

**CAROLYN GILLESPIE, IZALLIAR DALTON,
and SANDRA PARKER**

v. Docket No. 95-HHR-469

WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES

DECISION

Grievants Carolyn Gillespie and Izalliar Dalton are Office Assistants and Grievant Sandra Parker is a Telephone Operator. All are employed by the West Virginia Department of Human Services (HHR) at Welch Emergency Hospital (WEH). They initiated this complaint at Level I on or about April 19, 1995, protesting the appointment of Alma Barnes to the position of Accounting Assistant II. Their supervisor was without authority to grant relief and the grievance was denied at Levels II and III. Appeal to Level IV was made October 26, 1995, and after several continuances for cause, a hearing was held April 9, 1996. [\(See footnote 1\)](#)

There is little if any dispute over the facts of the case. The position in issue was posted in accordance with applicable regulations of the West Virginia Division of Personnel (Personnel) on or about March 20, 1995. The posting indicated that the duties of the job included, "accounting assistance in the Credit/Collections-Patient Accounting Department; previewing bills for accuracy and completeness, filing of bills, verification of charges, posting of changes and other related tasks." The "filing of bills" and "posting of changes" and perhaps other of the duties of the position were computerized functions and WEH was seeking a candidate who had such experience. During interviews of the nine applicants, WEH Patient Accounts Manager David Gillenwater and WEH Chief Financial Officer David Gresham focused on that particular qualification.

Mr. Gresham and Mr. Gillenwater eventually agreed that Ms. Barnes was the most qualified applicant. This decision was based primarily if not wholly on their determination that Ms. Barnes was

the only candidate who had experience in computerized billing. The record reflects that Ms. Barnes acquired this experience through several years of private employment at a bank and a 120-day temporary assignment as an Accounting Assistant I at WEH. During the latter employment, she was provided training in many if not all of the duties of the position in issue. Ms. Barnes was appointed to the post on or about May 16, 1995.

The grievants use computers in their current positions and have acquired a general knowledge of WEH's billing procedures, but they concede that they do not have the desired electronic billing experience. Their sole claim is that WEH did not but should have considered and weighed heavily their tenure or "seniority" at the hospital. The assertion is predicated largely if not entirely on W.Va. Code § 29-6-10(4), which provides,

For promotions within the classified service which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination, when such examination is practicable. An advancement in rank or grade or an increase in salary beyond the maximum fixed for the class shall constitute a promotion. When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit or have the benefit withdrawn, as the case may be.

The short and dispositive answer to the claim is that which was provided at the lower levels--the portion of this language which addresses seniority did not become effective until June 8, 1995, several weeks after the Accounting Assistant II post was filled. [\(See footnote 2\)](#) There is no indication whatsoever in the statute that it was intended to operate retroactively. See, Shanholtz v. Monongahela Power Co., 270 S.E.2d 178 (W.Va. 1980).

An equally dispositive response is that the record establishes conclusively that the assessment of applicants for the position in issue at no time resulted in a "choice between two or more classified employees." While the statute is somewhat ambiguous, it clearly does not mandate that seniority be a factor when there is a viable "outside" candidate.

Apparently recognizing the inapplicability of the statute, the grievants also assert that it was simply arbitrary and capricious of WEH not to consider seniority. The undersigned summarily finds that it was not. See, Bourgeois v. Marshall University, Docket No. 93-BOT-268 (Mar. 29, 1994).

It appears that the grievants also rely on the following portion of Section 11.01 of Personnel's

administrative regulations, [\(See footnote 3\)](#)

Whenever practical and in the best interest of the service, an appointing authority will fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the career service upon the basis of the employees' demonstrated capacity and quality and length of service. In filling vacancies, appointing authorities should make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees.

The grievants apparently view this provision as a requirement that state employers give preference in all hiring matters to permanent employees.

Obviously, the policy is more advisory than mandatory, and requires only that the appointing agency give consideration to permanent employees in hiring decisions in order to maintain a balance between "internal" and "external" appointments. In order to show a violation of the policy in a particular hiring decision, an employee must necessarily demonstrate that the employer, to some extent, has established a pattern of disregarding the viability of promotions in favor of hiring new employees. The grievants presented no such evidence. Finally, to the extent that the grievants allege that the selection process by which Ms. Barnes received the position in issue was otherwise flawed, they have failed to substantiate such claims. The record conclusively establishes that WEH complied with all applicable Personnel regulations; that it adhered to all applicable HHR and WEH internal hiring policies; and that Ms. Barnes was the most qualified applicant for the post. In short, the grievants have not shown any irregularity in the process whatsoever.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-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.

JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: April 30, 1996

[Footnote: 1](#)

The parties made oral legal argument at the hearing and did not request opportunity to make further written proposals.

[Footnote: 2](#)

It was apparent at the Level IV hearing that the grievants and their representatives were aware that the statute was not applicable. The undersigned was unable to discern why they continued to press the claim.

[Footnote: 3](#)

At Level III, the grievants cited several other Personnel regulations but did not explain their pertinence. It is clear that like the regulation cited above, none were applicable to the selection process in question. Nevertheless, the Level III evaluator carefully reviewed each cite and explained in detail why it had no bearing on the case. The undersigned finds it unnecessary to readdress those matters herein and merely affirms and adopts the evaluator's findings and conclusions.