KAREN BUSH,

Grievant,

v. **DOCKET NO. 94-BOD-1137**

BOARD OF DIRECTORS/SOUTHERN

WEST VIRGINIA COMMUNITY COLLEGE,

Respondent, and

TAMMIE THOMPSON,

Intervenor.

D E C I S I O N

Karen Bush ("Grievant"), an employee of the Board of Directors at Southern West Virginia Community College, Logan campus ("SWVCC"), filed a grievance on September 27, 1994, alleging a violation of W. Va. Code §18B-7-1 by SWVCC when it filled the posted position of JTPA Administrative Secretary with a new employee rather than selecting Grievant to fill the position. As relief, she sought "to be awarded the position with full backpay, and in any other way to be made whole."

After her grievance was denied below, Grievant appealed to Level IV. (See footnote 1) This case became mature for decision April 4, 1995,with the receipt of the parties' proposed findings of fact and conclusions of law.

The following findings of fact have been made from the record developed at Levels II and IV. Numbers 3-7 were stipulated to by the parties at Level II.

Findings of Fact

1. Grievant has been employed 15 years as a Building Service Worker at SWVCC, Logan Campus.

2. In July, 1994, SWVCC posted the position of JTPA Administrative Secretary, Logan

Campus, and Grievant applied for the position on July 21, 1994. The job posting stated:

> To provide secretarial support and prepare departmental statistical and accounting documents. Successful candidate will be skilled in all phases of secretarial work and possess considerable knowledge of business communications both verbal and written. Business, technical, or vocational school education of 18 months duration beyond high school required. One year secretarial experience required. Associate Degree preferred. Computer literacy preferred. $7.55 hourly / $1,226.00 monthly (Pay Grade 10).

3. The West Virginia State College and University System has an approved generic job description for the position of Administrative Secretary.

4. The generic job description is a representation of the duties that the majority of the incumbents in this classification perform.

5. The Administrative Secretary generic job description allows for any equivalent combination of education and/or relevant experience which provides the applicant with the capability to perform the essential functions of the job.

6. The West Virginia State College and University System permits the Institutions to determine any equivalencies and relevant experience based on the generic job description and the requirements of the position.

7. Included among the knowledge, skills and abilities listed in the "Job Specifications" section of the job description for Administrative Secretary is:

> Demonstrated ability to type with speed and accuracy.

8. The job description for Administrative Secretary states the knowledge, skills and abilities listed in the "Job Specifications" section "are typically acquired through the following levels of education and experience... [b]usiness, technical or vocational school education of up to 18 months beyond high school... [o]ne year of secretarial experience."

9. Grievant listed on her application for the position, 3 credit hours of education beyond high school, which she earned in Word Processing at SWVCC.

10. Grievant's application disclosed she had ten years' experience as a secretary for Supra Spray, Inc., Parma, Ohio, a carwash franchise, from 1965 to 1975. Grievant on her application described her duties in this secretarial position as filing, accounting, banking, real estate mortgages,

payroll taxes, public relations, and supervision of a crew of office workers. Grievant's letter accompanying her application also listed typing as one of her secretarial duties at Supra Spray, Inc. Grievant's application stated her typing speed as 25 words per minute ("wpm").

11. Forty-one people applied for the subject position. The applications were sent to a three-member Screening Committee appointed by the Campus Dean, and the Screening Committee was asked to choose ten to fifteen applicants to be tested.

12. The Screening Committee recommended fourteen people to be tested. Grievant was not tested, nor was she interviewed for the position. The Screening Committee did not evaluate whether Grievant was minimally qualified for the position.

13. It is the normal practice of SWVCC to test all applicants for a position. This was not done in this case because of the large number of applicants for four positions which were posted at the same time.

14. When there is an internal candidate for a position who has requested a transfer for health reasons, as was the case here, Patricia Hank, Director of Human Resources at SWVCC since 1986, reviews the application to determine if a transfer is appropriate. Accordingly, she reviewed Grievant's application and resume, and determined she was not minimally qualified for the subject position. Ms. Hank believes ten years' secretarial experience maybe a substitute for the educational requirement, however, the reason she decided Grievant was not minimally qualified was she thought Grievant's secretarial experience was too dated to be considered. She further felt that a typing speed of 25 wpm was insufficient.

15. Neither SWVCC nor the West Virginia State College and University System has a policy or regulation regarding how experience is equated to and substituted for minimum educational requirements.

16. There is not a standard minimum typing speed required by SWVCC for an Administrative Secretary, because the typing test is administered on an electronic typewriter, which may not accurately reflect the ability of an applicant who has been using a word processor.

17. One of the persons chosen by the screening committee to be tested typed 10 wpm in the typing test administered by SWVCC; one typed 25 wpm; and a third typed 26 wpm.

18. The successful applicant was not an in-house applicant.

Discussion

W. Va. Code §18B-7-1(d) required SWVCC to hire a minimally qualified in-house applicant for the posted JTPA Administrative Secretary position over a new employee. The pertinent language of that Code Section is:

> A nonexempt classified employee, including a nonexempt employee who has not accumulated a minimum total of one thousand forty hours during the calendar year or whose contract does not extend over at least nine months of a calendar year, who meets the minimumqualifications for a job opening at the institution where the employee is currently employed, whether the job be a lateral transfer or a promotion, and applies for same shall be transferred or promoted before a new person is hired unless such hiring is affected by mandates in affirmative action plans or the requirements of Public Law 101-336, the Americans with Disabilities Act. If more than one qualified, nonexempt classified employee applies, the best-qualified nonexempt classified employee shall be awarded the position. In instances where such classified employees are equally qualified, the nonexempt classified employee with the greatest amount of continuous seniority at that state institution of higher education shall be awarded the position. A nonexempt classified employee is one to whom the provisions of the federal Fair Labor Standards Act, as amended, apply. (See footnote 2)

The sole issue in this matter is whether SWVCC acted in an arbitrary and capricious manner in deciding Grievant did not meet the minimum qualifications of the subject job opening posted at SWVCC. Booth v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994). Importantly, in reviewing the actions of a decision-maker to determine whether it acted in an arbitrary and capricious manner, the undersigned cannot substitute her judgment for that of the decision-maker. Id.

