RICHARD NESTER,

Grievant,

v. **Docket No. 01-HEPC-619**

HIGHER EDUCATION POLICY COMMISSION/

WEST VIRGINIA UNIVERSITY,

Respondent,

and

DONNIE ROGERS,

Intervenor.

D E C I S I O N

Richard Nester (Grievant), employed by West Virginia University (Respondent or WVU) as a Campus Service Worker II assigned to the Physical Plant, filed a level one grievance on October 26, 2001, in which he alleged that he had not received a proper interview or consideration for a supervisory position. For relief, Grievant requested instatement. After the grievance was denied at levels one, two, and three, a level four appeal was filed on December 18, 2001. An evidentiary hearing was conducted on February 20, 2002, and the matter became mature for decision on March 20, 2002, the due date for submission of proposed findings of fact and conclusions of law. Grievant, representing himself, declined the opportunity to file post-hearing submissions. Respondent was represented by Samuel R. Spatafore, Assistant Attorney General, and Intervenor appeared on his own behalf.

The following findings of fact are derived from the record in its entirety.

Findings of Fact

1. Grievant has been employed by Respondent at the Physical Plant since 1987, and has held the classification of Campus Service Worker II at all times pertinent to this grievance.

2. On or about September 4, 2001, Respondent posted a vacancy for the position of Supervisor of Building and Campus Services at the Physical Plant.

3. Respondent's Human Resources department determined that Grievant was one of the five

applicants who met the minimum qualifications for the position of Supervisor. One applicant subsequently withdrew his name from consideration.

4. Bob Sine, Manager of Campus Support Services, conducted interviews of the four remaining applicants on October 16, 2001, posing fourteen standard questions to each. Mr. Sine recorded the answers as they were given on individual response sheets.

5. The interviews were scheduled to last forty-five minutes each, however, Mr. Sine spent additional time with an external candidate, and Grievant's interview, which lasted approximately thirty minutes, was somewhat delayed.

6. Intervenor Rogers was selected for the position based upon his twenty-five years of service with WVU, his nine hundred hours of differential pay earned as a supervisor, his impressive application, and demonstrated understanding of the position, as well as the skills required to satisfactorily perform at that level.

7. Reasons given for Grievant's non-selection were that he did not possess the same communication or motivational skills, and had less custodial experience and knowledge, than Intervenor.

Discussion

Grievant argues that the interview process was flawed because he was not given the opportunity to respond to all of the questions, it was shorter in duration than other interviews, and there was an interruption when Mr. Sine answered the telephone. Grievant further asserts that Mr. Sine did not properly consider his supervisory experience in excess of six thousand hours, earned at WVU and as a supervisor of housekeeping at a Pittsburgh, PA hospital, that he has more years of service as a Campus Service Worker II, and more experience training employees, than did Intervenor. (See footnote 1)

Testifying on behalf of Respondent, Mr. Sine stated unequivocally that he asked, and Grievant answered, all fourteen interview questions. In addition to the interview responses, Mr. Sine confirmed that he considered the resumes of the applicants, including their past work history, although he did not precisely calculate the number of hours each had worked in a supervisory capacity. Mr. Sine explained that the Physical Plant experiences a high turnover of employees, and typically has many vacancies, so his objective was to hire a supervisor who exhibited leadership and motivational skills for the employees. He recalled that Grievant's response in that area was that if you can't motivate an

employee, you “get rid of” them. Intervenor was offered the position after Mr. Sine concluded that he was the most qualified applicant, and his supervisor agreed.

The burden of proof was upon Grievant to demonstrate that Respondent acted in an arbitrary and capricious manner, or was clearly wrong in deciding Intervenor was the best qualified candidate to fill the subject job opening posted at WVU. Booth v. W. Va. Bd.of Trustees/Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994). 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).

W. Va. Code §18B-7-1(d) establishes guidelines for filling higher education positions. Initially, there a preference for minimally qualified employees of institutions of higher education over new hires in filling vacancies. If more than one qualified, nonexempt classified employee applies, the best-qualified nonexempt classified employee shall be awarded the position. In instances where such classified employees are equally qualified, the nonexempt classified employee with the greatest amount of continuous seniority at that state institution of higher education shall be awarded the position.

Simply, 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.

In this case, the Manager of Custodial Services was specifically searching for an individual who could motivate employees. The determination that Intervenor was more qualified than Grievant was based upon Intervenor's supervisory experience earned at WVU, an application which was well worded and indicated a good understanding of theposition and the skills required to perform at that level, and possession of twenty-five years of seniority. Grievant presented no evidence that Mr. Sine's determination was manufactured or otherwise arbitrary.

Although Grievant's frustration that his interview was delayed, and then interrupted by a telephone call, is understandable, these factors did not result in a flawed interview process. Further, a

comparison of Mr. Sine's notes and Grievant's typed responses to the questions, completed following the level two hearing, are substantially similar and support a finding that Grievant was asked and answered all the questions posed to the other candidates. Grievant opines that he was not given the same opportunity to present himself as were the other candidates, but did not produce any evidence from which the undersigned could conclude that he was slighted during the interview process, or that he is more qualified than, or even as qualified as Intervenor.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In order to prevail, a grievant must prove the allegations in his complaint by a preponderance of the evidence. Kirwan v. Bd. of Trustees/Marshall Univ., Docket No. 98-BOT-335 (Jan. 21, 1999); Vance v. Logan County Bd. of Educ., Docket No. 92-23-045 (May 21, 1992); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

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. West Virginia 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)." Rumer v. Bd. of Trustees/Marshall Univ., Docket No. 95-BOT-064 (May 31, 1995). 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. Aglinsky v. Bd. of Trustees/W. Va. Univ., Docket No. 95-BOT-387 (Jan. 31, 1996); Booth v. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994).

4. Grievant failed to prove that WVU violated W. Va. Code § 18B-7-1(d), or acted arbitrarily in filling the position.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). 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 §29-5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide

theGrievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: April 16, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Grievant explained that he had no record of differential pay for the supervisory work performed at WVU because he had never worked in that capacity for four consecutive weeks, a requirement for the advanced pay.