JOHN M. GEORGE,

Grievant,

v. **DOCKET NO. 95-BOT-O5O**

BOARD OF TRUSTEES/
WEST VIRGINIA UNIVERSITY,

Respondent,

D E C I S I O N

On or about October 10, 1994, Grievant filed a grievance against West Virginia University (WVU) raising a claim of discrimination and protesting WVU's decision not to select him for the position of "Building Trades Supervisor" in the Health Sciences Center Maintenance Engineering Department. Grievant, currently a refrigerator technician, alleges he is as "substantially equally qualified" as the successful candidate. Grievant also claims that he is a member of a protected class, a Vietnam Veteran and a disabled individual. Grievant seeks the position and back pay. The grievance was denied at Levels I and II and Level III was waived. On January 30, 1995, the grievance was appealed to LevelIV. A Level IV hearing was held on July 6, 1995 at which time the Grievant and the Respondent agreed to submit the matter on the record with the filing of Proposed Findings of Fact and Proposed Conclusions of Law. The case became mature for decision on August 14, 1995, with the receipt of responsive post-hearing argument.

Findings of Fact

1. The University system of West Virginia Board of Trustees (BOT) requires each institution under BOT to develop and implement affirmative action policies consistent with BOT, state and Federal regulations. WVU maintains an affirmative action plan

2. The person occupying the position of Building Services Worker Lead retired.

3. John Bihun from Human Resources sent the job description to the Compensation and Classification unit for review and then to the Employment unit for posting.

4. John Bihun reviewed all the applicants for the position and did the initial screening of the candidates including checking the Affirmative Action Plan for each position to determine if there is underutilization.

5. Underutilization, if present, is recorded on a Human Resources Referral Form for each applicant and forwarded along with the applicant's application and resume to the hiring department.

6. According to the Referral Form, dated September 9, 1994, the position was underutilized for females, blacks, Hispanics and Asians.

7. The backside of the Referral Form contains a "Special Notice," a short synopsis of WVU's Affirmative Action Policy. This document clearly states:

[w]here candidates are assessed to be substantially equally qualified for a position in relation to job related criteria, a member of a protected class should be selected to address underrepresentation...

This form also states that when there are protected class members who are being considered, but who are not chosen for the position, then a justification for their non-selection must be provided to the appropriate Human Resource Representative.

8. John Bihun completed a referral form for each of the screened applicants and forwarded them along with their applications and resumes to the Maintenance Engineering Department at the Health Sciences Center for use by Guy Varchetto and Gary Miller, the Supervisors, to use in interviewing the applicants.

9. Among the applicants were representatives of all the underutilized classes except for females.

10. Grievant has been employed at WVU since September 1, 1978. Currently he is a Lead Worker in the Mechanical Engineering Unit of the Maintenance Engineering Shop, which is part of the Medical Center Physical Plant.

11. On or about July 17, 1994, Grievant applied for the vacant position of "Building Trades Supervisor" in the Health Science Center Maintenance Engineering Department.

12. Grievant is a member of a protected class (a disabled Veteran) but he is not a member of an underutilized class under the Affirmative Action Plan of the institution.

13. WVU's Affirmative Action Plan is a guideline, not a policy. The Affirmative Action Plan

establishes goals and objectives for WVU for protected class individuals based on the Federal Guidelines, Executive Order 11246. Protected classes at WVU that have set goals and objectives are women, blacks, Hispanics and Asians.

14. The State of West Virginia does not have an established plan outlining goals and objectives for the hiring of disabled veterans.

15. Grievant was permitted an interview although his file contained a letter of warning. WVU policy is that a warning letter in a personnel file bars an employee from interviews until the letter is removed. Such a letter is systematically removed from the employee's file after a one year time period.

16. The selection process was conducted by Mr. Gary Miller, Mr. Guy Varchetto, and Mr. Harold H. Harper, Special Assistant to the Vice President for Health Sciences. Each member of the selection committee evaluated and rated each applicant individually, totaled his own scoring sheet/instrument and met as a committee to make the final decision on the successful applicant. Twelve (12) qualified applicants were interviewed.

17. Grievant was at least "substantially equally qualified" to interview for the vacant position based on his experience and education having earned an Associate's Degree in Business.

18. Grievant met ten (10) of the eleven (11) factors in Section III--ESSENTIAL FUNCTIONS and Section V--QUALIFICATION STANDARDS, of the Position Description.

19. Grievant ranked in the middle of the candidates on the scoring sheet evaluation.

20. By letter dated September 13, 1994, Grievant was notified that he was not selected for the position of "Building Trades Supervisor" in the Health Science Center Maintenance Engineering Department.

21. The position was awarded to Mr. Roy as the most qualified candidate.

22. Jennifer McIntosh, WVU's Affirmative Action Officer, personally visited the department after the Grievant expressed questions regarding his status and the position.

23. Ms. McIntosh did not ask the department to reconsider the decision to select Mr. Roy as the successful candidate. She believed this to be a "clean hire" and that Mr. Roy's selection was proper under the guidelines for Affirmative Action.

