JOHN A. CORNWELL,

Grievant,

v. **Docket No. 01-HE-102**

HIGHER EDUCATION INTERIM GOVERNING BOARD/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, John A. Cornwell, employed as a Campus Service Worker II at West Virginia University (WVU), filed a level one grievance on February 13, 2001, after he was not granted an interview for another position. For relief, Grievant requested that the position be reposted, and he be given an interview. Linda Kimbrel, Supervisor of Building and Campus Services, lacked authority to grant the relief requested at level one. Following an evidentiary hearing, Vice President Scott C. Kelley, denied the grievance at level two. Grievant elected to bypass consideration at level three, and advanced his appeal to level four on March 28, 2001. A level four hearing was conducted on July 17, 2001, at which time Grievant was represented by Bryon Stafford, a co-worker, and WVU was represented by Kristi A. McWhirter, Assistant Attorney General. The matter became mature for decision on August 16, 2001, the due date for submission of proposed findings of fact and conclusions of law.

The following facts are derived from the record developed at levels two and four.

Findings of Fact

1. Grievant has been employed by WVU since March 1990, and held the position title of Campus Service Worker II at all times pertinent to this grievance. Grievantperforms traditional custodial duties of building cleaning and maintenance, and serves as Lead Worker.

2. On or about November 30, 2000, WVU posted a position vacancy for Campus Service Worker II (Roads and Grounds).

3. The duties and responsibilities of the posted position are as follows:

Maintains and cares for institutional grounds by mowing, trimming, and edging around trees, flower beds, buildings, and walkways. Operates, maintains, and services hand power tools and equipment

such as weedeaters, lawn mowers, rototillers, chain saws, fertilizer spreaders, sod cutters, walk-behind sweepers and walk-behind vacs. (50% of time)

Assists Roads & Grounds workers in performing landscape tasks including: pruning and planting of ornamental shrubs, planting of ground covers, annual and perennial flowers and spring flowering bulbs. Seeds, sods, aerates, and fertilizes lawns as needed. Prepares grounds and flower beds for planting and seeding by spreading topsoil, peat moss, compost, and other additives to condition the soil. (15% of time)

Assists with Landscape Construction by: operating jackhammers and other related equipment to remove broken sidewalks; mixes, pours, and spreads concrete, asphalt, gravel, and other materials. Digs holes and trenches to assist in the repair or replacement of utility lines, preparation of irrigation and drainage systems, excavates and prepares grounds prior to initiation of construction projects. (15% of time)

Removes snow from sidewalks, steps, roads, and parking lots by means of hand tools, power brooms, tractors, and trucks. Shall operate different types of equipment such as front-end loaders and hi-lifts. Spreads de-icers and abrasive compounds on all campus areas as needed. Must be able to respond to emergency situations on all occasions and must be available for telephone contact during all emergency and unsafe environmental conditions. (10% of time)
Operates various hand and power tools and equipment in performance of duties such as: shovels, rakes, picks, power trimmers, edging tools, sandblasters, jackhammers, hand trucks, dollies, etc. Assists in the relocation of offices and set- ups for special events. (10% of time)

4. Qualifications for the position include a high school diploma or GED, a valid driver's license, and demonstrated knowledge of grounds maintenance and equipment. A minimum of six months to one year of directly related work experience was also required.

5. Grievant completed an application for transfer on or about December 8, 2000. Under the section “Employment Record,” Grievant listed: (1) the WVU Physical Plant from 1990 to the present; (2) Supply Sergeant with the West Virginia National Guard from April 1985 to February 1986. In this position Grievant requisitioned and distributed supplies, and kept records of all transactions; and, (3) Laborer/Equipment Operator for an excavating company from 1988 to 1990. Duties of this position

included the operation of earth moving equipment.

6. Grievant had submitted a resume to the Human Resources Department a number of years earlier, in which he accounted for the entire period of time since his high school graduation in 1974.

7. Human Resources Supervisor Kathy Trickett reviewed all applications for the Roads & Grounds position, and after conferring with Physical Plant officials, determined that Grievant did not meet the minimum qualifications because his application did not indicate experience related to roads and grounds.

8. Because he was deemed to be not minimally qualified, Grievant was not referred for an interview.

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 §4.21 (2000); 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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant asserts that he was minimally qualified for the position by virtue of his experience with the excavating company. He also argues that his resume and performance appraisals should have been considered. It is Respondent's contention that the decision regarding Grievant's lack of qualifications was not arbitrary and capricious, but was due to the fact that Grievant did not effectively communicate his qualifications on the transfer application. Further, the operation of earth moving equipment was not given a great deal of weight, since the primary duties of the position were pruning, planting, landscaping, and edging. Respondent notes that Grievant was advised on the transfer application that resumes were not to be considered as a substitute for a completed application.

It is understandable that Grievant views himself as at least minimally qualified for a position which

is in his present classification, and consists of many duties we all performat home. Unfortunately, he did not include any such experience on his transfer application. Grievant's testimony at level four indicates that his work with the excavating company was his only related experience, and, as noted by Ms. Trickett, the Roads & Grounds position required experience in pruning, etc., so it was not particularly helpful. Grievant has failed to prove that the failure to consider his resume or performance evaluations when determining whether he was an employee is minimally qualified for the position was a violation of any rule, regulation or policy by WVU. Further, the evidence does not support a finding that the decision Grievant was not minimally qualified was arbitrary and capricious or otherwise improper.

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 his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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. Grievant has failed to prove by a preponderance of the evidence that the decision he was not minimally qualified for the Roads & Grounds was contrary to any policy, or was otherwise improper.

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: September 4, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE