HAROLD RUMER, Grievant,

v. Docket No. 95-BOT-064

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY, Respondent,

and

STEPHANIE GRAHAM-SIMS, Intervenor.

D E C I S I O N

On or about November 11, 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 Training Specialist. Grievant alleges he is more qualified than the successful candidate, Intervenor Stepha nie Graham-Sims, a less-senior employee. Grievant seeks the position and back pay. Because the parties compiled an exten sive record at level two, they decided merely to supplement the record at the March 20, 1995, level four hearing. The case became mature for decision upon the agreed-upon date for the completion of responsive post-hearing argument, April 21, 1995.1

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1Ms. Graham-Sims joined the case as Intervenor at level four. Of record are the grievance pleadings, the adverse decisions rendered at the lower grievance levels and the transcript and exhibits of the level two hearing, held January 5 and 24, 1995.

First and foremost, because this is not a disciplinary case, 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). Grievant did not present a compelling legal theory in support of his position in this matter.

In Grievant's view, it was wrong of WVU to hire a woman instead of him based on gender instead of qualifications. Grievant notes that, by policy, WVU must not discriminate in hiring matters. In other words, Grievant essentially argues that he was the victim of "reverse" discrimination.2 However, it seems that the administrator who finally decided to employ Intervenor based that decision on a reasoned belief that, on balance, Intervenor was the most qualified candidate. Moreover, 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 extensively in this case by WVU and undisputed by Grievant, dictate that the grievance must fail. Accordingly,

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2For grievance purposes, W.Va. Code 18-29-2(m) states that discrimination "means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

based on the record as a whole, the following formal findings of fact and conclusions of law are properly made.3

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 and has an affirmative action office and officer. Prior to an interview process for an available position, WVU's Human Resources office checks for underutilization of the position from information obtained from the affirmative action plan.

2. In early August 1994, Katherine Powell, Assistant Director of the Office of Environmental Health and Safety (OEHS), advised John Bihun, a Human Resources Supervisor, of her desire to hire a Training Specialist, Pay Grade 19.

3. Mr. Bihun sent the Training Specialist job description to the Compensation and Classification unit for review, and then to the Employment unit for posting. Mr. Bihun also personally reviewed all the applicants for the position and did the initial screening of the candidates.

3It is noted that WVU's post-hearing fact/law proposals were quite thorough and, in addition, supported by the record as a whole. Therefore, much of the text of those proposals have been adopted in this Decision, though modified for clarity and for stylistic or other reasons when warranted.

4. Mr. Bihun is also responsible for checking WVU's affirmative action plan for each position to determine if there is underutilization. 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.

5. According to a Referral Form dated August 16, 1994, the position in question was underutilized for females, blacks,

Asians/Pacific islanders and Hispanics.

6. 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 Resources representative.

7. Mr. Bihun completed a referral form for each of the six screened applicants and forwarded them along with their applications and resumes to Ms. Powell. Among the applicants were representatives of all the protected classes.

8. Grievant, a white male and an internal candidate within OEHS, was one of the six applicants for the position as was Intervenor, a white female and also an internal candidate within OEHS.

9. As the hiring supervisor, Ms. Powell selected a three-person team to do the initial interview of the qualified applicants. The team consisted of Dorsey Jacobs, Director of Physical Plant, chairman; Paul Becker, Director of Safety and Health Extension; and Maria Yester, Manager of Training for Human Resources.

10. Ms. Powell sent the selected six applications to the interview committee along with a memo stating the date and time for each independent interview.

11. Ms. Powell also provided the committee members with

questionnaire forms for each of the candidates.

12. By memo dated August 25, 1995, Mr. Jacobs advised Ms. Powell that there were two candidates whom the selection commit tee felt could handle the position in question, but that Grievant was ranked slightly ahead of Intervenor.

13. Subsequently, Ms. Powell, together with her supervi sor, Roger Pugh, interviewed the two finalists, Grievant and Intervenor, for the position.

14. Ms. Powell and Mr. Pugh failed to reach a consensus on who would be the best individual to handle the position, as Grievant and Intervenor were deemed equally qualified, and both were considered to be capable of performing the job duties.

15. In the meantime, Mr. Bihun received inquiries from two of the candidates who said they had been told that they were among the top candidates. This prompted Mr. Bihun to advise Ms. Powell that she would have to provide letters of justification for non-selection, in that there were representatives in the pool of all of the underutilized groups.

16. Having discussed the issues of affirmative action with Mr. Bihun, Ms. Powell sent a memo to him outlining the process that she followed in the selection of the committee, and also the process that had been completed to date.

17. Ultimately, Ms. Powell determined that, in the spirit of affirmative action and for other reasons, the position should be awarded to Intervenor. Her justification was that, while Grievant had the most supervisory experience and perhaps more budgetary experience, Intervenor had other qualifications which tipped the balance in her favor. Intervenor holds a Master's degree in Safety Management, a desirable educational background, but Grievant does not. See Joint Ex. 5 (1/5/95). In addition,

Intervenor has more computer skills than Grievant, and she possesses personal qualities that complement this type of position. Intervenor also coordinated a conference the previous year, and the skills that she exhibited were transferable to the management qualifications of the position. In the final analy sis, Ms. Powell determined that Intervenor's qualifications were equivalent to or exceeded Grievant's qualifications.

18. Ms. Powell accordingly asked Mr. Bihun to review her hiring decision with Jennifer McIntosh, WVU's Affirmative Action Officer. As part of her duties, Ms. McIntosh must be familiar with the concept of underutilization, a term used interchange ably with the term underrepresentation, to address whether a position within a finite group is, in fact, underutilized or underrepresented by members of a protected class: blacks, Hispanics, Asians and/or white females, in the institution as compared with the relative job market. The statistical informa tion used for comparison of the institution with the relative job market is normally updated annually.4 WVU last updated the statistical data in September 1992, due to the implementation of the Mercer Classification System and Ms. McIntosh's illness.5

19. Ms. McIntosh agreed with the decision to select Intervenor as the successful candidate relative to affirmative action guidelines.

20. Mr. Bihun subsequently made an offer to Intervenor, Ms. Graham-Sims, and Intervenor accepted the position.

Conclusions of Law

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

4WVU recognized that its statistical information is always at least one year behind and that the same data is utilized until the plan changes. According to WVU, while the "snapshot" taken of an organization at a particular time can change quite rapidly from one day to the next for statistical purposes, not that much change occurs in a university over time. Finally, WVU represented that its statistical numbers may tend to be a little skewed because the Federal government utilizes the 1990 census to determine the different types of job categories and the number of individuals in each category.

5While Grievant seemed to take issue with WVU's affirmative action determinations relative to the job in question, he failed to identify any specific errors. Therefore, it cannot be said that WVU's determinations on this issue were wrong.

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. The fact that a candidate has the most relevant experience or the most seniority does not necessarily entitle that candidate to a position. Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995).

4. 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 contemplated in W.Va. Code

18-29-2(m).

5. 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.

6. 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 Monongalia 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: May 31, 1995