TERRY NEBEL,

Grievant,

v. **Docket No. 97-BOT-422**

BOARD OF TRUSTEES/
WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Terry Nebel (Grievant), currently employed by Respondent West Virginia University (WVU) as an Administrative Assistant, filed a grievance pursuant to W. Va. Code §§ 18-29- 1, et seq., alleging that he should have been selected to fill a Manager/Inventory Control position. Grievant alleged that he was the victim of discrimination, harassment and reprisal. This grievance was denied at Level I by Grievant's immediate supervisor, Douglas Knorr (Knorr), on March 12, 1997. The grievance was advanced to Level II where an evidentiary hearing was held on July 14, 1997 and September 2, 1997. Grievant was represented at this hearing by Owen A. Tapper. WVU was represented by attorney William H. Hutchens, III. The grievance was denied at Level II by Chief Administrator/Superintendent Scott C. Kelley on September 9, 1997. No Level III proceedings occurred.

A Level IV hearing was held on January 7, 1998, before Administrative Law Judge Jeffrey N. Weatherholt. (See footnote 1) Grievant was again represented by Owen A. Tapper. WVU was represented by Assistant Attorney General Andrew G. Dimlich. This grievance becamemature for decision on March 2, 1998.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II and Level IV hearings, and documentary evidence admitted at Levels I through IV.

FINDINGS OF FACT

1. Grievant was hired by WVU in 1989 as an Inventory Clerk in the Department of Inventory Management. On January 1, 1994, as a result of the “Mercer” reclassification of all classified employees within the State College and University Systems of West Virginia, Grievant's job title became Administrative Assistant in the Asset Management Unit of Procurement Services.

2. Sam Lopez held the Manager/Inventory Control position until July 1, 1996. Grievant submitted an application for the position.

3. The position description for Manager/Inventory Control set forth the following educational requirements: 1) a Bachelor's Degree in business administration or related academic discipline; or 2) a Master's Degree in an appropriate academic discipline is preferred and may be substituted for some of the experience required. 4. Grievant did not possess a Bachelor's Degree.

5. Knorr informed Grievant that he was not qualified for the position, and that he was not on the list of final candidates for the position.

6. The position of Manager/Inventory Control has since been abolished.

7. Grievant initially alleged that Knorr's decision not to include him as a final candidate for the position was arbitrary, capricious and clearly wrong. As relief, Grievant initially requested that he be instated as Manager/Inventory Control, that Knorr stop harassing and discriminating against Grievant, and that Knorr write a formal letter of apology to Grievant for unprofessional and improper management practices.

8. At Level IV, Grievant alleged for the first time that he performed the duties of the Manager/Inventory Control position from July 1, 1996 to July 3, 1997.

9. At Level IV, Grievant submitted a handwritten document entitled “Amended Relief Requested for Level IV” seeking as relief the difference between his salary as Administrative Assistant and the salary of Manager/Inventory Control, a difference of five pay grades.

10. Grievant's performance was evaluated on July 3, 1997. In his written response to his evaluation, he made no mention of having performed the duties of the Manager/Inventory Control position from July 1, 1996 to July 3, 1997.

11. Knorr resigned and no longer works at WVU. Knorr is currently working in the State of Washington.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Grievant initially alleged that the decision of Director not to include him as a final candidate for the position was arbitrary, capricious and clearly wrong. As relief, Grievant initially requested that he be instated as Manager/Inventory Control, that Knorr stop harassing and discriminating against Grievant, and that Knorr write a formal letter of apology to Grievant for unprofessional and improper management practices. However, the abolition of the Manager/Inventory Control position and the departure of Knorr have rendered these issues moot and this relief meaningless.

Therefore, Grievant attempted to amend his grievance at Level IV, alleging that he performed the duties of the Manager/Inventory Control position from July 1, 1996 to July 3, 1997, and sought as amended relief the difference between his salary as Administrative Assistant and the salary of Manager/Inventory Control, a difference of five pay grades.

When new claims are raised at Level IV, the following statutes govern:

> Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw same, the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitations for filing the new grievance shall be measured from the date of such ruling. W. Va. Code § 18-29-3(j).

Similarly, “[a]ny change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner.” W. Va. Code § 18-29-3(k).

The purpose of these statutes is evident from this grievance. The focus of the hearing at Level II was the requirement that applicants for the Manager/Inventory Control position have a Bachelor's Degree, the fact that Grievant was not selected for the position, and Grievant's allegations that he was the subject of discrimination, harassment and retaliation. Grievant's representative made a

single, passing reference to the relief Grievant now seeks in the 275 page transcript of the Level II hearing.

Grievant never asked to amend his grievance at Level II. The parties never agreed to amend it. Facts concerning this new grievance and relief occur only sporadically and incidentally at the Level II hearing.

Most importantly, Knorr was not questioned about the new grievance and relief. He was the person who could best address Grievant's new claim. Having left West Virginia, he could not be called to testify at Level IV. This leaves only Grievant's side of the story, and the undersigned declines to blind side WVU by allowing Grievant to amend his grievance at Level IV.

The West Virginia Supreme Court of Appeals and this Grievance Board have consistently held that a grievance may not be granted at Level IV unless the theory upon which relief was awarded was developed at the lower levels. Hess v. W. Va. Dept. of Health and Human Resources, 189 W. Va. 357, 432 S.E.2d 27 (1993), Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (April 13, 1995), Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995). As in this case, the lower level transcriptsin Hess revealed no discussion of evidence related to the grievant's new theory, and no decision by any hearing examiner to incorporate the new issue into the grievance.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw same, the parties may consent to such evidence, or the grievance evaluator may decide to

hear the evidence or rule that the grievant must file a new grievance. The time limitations for filing the new grievance are measured from the date of such ruling. W. Va. Code § 18-29-3(j).

3. At Level IV, any change in the relief sought by the grievant shall be consented to by all parties or may be granted within the discretion of the hearing examiner. W. Va. Code § 18-29-3(k).

3. Grievant did not meet the posted minimum qualifications for the position of Manager/Inventory Control.

4. Grievant may not amend his grievance and the relief sought at Level IV.

Accordingly, the 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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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated May 8, 1998

Footnote: 1 *For administrative reasons, the grievance was reassigned to the undersigned Administrative Law Judge on March 18, 1998.*