Both parties introduced evidence in an effort to demonstrate the level of Grievant's secretarial skills. Much of that evidencemust be disregarded by the undersigned because in an evaluation of whether the decision-maker acted in an arbitrary and capricious manner the question is not, "what are Grievant's abilities", but rather, what did the decision-maker know of Grievant's abilities when she decided Grievant was not minimally qualified for the position. Further, while the decision-maker has "the obligation to act reasonably and to thoroughly and carefully consider the qualifications of the candidates... so did Grievant bear the burden to be precise in detailing her qualifications for the position so that the [decision-making] committee could make its determination. If Grievant possesses skills and abilities relating to the qualifications for the position which she sought, but which she did not effectively communicate to the [decision-making] committee, she failed to met [sic] her obligation

to be persuasive." Id., citing Merritt v. Kanawha Co. Bd. of Educ., Docket No. 91-20-439 (Feb. 5, 1992).

Grievant argues she is minimally qualified because she believes she can operate the necessary office equipment, she believes she can do the job, and she has ten years of secretarial experience. SWVCC found Grievant not minimally qualified because she can type only 25 wpm, and SWVCC believes she does not possess the requisite education or experience. Even though experience can be substituted for education, SWVCC discounted Grievant's secretarial experience because it was ten years old, and office equipment has changed dramatically in the last ten years. SWVCC, however, did not test Grievant to determine whether this assumptionwas accurate, even though SWVCC's normal practice is to test all applicants.

The phrase, "minimally qualified," is not defined in W. Va. Code §18B-7-1, nor elsewhere in the Code. Neither SWVCC nor the West Virginia State College and University System has developed a standard for determining whether an applicant is minimally qualified for the position of Administrative Secretary. However, SWVCC's normal practice is to administer a test to each applicant, apparently to assess his or her abilities. In this case, however, Grievant was not allowed to take the test to demonstrate her abilities. SWVCC instead relied upon Ms. Hank's feelings about Grievant's abilities.

Further, even though a typing speed of 25 wpm on its face does not appear to meet the job specification in the Administrative Secretary job description of ability to type with speed and accuracy, Ms. Hank explained there is no absolute minimum typing speed required because those who normally work on a word processor may type very poorly on an electric typewriter. The undersigned is also influenced by the fact that three of the applicants who were tested produced typing speeds of 10 wpm, 25 wpm, and 26 wpm. Clearly, Grievant's typing speed was competitive with others who made the first cut, and were chosen by the Screening Committee to be tested. Grievant deserved at least the same chance as these applicants to demonstrate whether she could perform the duties of the job.

In the absence of some other clearly defined standard for evaluation of minimum qualifications, SWVCC acted in an arbitrary and capricious manner in failing to test Grievant to determine whether she was minimally qualified for the posted position.

Conclusions of Law

1. W. Va. Code §18B-7-1(d) required SWVCC to hire a minimally qualified in-house applicant before it could hire a new employee to fill the posted position of JTPA Administrative Secretary.

2. The standard applied is whether SWVCC acted in an arbitrary and capricious manner in deciding Grievant did not meet the minimum qualifications of the subject job opening posted at SWVCC. In reviewing the actions of a decision-maker to determine whether it acted in an arbitrary and capricious manner, the undersigned cannot substitute her judgment for that of the decision-maker. Booth v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994).

3. SWVCC acted in an arbitrary and capricious manner in deciding Grievant did not meet the minimum qualifications of the subject job opening posted at SWVCC, because it failed to test Grievant, as is its normal practice, but instead assumed her ten years of secretarial experience was so dated that it could not be given any weight in determining whether Grievant met the minimum educational and/or experience requirements, and because it determined that her typing speed of 25 wpm was insufficient to meetthe minimum qualifications when no standard minimum typing speed has been set.

Accordingly, this grievance is **GRANTED IN PART**, and SWVCC is hereby **ORDERED** to administer to Grievant the test taken by the applicants selected by the Screening Committee to be tested, and if the test results indicate she is minimally qualified to perform the duties of the JTPA Administrative Secretary, she is to be placed in that position.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: May 15, 1995

Footnote: 1 Grievant's immediate supervisor was unable to grant the requested relief. The Level II hearing was held

November 17, 1994, at which time Tammie Thompson, the successful applicant for thesubject position was granted Intervenor status. The Level II decision denying the grievance was issued December 1, 1994. Grievant appealed the Level II decision on December 7, 1994. Level III was waived, and the appeal was forwarded to Level IV on December 22, 1994. After mediation was attempted without an agreement being reached, the Level IV hearing was held before the undersigned on March 13, 1995.

Footnote: 2 The parties do not dispute that Grievant is a nonexempt classified employee; that the job opening would be a lateral transfer or promotion; or that the hiring is not affected by mandates in affirmative action plans or the requirements of Public Law 101-336, the Americans with Disabilities Act. Further, no evidence was presented that any other applicant for the position was a SWVCC (in-house) employee who was better qualified than Grievant.