

**LOIS FRY, .**

**Grievant, .**

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**V. .DOCKET NUMBER 95-BOT-376**

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**WEST VIRGINIA BOARD OF TRUSTEES at .**

**MARSHALL UNIVERSITY, .**

**Employer. .**

### **DECISION**

Grievant, Lois Fry, is an employee of the West Virginia Board of Trustees and works at Marshall University. She is currently assigned the classified title of Administrative Associate. On July 10, 1995, she filed the instant grievance against the Employer, pursuant to West Virginia Code §18-29-1, et seq., claiming that it had violated W. Va. Code §18B-7-1 by not selecting her for the position of Payroll Representative that it posted for bid and filled in late June, 1995. Grievant claims that she is, at least, as equally qualified for the position as the successful candidate and has more seniority; therefore, she should have been awarded the position. [\(See footnote 1\)](#) The grievance was denied at levels one and two, and appealed to level four on August 24, 1995. [\(See footnote 2\)](#) An evidentiary hearing was held at this Grievance Board's Charleston, West Virginia office on November 28, 1995, and the case became mature for decision on that date.

### **Positions of the Parties**

The statutory provision Grievant relies upon, W. Va. Code §18B-7-1(d), states as follows:

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 minimum qualifications 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 the 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 argues that she is just as qualified for the position in question as the successful applicant, another Marshall University employee; therefore, she was entitled to the position based upon her greater seniority within the institution. The Employer contends that Ms. Pertee was the most qualified candidate for the position; therefore, it was not bound to award the position to Grievant based upon her seniority. It avers that this Code section allows for the hiring of the most qualified, in-house candidate, and that seniority only comes into play whenever the top two or more in-house candidates are equally qualified for the position in question.

The following findings of fact are properly deduced from the evidentiary record in the case.

#### Findings of Fact

1. On May 26, 1995, the Employer posted the position of Payroll Representative as vacant at Marshall University.
2. Forty-two individuals, including eight internal candidates, applied for the position.
3. Grievant submitted an application for the position.
4. The job posting listed the following as the position's minimum qualifications:

Associate's degree in accounting or a related field and two years of payroll or related experience (or equivalence). Basic knowledge of accounting functions; ability to operate computer utilizing various software programs, and knowledge of state and federal laws concerning payroll such as exempt status, social security, etc.

5. Marshall's Department of Human Resources decided that only six of the candidates, all internal applicants, met the minimum requirements for the position and recommended that these six employees be interviewed.

6. Grievant was found qualified for the position and was interviewed. 7. The interview committee was made up of the payroll department director, the manager and three payroll representatives. Each committee member reviewed the applicants' applications and developed their own questions to ask each candidate during an interview.

8. Based upon the information provided to the interviewers, they each completed an Applicant Evaluation Form where the following factors were considered: knowledge of specific job and job related topics, experience, ability to communicate, interest in position and our organization, overall motivation to succeed, appearance and habits, poise, insight and alertness and personality. For each of these nine factors, the candidates were rated as 0 for unsatisfactory, 1 for some deficiencies evident, 2 for satisfactory, 3 for above average or 4 for clearly outstanding. The ratings were then totaled.

9. The successful candidate was the interviewee who was given the most points by the most interviewers. Ms. Pertee was awarded the position because she received the top score on the Applicant Evaluation Form from three of the five interviewers.

10. Grievant was ranked as the fourth highest scorer by two of the interviewers and the sixth highest by the other three individuals.

### Discussion

Both Grievant and the Employer correctly interpret Code §18B- 7-1. This provision requires that institutions of higher education transfer or promote their internal, nonexempt classified employees to vacant positions, as opposed to hiring outside candidates, if the internal candidates are minimally qualified. However, if there is more than one minimally qualified, internal candidate, the institution may decide who shall be promoted or transferred based upon a "best-qualified" standard. Only when the institution decides that two or more internal candidates are equally qualified does seniority determine who receives the position in question. The real issue here is whether the Employer erred in determining that Ms. Pertee was better qualified for the position than Grievant.

In deciding this case, it must be noted that the Undersigned may not play the role of a "superinterviewer" and substitute his judgment for that of the Employer in determining who was the most qualified candidate for the position of Payroll Representative. Here, only a review of the legal sufficiency of the selection process, at the time it occurred, is allowed. Stover v. Kanawha County Bd.

of Educ., Docket No. 89-20-75 (Jun. 26, 1989). "The exercise of administrative judgment 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." Sloan v. West Virginia Univ., Docket No. BOR-88-109 (Sep. 30, 1989), p. 6. It is recognized that a determination of whom is the most qualified for a position necessarily results from a subjective decision-making process. See, Harper v. Mingo County Bd. Of Educ., Docket No. 93-29-064 (Sep. 27, 1993). An ALJ's subjective assessment of two individuals' qualifications is irrelevant, if both candidates, as here, are minimally qualified. Bourgeois v. Bd. of Trustees, Docket No. 93-BOT-268A (Mar. 29, 1994), p. 7, citing, Harper, supra. Finally, "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, citing, Bedford County Memorial Hosp. V. Health and Human Serv., 769 Fed 2d. 1017 (4th Cir. Va., 1985).

Grievant has failed to establish sufficient evidence to support a conclusion that the Employer abused its discretion by acting arbitrarily or capriciously in selecting Sharon Pertee for the position in question. She has also not shown that the decision was clearly wrong in light of the information presented to the Employer. Grievant has approached the case by attempting to show the decision to promote Ms. Pertee to the position of Payroll Representative was subjective, and that she was just as qualified or more qualified for the position based upon her demonstrated qualifications and credentials. Based upon a review of the evidence, Grievant has failed to prove that the decision was based upon improper factors, that the Employer has ignored important aspects of the candidates' backgrounds or credentials, that it expressed its decision in a manner contrary to its own findings, or that it reached an implausible decision. Finally, she has failed to show that the selection process was significantly flawed to the point that the outcome would have been different had the flaw not occurred. Therefore, Grievant has failed to meet her burden of proof.

The foregoing discussion is hereby supplemented by the following conclusions of law.

#### Conclusions of law

1. Grievant bears the burden of proving her claims by a preponderance of the evidence. See, W. Va. Code §18-29-6.

2. Grievant has failed to prove that the Employer has abused its discretion, acted arbitrarily or capriciously or that its decision was clearly wrong in light of the facts it was presented. Sloan, supra; Harper, supra.

3. Grievant has failed to establish that the Employer's selection process, at issue herein, was sufficiently flawed in that an absence of any flaw would have resulted in a different result. Jones, supra.

Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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.

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**ALBERT C. DUNN, JR.**  
**Administrative Law Judge**

March 27, 1996

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[Footnote: 1](#)

*The successful applicant, Sharon Pertee was present at the level four hearing but presented no testimony on her own behalf and did not examine witnesses called by the other parties. Therefore, she has not been afforded intervenor status as it is determined that her interests have been adequately represented by the Employer.*

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[Footnote: 2](#)

*The grievance was waived at level three by the Employer pursuant to W. Va. Code §18-29-4(c).*