr. Welty asked for and received permission from Dr. Piou to offer the position to the top candidate. She declined.

19. Mr. Welty then asked for and received permission from Dr. Piou to offer the position to the candidate ranked second on the list. This was Mr. Winston Baker, the successful applicant. He accepted.

20. Dr. Piou testified Marshall University met the requirements to give preference to internal candidates by granting them interviews.

21. Dr. Piou testified he would not have given permission to offer the position to Grievant, a white female, over the successful applicant, a black male, without strong justification. He stated the fact that Grievant was a female, internal candidate would be insufficient justification since Marshall has a history of under-utilization of Afro-Americans in employment situations.

22. The search committee, including Mr. Welty, followed the required guidelines in selecting the successful applicant. The successful applicant was not given any additional points because of his minority status.

Conclusions of Law

1. The Grievant has the burden of proof in a nondisciplinary case such as nonselection. Bucklew v. West Virginia Univ., Docket No. 89-BOR-551 (Dec. 29, 1989).

2. "The grievance procedure, W. Va. Code §§18-29-1 et seq., is not intended to be a 'super interview' for unsuccessful job applicants; rather, in this context, it allows analysis of legal sufficiency of the selection process at the time it occurred." Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

3. An agency's decision 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." Sloane v. West Virginia Univ., Docket No. BOR-88-109 (Sept. 30, 1988).

4. "[I]f the grievant can demonstrate that the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion," this Board will require the employer to reevaluate the qualifications of the grievant and thesuccessful applicant. Jones v. Board of Trustees/West Virginia Univ., Docket No. 90-BOT-283 (Mar. 28, 1991).

5. "As in all selection cases, a determination of whom is the most qualified results in subjective decision-making process." Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). [Hereinafter cited as Harper.]

6. The ALJ's subjective assessment of two individuals' qualifications is irrelevant, if both candidates, as here, are minimally qualified. Id. at 2.

7. Marshall University has substantial discretion in the selection of professional employees as long as this discretion is not exercised in an arbitrary or capricious manner. Accord, Syl. Pt. 1, Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991).

8. "Although the arbitrary and capricious standard of review of agency decisions requires searching and careful inquiry into facts, the ultimate scope of review is narrow, and [an ALJ] may not substitute [her] judgement for that of the [university]." Harper at 3.

9. "Generally, an agency's action is arbitrary and capricious if the agency did not rely on the factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view." Harper at 3-4, citing Bedford County

Memorial Hosp. v. Health and Human Serv., 769 Fed.2d 1017 (4th Cir. Va., 1985).

10. In this case the record does not support a finding that the University acted in an arbitrary or capricious manner, relied on improper factors, ignored important aspects of the candidates or their background, expressed their decision in a manner contrary to the findings, or reached an implausible decision.

11. If a hiring decision was proper based on the available information, and the hiring process and decision was not flawed to the point that the outcome might be reasonably have been different, then the hiring will be upheld. Stover at Conclusion of Law 3.

12. The Grievant has not met her burden of proof and demonstrated either that the selection process was flawed or that she was more qualified than the successful candidate.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 29, 1994

APPENDIX A

Candidate's Name _____

Evaluator's Name _____

DIRECTOR OF RESIDENCE SERVICES

CANDIDATE EVALUATION FORM

0 = Unsatisfactory

1 or 2 = Some deficiencies evident

2 or 4 = Satisfactory

3 or 6 = Above Average

4 or 8 = Outstanding

Supervisory Experience	**0 1 2 3 4**
Ability to Communicate	**0 1 2 3 4**
Personality (in relation to projected image to students, parents, employees and the public)	**0 1 2 3 4**
Experience In And Understanding Of A Joint Housing/Res. Life System	**0 2 4 6 8**
Administrative Experience	**0 1 2 3 4**
Budgeting Experience	**0 1 2 3 4**
Student Development Experience	**0 1 2 3 4**
Philosophy As It Relates To Residence Halls	**0 1 2 3 4**
Interest In Position And In Organization	**0 1 2 3 4**
Poise	**0 1 2 3 4**

Overall Experience 0 1 2 3 4

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TOTAL

Comments on major factors noted above:

Is candidate acceptable for job? Acceptable Not Acceptable

Footnote: 1*The Grievant actually filed two separate and distinct grievances. These were consolidated for hearing. Since the two issues are complex and only slightly interrelated, a separate decision will be issued in each. See Marcia Bourgeois v. Bd. of Trustees/Marshall Univ., Docket No. 93-BOT-268B.*

Footnote: 2*The evaluation form is reprinted at Appendix A.*

Footnote: 3*The calculated difference between the second and third candidate has varied throughout the information received during the hearing. For all intents and purposes this difference was less than a point. While it is unusual for the rankings to be this close after this lengthy an interview process it does not invalidate the results, only reflects that both parties were qualified and considered acceptable for the position.*