24. The selection committee believed that the Grievant's knowledge was more focused in one area of refrigeration and that he had some electrical training; however, he lacked sufficient

knowledge/training in the areas of plumbing, welding, carpentry and electric, areas in which this position required the successfulcandidate to have knowledge/training in order to perform the duties and responsibilities of the job.

25. The score sheets/instruments utilized by the selection committee were destroyed by the department after the hire was made. 26. On September 14, 1994, the Grievant was injured on the job and has not returned to work and has been receiving Workers' Compensation benefits. The Grievant is also scheduled to undergo "white lung" testing. It is unclear as to whether Grievant is or will be able to return to work.

Discussion

This is not a disciplinary case, accordingly, Grievant bears the burden of establishing the elements of his grievance by a preponderance of the evidence. Napier v. Marshall Univ., Docket No. 91-BOT-105 (June 24, 1991); Canfield v. W.Va. Univ., Docket No. 90-BOT-127 (Sept. 28, 1990); Durrett v. Fairmont State College, Docket No. 98-BOR-122 (Feb. 20, 1990).

In Grievant's view, the factors outlined in the Scoring Instrument utilized by WVU did not relate directly to the position requirements as stated in the position description (University Exhibit 4). The Scoring Instrument contains 11 factors:
(1) SUPERVISORY EXPERIENCE/ TRAINING; (2) EXPERIENCE IN CONDUCTING TRAINING; (3) ABILITY TO COMMUNICATE EFFECTIVELY; (4) PHYSICAL CONDITION; (5) CARPENTRY EXPERIENCE/TRAINING; (6) PLUMBING EXPERIENCE/TRAINING; (7) ELECTRICAL EXPERIENCE/TRAINING; (8) MECHANICAL EQUIPMENT EXPERIENCE/TRAINING; (9) PROJECT MANAGEMENT EXPERIENCE/TRAINING; (10) COMPUTER EXPERIENCE/TRAINING; and (11) ATTITUDE. (Grievant's Exhibit #3).

Section III of the Position Description--ESSENTIAL FUNCTIONS and Section V of the Position Description--QUALIFICATION STANDARDS (University's Exhibit #4), clearly cover 9 of the 11 factors. However, the factors Project Management Experience/Training and Attitude are not clearly outlined in the Qualifications Standards. It can be reasoned that Project Management Experience/Training is encompassed by ESSENTIAL FUNCTION #1 and by several of the

QUALIFICATION STANDARDS. Although Attitude is not clearly outlined on the Position Description, there is no policy, procedure or law which states that an interviewing committee cannot utilize a category such as attitude, which is both general and subjective, as a way in which to evaluate a candidate. Moreover, no policy, procedure or law was presented by the Grievant which would prohibit the use of such a category during an interview process.

At the Level II hearing Mr. Varchetto was questioned as to why he felt that the Grievant was not the best candidate for the position. Mr. Varchetto testified that

"In my mind, it boils down to primarily lack of experience in the variety of crafts that are called for in the job description. John came across to me that he had experience in the area of refrigeration, air conditioning, he had some training in electronics; but in the other areas that are called for in the job description, he did not have near as much experience or training as a number of the other applicants." (Hearing Transcript, 1/18/95, p. 121)

W.Va. Code §29-6A-2(d) defines discrimination as "any differences in the treatment of employees unless such differencesare related to the actual job responsibilities of the employee or agreed to in writing."

Grievant did not identify any unfair treatment or differences in treatment other than to say in his statement of grievance that he had not been selected for the open position although he felt that he was the most or at least a substantially equally qualified candidate. In order to make a prima facie showing of discrimination the Grievant must establish:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to the] actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (October 19, 1989).

Furthermore, since the Grievant had been unable to return to work for over five months and was scheduled to have "white lung" testing, it is unclear whether Grievant could currently fulfill the job

duties and responsibilities of the position due to his physical condition. This, in and of itself, shows that Grievant was not similarly situated as any other employees. Therefore, Grievant failed to prove a prima facie case by demonstrating that he was "similarly situated to one or more employees."

The facts in this case do not support Grievant's contention that he is entitled to the job he seeks as a matter of law. On the contrary, the facts and applicable law, as set forth in this Decision dictate that the grievance must fail. Accordingly, based on the record as a whole, the following formal findings of fact and conclusions of law are properly made.

Conclusions of Law

1. In hiring matters, the administrative law judge must not ordinarily substitute her judgment for that of the decision-maker. See Booth v. Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994).

2. 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-88-108 (Sept. 30, 1988), as cited in Bourgeois v. BOT/Marshall Univ., Docket No. 93-BOT-268A (Mar. 29, 1994).

3. Inasmuch as the record reflects that WVU accorded Grievant the same hiring considerations as given the successful applicant, Grievant failed to show any unlawful discrimination on WVU's part, as that term is defined in W.Va. Code §18-29-2(m).

4. Grievant failed to show a violation, misapplication or misinterpretation of any statute, policy, rule, regulation or written agreement relative to his non-selection for the position in question.

5. Grievant failed to prove by a preponderance of the evidence that he was entitled to the position as a matter of law.

Accordingly, this grievance is **DENIED**.

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

MARY BETH ANGOTTI-HARE

Administrative Law Judge

Dated: November 29, 1995