JOHN M. GEORGE,

Grievant,

v. **Docket No. 99-BOT-429**

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Grievant, John M. George, employed by the Board of Trustees as a Refrigeration Technician at West Virginia University (WVU or Respondent), filed a level one grievance on February 17, 1998, in which he alleged "he has been unjustly treated in job promotions and upgrading by means of discrimination, harassment, favoritism, and reprisal by management." For relief, Grievant requested to be made "whole in every respect." Guy Varchetto, Assistant Director of Health Science Maintenance Engineering, denied the grievance at level one on March 24, 1998. Following an evidentiary hearing at level two, Scott C. Kelley, Vice President for Administration, Finance and Human Resources at WVU, also denied the claim on September 30, 1999. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced the grievance to level four on October 25, 1999. An evidentiary hearing was conducted in the Grievance Board's Morgantown office on December 9, 1999, at which time Grievant was represented by Tim Tucker, of Laborers' International Union Local 814. Respondent was represented by Assistant Attorney General Samuel R. Spatafore. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on or before January 13, 2000. (See footnote 1) The essential facts of this matter are undisputed and are made based upon the credible evidence entered into the record at level two and level four.

Findings of Fact

1. Grievant has been employed by the Board of Trustees at West Virginia University since 1978, and has held the position of Senior Lead Refrigeration Technician at all times relevant to this decision.

2. Grievant has an Associate of Arts degree in Business, and served as a military squad leader from 1967-69. He managed the sporting goods department at Murphy's Mart in the evenings while

attending the vocational/technical school during the day, and worked at Seneca Glass Company as a Lead Glass Selector, supervising other personnel in selecting and grading different types of glass, in the early 1970's. He has completed training in air conditioning and refrigeration. As a Lead, Grievant ocassionally fills in during the absence of his supervisor.

3. On or about October 16, 1997, the position of Supervisor, Building Trades II, Electrical, was posted. Of the sixteen applicants, five, including Grievant, were determined minimally qualified, and were referred by Human Resources to be interviewed for the position. Grievant was the only applicant to be interviewed who was not an electrician by trade. 4. Interviews for the Supervisor position were conducted by Mr. Varchetto, Medical Center Physical Plant Program Director Gary Miller, and Bill Wyant. Each candidate was asked the same seventeen questions by Mr. Varchetto. The three interviewers individually scored each candidate's responses.

5. Richard Moran was unanimously determined to be the best qualified candidate, and was appointed to the position after being approved by Human Resources and the Office of Social Justice. Mr. Moran has worked for Respondent as an Electrician for approximately ten years, and had served as acting supervisor for approximately six months prior to the position being filled on a permanent basis.

6. The position of Supervisor, Building Trades II, Electrical, requires extensive knowledge and experience with electricity because much of the work is with high voltage electricity.

7. Grievant is a veteran of the armed forces and served in Viet Nam from 1967 through 1969.

8. Grievant and his co-workers were assigned classifications and pay grades as a result of the Mercer reclassification project, effective 1994. Review of these determinations was available to the employees through this grievance procedure, and Grievant was determined to be properly classified.

9. Grievant has filed four grievances prior to the present matter. One involved a disciplinary matter, another resulted when he was not selected for a position, the third involved working conditions and discrimination, and the four addressed his classification.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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 argues that his nonselection for the position of Electrical Supervisor was the result of discrimination, favoritism, harassment, and reprisal. Respondent denies the allegations, and asserts that it hired the best qualified candidate for the position.

W. Va. Code §18-29-2(m) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

W. Va. Code §18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

An employee seeking to establish that his non-selection was motivated by unlawful discrimination or favoritism must first establish a prima facie case by demonstrating the following:
(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 actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievant's claim of discrimination is based upon his status as a Viet Nam veteran. While not entirely clear, Grievant either asserts that he is entitled to either the position, or some preference for the position by virtue of his military service. His assumption is not accurate. Jennifer McIntosh, Director of WVU's Affirmative Action and Equal Opportunity Programs and Interim Executive Officer of Social Justice, testified at level two that unlike federal agencies, veterans are not protected, or given preference, under Respondent's affirmative action program. (Level II Transcript, pp. 94-95.)

