

THOMAS AGLINSKY,

Grievant,

v.

DOCKET NO. 95-BOT-387

BOARD OF TRUSTEES/

WEST VIRGINIA UNIVERSITY,

Respondent,

DECISION

Thomas Aglinsky (hereinafter Grievant), currently employed as a custodian at the Department of Agricultural Sciences at West Virginia University ("WVU"), filed this grievance pursuant to the provisions of W.Va. Code §18-29-1 et seq. on or about August 30, 1995 claiming age discrimination in the hiring process of three Public Safety Officer Assistants at West Virginia University. Grievant requested as his remedy that he fill one of the three positions or the next available position. Grievant's claim was denied at the lower three levels of the grievance procedure and he appealed to level four on September 5, 1995. The parties agreed to waive the level four hearing, to submit the case on the record, and to submit proposed findings of fact and conclusions of law. The case became mature for decision on January 12, 1996.

FINDINGS OF FACT

1. Grievant applied for the position of Security Police with the West Virginia University ("WVU") Department of Public Safety on or about October 26, 1993.
2. Grievant is currently employed as a custodian at the Department of Agricultural Sciences at WVU.
3. Twelve candidates, including Grievant, were chosen by the Department of Human Resources to be interviewed for the position.
4. On or about March 9, 1994, Grievant interviewed with Bob Roberts the Director of Public Safety at West Virginia University.
5. Grievant also interviewed with Captain Mathess and Sergeant Cheslock, both from WVU's

Department of Public Safety, in March of 1994.

6. Grievant had been previously employed as a Police Officer for the town of Star City, West Virginia from 1977 to 1979.
7. Grievant's position with the Star City Police was funded by CETA.
8. In 1979 the CETA funding ran out for Grievant's position with the Star City Police and Grievant was laid off.
9. Grievant had one year military training in the U.S. Army as a tank commander.
10. Grievant was not selected for the campus security position at WVU.
11. Two male candidates over the age of 40 and a woman under the age of forty were chosen for the available campus security positions.
12. One of the successful male candidates had been a West Virginia State Police officer for twenty-three years, had attended the required West Virginia State Police Academy, had military police experience while in the armed forces and had earned a Master's degree in Safety Studies.
13. The other successful male candidate, had been employed previously with WVU as a shift Sergeant (Security Officer) in the Department of Public Safety and had military and other specialized training.
14. The successful female candidate possessed a Bachelor's degree in Crime and Justice and had served two years in the U.S. Navy. This candidate was hired under WVU's affirmative action policy.
15. In 1989 an officer fifty-three years old was hired by the Department.
16. Sometime prior to 1989 an officer aged fifty-eight was hired by the Department.

DISCUSSION

Respondent argues that according to W.Va. Code §18-29-1 the West Virginia Education and State Employees Grievance Board does not have jurisdiction over allegations of age discrimination and that allegations of age discrimination are properly filed before the West Virginia Human Rights Commission. W.Va. Code §5-11-1. However, according to Vest v. Board of Education of County of Nicholas, 455 S.E. 2d 781 (W.Va. 1995), this Board does have such jurisdiction. Therefore, this grievance is properly before this Grievance Board.

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

W.Va. Code §18-29-2(d) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employee or agreed to in writing by the employees." Grievant could not identify any different treatment other than to claim that although he felt that he was a qualified candidate, he had not been selected for the available position in campus security because of his age. 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). Grievant has failed to show by a preponderance of the evidence that age played any part in the decision not to select him. The interviewing panel did not ask any questions pertaining to age, and the decision

appears to have been made based upon the individual interviewer's evaluations of the applicants' interviews, educational background and experience as it related to the position. Mr. Roberts, the current Director of Public Safety at West Virginia University testified that if he could have screened out any of the twelve candidates' applications, he would have probably screened out Mr. Aglinsky's because of the training dates... [t]he last law enforcement training he had was 1977 and 1980. A lot of things have changed in law enforcement since 1978 to today. He's had no continuing education since then. He has taken no courses since then. In fact, when he had the training then, it wasn't certified. He did not go to the academy. So none of the training that he actually had at that time point would be relevant to what we're doing today."(Transcript, p. 93).

Mr. Roberts, in answering a question addressed to him by the Grievant, additionally testified, "You asked if you met the minimum qualifications that I'm looking for. If you ask me that question, I will tell you no."(Transcript p. 148). Mr. Aglinsky asked Mr. Roberts for specifics and Mr. Roberts testified: "Relevant training. You have no academy training, you have no college experience that are [sic] in the job description, your military experience was approximately two years, as I believe you've corrected me." (Transcript pp. 148-149).

The selected applicants possessed either more recent educational training or experience. In fact, one of the two successful male candidates, at age forty-three, had been a West Virginia State Police officer for twenty-three years, had attended the required West Virginia State Police Academy, had military police experience while in the armed forces and had earned a Master's degree in Safety Studies. The second successful male candidate, age forty-two, had been employed previously with WVU as a shift Sergeant (Security Officer) in the Department of Public Safety and had military and other specialized training. The female candidate possessed a Bachelor's degree in Crime and Justice and had served two years in the U.S. Navy. This candidate was hired under WVU's affirmative action policy. Moreover, all three successful candidates received higher cumulative interview scores than Grievant. Inasmuch as the record reflects that WVU accorded Grievant the same hiring considerations as given the successful applicants, Grievant failed to show any unlawful discrimination on WVU's part, as that term is contemplated in W.Va. Code §18-29-2(d). In his Proposed Findings of Fact, Grievant raised the issue of W.Va. Code §18B-7-1(d) which states, in part, A nonexempt classified employee, including a nonexempt employee who has not accumulated

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.

It is concluded from the record that the Grievant, although a classified employee at WVU, did not meet the minimum qualifications for the open position. Therefore this statute does not apply to this grievance.

CONCLUSIONS OF LAW

1. In hiring matters, the administrative law judge must not substitute her judgment for that of the decision-maker. See Booth v. Marshal 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. W. Va. 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. 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).

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

DATE: **January 31, 1995** _____

MARY BETH ANGOTTI-HARE

ADMINISTRATIVE LAW JUDGE