LINDA CUTRIGHT, Grievant,

v. DOCKET NO. 95-BOT-090

BOARD OF TRUSTEES/WEST VIRGINIA

UNIVERSITY - PARKERSBURG, Respondent,

and,

MELODY MERCER, Intervenor.

D E C I S I O N

This grievance was filed by Grievant, Linda Cutright, against the Board of Trustees/West Virginia University - Parkersburg ("Respondent" or "WVU-P"), alleging she should have been selected for a posted payroll representative position as she was the best qualified applicant. Grievant alleged the selection process was flawed, specifically that the process may have been superficial, inadequate and discriminatory, and that seniority was ignored and other factors were given undue weight. As relief, she sought "to be awarded the position with full backpay, and in any other way to be made whole." (See footnote 1)

The following findings of fact have been properly made from the record developed at Levels II and IV.

Findings of Fact

1. Grievant has been employed by WVU-P since January 1981. She has been in her present position since 1983. That position is a classified staff position, Library Catalog Assistant, pay grade 12.

2. WVU-P posted a new position of payroll representative, pay grade 14, on August 29, 1994. The position is a classified staff position. The job posting stated, in pertinent part:

> QUALIFICATIONS: Associate's degree in accounting or related field; two years of detailed payroll experience. Must possess basic knowledge of accounting functions,

knowledge of state and federal laws concerning payroll, and ability to operate computer terminal, office equipment and machines.

RESPONSIBILITIES: Administer the processing of payroll and distribution of pay checks; complete all payroll related reports in a timely manner.

RANK/SALARY: Pay grade 14; $18,780 annual salary.

3. Four persons applied for the position, including Grievant and Melody Mercer. All were WVU-P employees at the time they applied for the position.

4. The payroll representative position reports to Jack Simpkin, Business Manager at WVU-P, and he was the hiring supervisor. Mr. Simpkin chose to utilize a selection committee to interview all applicants for the position. The members of thecommittee were Dan Williamson, Sandy Swisher and Mr. Simpkin. Sandy Swisher had performed all the duties of the payroll representative position for 16 years. Dan Williamson is the computer center director, and was Melody Mercer's supervisor at the time she applied for the posted position.

5. The selection committee chose Melody Mercer to fill the position because the members of the committee determined she met the degree requirement and was the best qualified applicant based upon her extensive payroll and computer experience.

6. Grievant holds an associate degree in business, and Melody Mercer holds an associate degree in business management.

7. Melody Mercer submitted a resume with her application for the posted position, which showed 9 months' experience in computer data entry, and 8 1/2 years' experience in payroll and bookkeeping. Ms. Mercer also asked in her letter of application that her "current resume on file" be used as part of her application. (See footnote 2)

8. Grievant submitted a half page document to apply for the position, which briefly described her work experience as a Library Technical Assistant at WVU-P, and as a sales clerk, switchboard operator, customer service supervisor, and in personnel at J.C. Penneys. She indicated her payroll experience as "[b]enefits, payroll for commission and non-commission, [and] data entry" at J.C. Penneys.

9. Grievant did not ask the selection committee to review her personnel file prior to making their selection, nor did she sign a release allowing any member to review her personnel file.

10. WVU-P's practice is that the personnel file of an applicant for a posted position is not reviewed in filling a position unless the applicant asks that the personnel file be considered. WVU-P does not ask applicants if their personnel file may be reviewed.

11. All applicants for the subject posted position were asked in the interview to describe their payroll experience.

12. During the 15 to 20 minute interview, Grievant described her three to four years' payroll experience at J.C. Penneys to the selection committee as primarily data entry of employee hours. She told the committee she collected the hours from time cards for commission and non-commission employees, and separated these hours into 2 categories. Grievant explained to the committee that she would send the hourly number to the main office, which took care of payroll from that point. Grievant indicated during the interview process that she did not have experience in tracking salaries, calculating tax withholdings and benefits, supplemental payrolls, or filling out state and federal employment tax returns, workers compensation and unemployment returns. Grievant described her computer experience to the committee as data entry of time sheets on a computer system once a week which she then sent to a central office for processing.

13. Melody Mercer was employed as a computer operator/data entry clerk at WVU-P at the time she applied for the subject posted position, and had been in that position since April 1993.

14. During the 15 to 20 minute interview, Melody Mercer indicated to the selection committee that she had a broad range of payroll experience including bookkeeping, the generation of payroll checks, preparation of tax deposits and reports, calculation of benefits and taxes, and preparation of quarterly and annual state and federal employment tax forms, workers compensation and unemployment forms. She also indicated she had experience in her position at WVU-P entering the payroll in the computer system bimonthly, and she had generated reports and budgets on the computer at WVU-P.

Discussion

W. Va. Code §18B-7-1(d) requires WVU-P to hire the best qualified candidate when all applicants for a position are in-house classified employees. If it is determined that no in-house applicant is best

qualified, that is, applicants are equally qualified, then the most senior applicant must be placed in the position. The pertinent language of that Code Section is:

> 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.