Absent any evidence that the successful applicant was shown a preference based upon veteran status, Grievant has failed to establish a prima facie case of discrimination.

When asked why he believed favoritism was shown at the Physical Plant, Grievant explained as follows:

I think some of the _the closest personnel_the question was the HVAC, I'm an HVACV and I have a helper, Bruce Lewis, is an HVAC Mechanic also, but yet we have Tom Livengood andJimmy Bowser and Lloyd McCartley who are all paygrade thirteens (13) and I think favoritism is there because they don't deserve to be paygrade thirteens (13). Ah, they're not qualified in the freons or _I mean, they don't work in them. . . how they got their HVAC certification papers is beyond me 'cause they don't know anything about it.

This issue differs from that stated on the grievance form, i.e., that favoritism had played a role in Grievant's nonselection. Further, this testimony relates to the classification of other employees, not Grievant's own classification. W. Va. Code §18-29-2(a) defines grievance as:

any claim by one or affected employees . . . alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; and discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

Grievant does not claim that the alleged misclassification of other employees has caused a detriment to or interfered with his job performance, or the health and safety of students or employees. Therefore, the claim of favoritism in this instance is not a grievance as defined by law.

W. Va. Code §18-29-2 (n) defines harassment as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” When questioned by his representative regarding this issue, Grievant confirmed that he felt harassed when, in 1994, he wasevicted from a room in which he worked. He also complained that he needs an additional helper, because with only one assistant, he is required to stop working and

respond to calls. Additionally, Grievant testified that he is required to work in some laboratories which are dirty or have unlabeled radioactive materials, and that other employees, who are in paygrade thirteen, won't assist him in the cadaver coolers. While this argument appears to be separate from that of selection, or perhaps part of the reprisal claim, it will be interpreted in a manner most favorable to Grievant, i.e., that the nonselection was the latest incident of harassment.

It is undisputed that Grievant's belongings were moved out of Room G-100-A of the Health Sciences Center on September 10, 1993. However, his Exhibit No. 3, admitted at level two, also establishes that Grievant had been asked to vacate the room which was to be renovated for expanding cafeteria services. After Grievant failed to leave the premises by the target date, and with delivery of equipment impending, his equipment was relocated to the Mechanical Equipment Shop.

In reference to Grievant's need of another assistant, his level two testimony was that he had been told there was not adequate funding for another employee. Grievant notes that other areas have numerous employees while only he and his assistant must serve the refrigeration needs of the entire complex. Grievant offered no proof that the explanation given to him was pretextual. Further, there is no evidence that the refrigeration work is not being completed, or that Grievant has otherwise suffered any harm due to the staffing level. By his own testimony, he simply has to stop what he is working on to respond to calls. Interruptions can be annoying, but they do not support a need for additional personnel. Grievant's remaining claim, that other employees will not assist him, appearsto be a managerial problem, and not an action by Respondent to harass Grievant. In any event, the proper relief for harassment is to cease the action, not to instate Grievant into a supervisory position.

Reprisal is defined by W. Va. Code §18-29-2(p) as “retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1)that he/she engaged in protected activity, e.g., filing a grievance;

(2)that he/she was subsequently treated in an adverse manner by the employer or an agent;

(3)that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,

(4)that there was a causal connection (consisting of an inference of a retaliatory motive) between the

protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon- Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994). If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Connor, supra. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

The record establishes that Grievant has filed a number of grievances in the past ten years, with the present matter being the fourth appealed to level four. Grievant's first complaint was filed in 1991, after he was suspended for fifteen days for allegedly leaving work without permission. That grievance was granted, and the suspension rescinded. Grievant filed a second grievance in 1993, after he was not selected to fill the position of Building Trades Supervisor. That grievance was denied at level four, and the decision affirmed by the Monongalia County Circuit Court. A third grievance was initiated in 1994, when Grievant alleged retaliation, unsafe working conditions, and discrimination. That grievance was not pursued beyond level two. Grievant challenged his classification in 1994, following implementation of the Mercer classification plan. That grievance was also denied at level four. Grievant argues that he was not selected for the position of Supervisor in retaliation for the foregoing grievance activity.

Although Grievant has pursued a number of grievances, the most recent action prior to the instant matter, was filed in 1994 and was one of approximately five hundred forty-five grievances filed as the result of the reclassification. The only grievance upon which Grievant prevailed was decided at level four in 1994. Three years elapsed between these matters and they are not close enough in proximity to the present matter to infer a retaliatory motive. Grievant has failed to establish a prima facie case of reprisal.

Finally, Grievant failed to demonstrate that Respondent acted in an arbitrary and capricious manner, or was clearly wrong in deciding Mr. Moran was the best qualified candidate to fill the subject job opening. Rumer v. Bd. of Trustees/Marshall Univ., DocketNo. 95-BOT-064 (May 31,

1995); Booth v. W. Va. Bd. of Trustees /Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994). An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Watts v. Lincoln County Bd. of Educ. Docket No. 98- 22-348 (Nov. 16, 1998), Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

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 he was not the best qualified candidate for the position. Jefferson v. Bd. of Trustees/W. Va. Univ., Docket No. 97-BOT-565 (May 21, 1998); Bush v. Bd. of Directors/Southern W. Va. Community College, Docket No. 94-BOD-1137 (May 15, 1995).

Also to be considered is W. Va. Code §18B-7-1(d), which provides that if two or more minimally qualified employees are competing for the position, and one of theemployees is the best qualified, that employee must be placed in the vacancy. If none of the employees stands out as the best qualified, employee seniority determines who gets the position. Reed v. Bd. of Trustees/W. Va. Univ., Docket No. 98-BOT-448 (Nov. 18, 1999); Ward and Laney v. Bd. of Trustees, Docket No. 98-BOT-153 (Sept. 18, 1998).

In this case, the interview committee was aware that Grievant had earned an Associate's Degree in Business Administration, and had experience as a Squad Leader while in the military, worked as a Lead Glass Selector at Seneca Glass, and supervised the sporting goods department at Murphy's Mart, as well as having occasionally filled in for his supervisor at the Health Sciences Center. The record also establishes that as a Refrigerator Technician, Grievant has some knowledge of electricity.

Nevertheless, the decision of the committee to award the position of Electrical Supervisor to an employee who is an electrician was not arbitrary and capricious. Grievant asserts that it is a "non-working supervisor position" which requires supervisory skills, not knowledge of the trade. Perhaps this is true; however, an applicant holding a license as an electrician would surely be better qualified than one with little subject specific knowledge.

Finally, Grievant's experience in supervision does not establish him more qualified than Mr. Moran. The record does not include a description of his duties and responsibilities as squad leader, as supervisor of the sporting goods department, or as Lead Glass selector. In any event, these experiences are so distant in time as to make their applicability questionable. There is no information as to the number of times he has substituted for his supervisor while employed at WVU, or what his duties and responsibilities were on those occasions. Based upon the information available, thedecision of the committee to award the position of Electrical Supervisor to Mr. Moran was neither arbitrary and capricious, nor clearly wrong.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

___1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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. W. Va. Code §18-29-2(m) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

3. W. Va. Code §18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

4. An employee seeking to establish that his non-selection was motivated by unlawful discrimination or favoritism must first establish a prima facie case by demonstrating the following:
(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 actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievant failed to establish a prima facie case of discrimination or favoritism in this matter.

6. W. Va. Code §18-29-2 (n) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

7. Grievant failed to prove that Respondent has engaged in harassment.

8. Reprisal is defined by W. Va. Code §18-29-2(p) as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

9. Grievant failed to prove that Respondent has engaged in reprisal.

10. W. Va. Code §18B-7-1(d) provides that if two or more minimally qualified employees are competing for the position, and one of the employees is the best qualified, that employee must be placed in the vacancy. If none of the employees stands out as the best qualified, employee seniority determines who gets the position. Reed v. Bd. of Trustees/W. Va. Univ., Docket No. 98-BOT-448 (Nov. 18, 1999); Ward and Laney v. Bd. of Trustees, Docket No. 98-BOT-153 (Sept. 18, 1998). 11. Respondent's decision to award the position of Electrical Supervisor to an employee with extensive electrical knowledge was neither a violation of W. Va. Code §18B- 7-1(d), nor arbitrary and capricious or clearly wrong.

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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit

court.

Date: March 20, 2000 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

At level two it was clarified that Grievant was grieving his nonselection for the position of Supervisor, Building Trades II, Electrical.