Grievant argued that she should have been selected for the position because she had more seniority than Ms. Mercer. The seniority preference of W. Va. Code §18B-7-1(d), is applicable only if Ms. Mercer and Grievant were equally qualified for the position. The burden was upon Grievant to prove she was as qualified for the position as Ms. Mercer. Grievant did not prove she was as qualified as Ms. Mercer, and her seniority argument must fail.

The remaining issue in this matter is whether WVU-P acted in an arbitrary and capricious manner, or was clearly wrong in deciding Ms. Mercer was the best qualified candidate to fill the subject job opening posted at WVU-P. 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.

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 deciding Grievant was not the best qualified candidate 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 possessesskills 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 argued she was the best qualified applicant. Grievant asserted the selection process

was flawed, arguing first, the selection committee placed too much emphasis on whether the applicants had prepared various state and federal employment tax forms. Grievant asserted she had gathered all the data necessary to preparation of these forms, and the forms themselves were not that difficult to complete; therefore, the fact that she had not ever completed the forms should not have been a consideration in the evaluation of who was best qualified for the position. The evidence does not support that Grievant had gathered all the data necessary to preparation of the subject employment tax forms.

Grievant's argument originated from a September 12, 1994 Memorandum Mr. Simpkin sent to Grievant in response to a memo Grievant had sent to him. Mr. Simpkin stated in the Memorandum:

> You were specifically asked during your interview about your experience with State and Federal monthly, quarterly, and annual tax returns, quarterly Worker Compensation returns, and quarterly Unemployment returns. You stated you had no experience with these returns. These are very important parts of the payroll process at WVU-P. The successful candidate did have experience with these returns. The unanimous, conclusion of the selection committee was, therefore, that Melody Mercer was more qualified for the position.
>
> If you examine the legislation, you will find that seniority is used as the deciding factor only when the candidates are equally qualified. Since Ms. Mercer wasunanimously deemed to be more qualified, seniority was not a factor in the selection.

Grievant's Level II Exhibit 8.

In a previous Memorandum to Grievant dated September 6, 1994, notifying her that Melody Mercer had been selected to fill the posted position, Mr. Simpkin had explained, "only Melody [Mercer] had the broad-based payroll experience applicable to the position -particularly tax returns and reports." Grievant's Level II Exhibit 8.

Mr. Simpkin's explanation for his September 12, 1994 Memorandum to Grievant was that it was written with the intention of addressing the issue he believed Grievant was raising at that time, which was, whether Grievant should have received the position because she had more seniority than Ms. Mercer. He did not intend it to detail the reasons Ms. Mercer was selected. Regardless of the intent, the Memorandum, standing alone, clearly leaves the impression that Ms. Mercer was selected because she had prepared the noted forms, while Grievant had not.

Mr. Simpkin's September 12, 1994 Memorandum standing alone is misleading. However, his

earlier Memorandum of September 6, 1994, did indicate the real reason for Ms. Mercer's selection, which was her "broad-based payroll experience applicable to the position". Grievant does not allege any harm to her case preparation because of the September 12, 1994 Memorandum.

Ms. Swisher agreed that filling in the forms was simple. It is the process prior to putting the numbers on the forms which is the difficult part. Ms. Swisher defined "payroll" as the processof collecting information in order to produce paychecks for employees and information required by federal and state government and other organizations. Ms. Swisher stated that according to the information provided to the selection committee by Grievant, Grievant was not performing these functions at J.C. Penneys. Grievant indicated to the selection committee when asked about the unemployment form, that J.C. Penneys does not have unemployment. That was an indication to Ms. Swisher that Grievant had no knowledge about in-depth, detail payroll work. Level IV Hearing.

Mr. Simpkin testified that the job involved more than "just the production of checks, it's all the attendance reports, taxes, deductions, unemployment compensation, those are very significant parts of the job both in terms of time involved and significance to the successful completion of the job." He noted that Ms. Mercer "had much broader payroll experience particularly with the tax reporting. The payroll itself was more in line with our type of payroll situation where we take a gross check and break it down into all the various tax deductions. We have to do that by hand for supplemental payroll which we do several times a year." Level II Transcript.

Mr. Williamson's role on the selection committee was to evaluate the computer experience of the applicants. Mr. Williamson's assessment of the computer experience of Ms. Mercer and Grievant was:

> I thought that Melody had a lot of various types of computer experience. Entering sheets on a display terminal, that is computer experience, but not what I would consider extensive computer experience. That'ssort of one type of computer type of job. Melody has had a much more extensive and variation of computer experience. She has done a lot of different things in terms of generating reports; verifying accuracy of reports; operating the computer system? [sic]

Level II Transcript.

The testimony presented was that the selection committee reasonably reviewed and evaluated the qualifications of the applicants related to past payroll experience and computer experience, and that the fact that Grievant had not prepared certain state and federal employment tax forms was not

the sole basis for their decision. While Mr. Simpkin could have chosen his words more carefully in his September 12 Memorandum to Grievant, the undersigned has been presented with no reason why Respondent should be held to that Memorandum in these circumstances, particularly where Mr. Simpkin had indicated in an earlier memorandum that the successful applicant was chosen because of her broad-based payroll experience.

The second flaw asserted by Grievant was that the selection committee should have based its decision on objective criteria. Grievant cited Executive Order No. 2-93 to support her argument. Grievant believes the criteria which should have been used are employee performance appraisals, the number of college credit hours earned by each applicant, and college courses taken which were relevant to the posted position.

The referenced Executive Order requires the Director of Operations to "develop by September 1, 1993, uniform policies and procedures to be applied to all state agencies that are designed toestablish", among other things, "guidelines to ensure that employees who perform well, as measured by objective standards, receive preference for transfer or promotion". Assuming this Executive Order applies to higher education, it is not the Executive Order itself which would be applied by the undersigned, but the uniform policies and procedures developed by the Director of Operations. Grievant did not produce any "uniform policies and procedures", or indicate that they existed, and the undersigned is not aware of their existence. It is possible that such policies and procedures would conflict with the statutory requirement that the best qualified applicant shall be awarded the position, and would therefore require analysis as to its applicability to this case. For these reasons, this Executive Order will not be addressed.

Performance evaluations were not considered by the committee because they are a part of the personnel file, and according to Ms. Swisher, the selection committee has no access to the personnel file unless the applicant allows it. WVU-P's practice is that personnel files are not reviewed in making hiring decisions. This practice is not unreasonable. While a review of performance evaluations may shed light on whether a person has been a good employee, it will not assist in the determination of which applicant has more job related experience. Further, Grievant did not produce any evidence from her personnel file which would have shown the selection committee she had experience in payroll orcomputer operation, other than that which she addressed in the interview.

As to whether the selection committee should have considered the number of college credit hours

earned by each applicant, and college courses taken which were relevant to the posted position, the degree requirement was an Associate Degree in a related field. The committee considered college credit earned when it determined that both Grievant and Ms. Mercer met this requirement. It was not arbitrary and capricious for the committee to look at Ms. Mercer's many years of payroll experience as a better indicator of her qualifications, rather than rely upon college credit hours earned in excess of an Associate Degree.

Grievant has not shown that Respondent acted in an arbitrary and capricious manner, or was clearly wrong in its selection. Mr. Simpkin appointed a selection committee comprised of persons qualified to assist him in selecting the best qualified applicant. The committee reviewed the applications submitted and conducted interviews, asking applicants to describe their experience relevant to the job. Grievant described her experience in the interview, as did Ms. Mercer. Ms. Mercer has years of experience in all phases of payroll, while Grievant's payroll experience is very limited. Ms. Mercer's computer experience is directly related to payroll, and includes generation of reports and budgets, while Grievant's computer experience is limited to data entry.

Finally, Grievant inferred that Ms. Mercer had received special treatment by receiving notice of the position vacancy priorto posting, coaching from members of the selection committee, and that her selection was pre-determined. The evidence does not support these assertions. While Ms. Mercer had heard a rumor that the position would be posted, there was no evidence the selection committee members originated this rumor, or that it was originated for Ms. Mercer's benefit. The evidence quite simply supports the selection committee's conclusion that Melody Mercer was the best qualified applicant for the posted position.

Grievant obviously has worked very hard during her 14 years of employment at WVU-P. She is a single mother with three children who has also worked at J.C. Penneys, and taken courses at WVU-P, while working full-time at WVU-P. Respondent has never taken the position that Grievant could not learn to do the job of payroll representative, and in fact found her to be minimally qualified for the position. Unfortunately for Grievant, the successful applicant for the position simply had many years of experience applicable to the duties of the position which Grievant did not have. Grievant did not prove a flaw in the selection process or that she was the best qualified applicant for the posted position; therefore, this grievance is denied.

Conclusions of Law

1. In order to prevail, Grievant must prove the allegations in her complaint by a preponderance of the evidence. Vance v. Logan County Bd. of Educ., Docket No. 92-23-045 (May 21, 1992); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Under the facts of this case, W. Va. Code §18B-7-1(d) required WVU-P to hire the best qualified applicant to fill the posted position of payroll representative.

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-88-108 (Sept. 30, 1988), as cited in Bourgeois v. BOT/Marshall Univ., Docket No. 93-BOT-268A (Mar. 29, 1994)." Rumer v. BOT/Marshall Univ., Docket No. 95-BOT-064 (May 31, 1995). 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. BOT/Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994).

4. Grievant did not meet her burden of proving that WVU-P acted in an arbitrary and capricious manner, or was clearly wrong, in deciding Grievant was not the best qualified applicant.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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: November 3, 1995

Footnote: 1 The grievance was denied at Levels I and II, on November 4, 1994, and February 20, 1995, respectively. Level III was waived by Grievant, and appeal was made to Level IV on February 24, 1995, with Grievant requesting that a

decision be rendered on the lower level record. Respondent requested a Level IV hearing, and after a continuance for good cause, the hearing was held May 24, 1995. The successful applicant, Melody Mercer, was allowed to interveneat Level IV. This case became mature for decision at the conclusion of the hearing.

Footnote: 2 Ms. Mercer's "current resume on file" was not made a part of the record.