WILLIAM THOMASCHEK,

Grievant,

v. Docket No. 03-HEPC-024

HIGHER EDUCATION POLICY COMMISSION/

FAIRMONT STATE COLLEGE,

Respondent,

and

JASON BEAFORE,

Intervenor.

D E C I S I O N

William Thomaschek (Grievant), employed by Fairmont State College (FSC) as a Campus Service Worker, filed a level one grievance on or about November 5, 2002, after he was not selected for a position vacancy. For relief, Grievant requests "a job of equal pay grade." The grievance was denied at levels one and two. Grievant bypassed consideration at level three, and advanced his appeal to level four on January 21, 2003. A level four hearing was conducted on March 26, 2003, at which time Grievant was represented by Tim Tucker of Laborers' International Union Local 814, and FSC was represented by Assistant Attorney General Samuel R. Spatafore. The matter became mature for decision on April 28, 2003, the due date for submission of proposed findings of fact and conclusions of law. (See footnote 1)

The following facts are derived from the record in its entirety.

Findings of Fact

1. Grievant was first employed by FSC on a part-time basis in 1996, and has worked full-time as a Campus Service Worker since 1998. From 1972 through 1997 Grievant owned and operated an Exxon gas station and food service operation. During thistime, Grievant performed auto repair and maintenance work such as tune-ups, changing, mounting and balancing tires, brake repairs, oil changes, and muffler and tail pipe replacement.

2. By internal posting dated July 11, 2002, FSC advertised a position vacancy for

Equipment Technician. The posting included the following:

DUTIES: Under direct supervision of the Mechanic Lead, the Equipment Technician performs semi-skilled duties involving automotive, truck and hydraulic repair and maintenance. Performs repairs to 2 and 4 cycle small engine equipment such as mowers, blowers, weed eaters, etc. Drives and operates College's fork lift, backhoe, tractors, bucket truck and Kut-Kwick. Fuels all College vehicles and equipment. Washes cars, trucks and other College equipment and drive equipment to and from various sites for washing and cleaning. Greases and changes oil and filters for all types of college equipment. Changes and repairs flat tires for all vehicles. Assists with emergency snow removal operations. Cleans garage and yard areas. Performs vehicle check-in's and maintenance inspections. Picks up parts and materials for equipment as needed. Complies with emergency call-up procedures when conditions affect College operations. Performs other related duties as assigned.

QUALIFICATIONS: Business, technical or vocational school education of up to 18 months beyond high school and over six months and up to twelve months of related knowledge and experience. Equivalent combination of education and/or experience accepted, provided applicant has the knowledge, skills and ability to perform essential functions of the job. Ability and knowledge to make minor automotive repairs. Ability and knowledge to drive all types of automotive equipment, including automobiles, vans, trucks, etc. Valid West Virginia driver's license (CDL preferred). Must be knowledgeable of West Virginia highway safety regulations. Knowledge of fueling operations using College procedures and safety standards. Must be able to perform heavy lifting, stoop, bend, and use tools.

3. Six individuals applied for the position of Equipment Technician. An interview committee led by Assistant Director of Facilities Thomas Tucker, interviewed each individual using the FSC standard interview evaluation form. The applicants were then taken to the physical plant where they were given the opportunity to demonstrate their ability to operate a backhoe, forklift and Kut-Kwik machines, and to complete a small engine repair.

4. Grievant declined to operate the equipment, and did not give any reason but to say that he did not feel comfortable doing so. Several days later, Grievant advised Mr. Tucker that he was taking an antibiotic for a sinus infection, and believed his sense of balance was impaired. He did not request another opportunity to operate the equipment.

5. On the third section of the interview , Grievant successfully replaced a cord on a leaf blower.

6. Intervenor received 348 total points, the most awarded any applicant. Grievant received the fewest number of points, 123.

7. Prior to his assignment as Equipment Technician, Intervenor had been employed on a part-time basis by FSC since May 2001, assigned to the physical plant. Intervenor completed a two-year program in residential and industrial electrical engineering at the North Marion Vocational Technical Center, is an OSHA certified forklift operator, and has also operated a backhoe and loader, snow plow truck, dump truck, end loader, trencher, bobcat, and excavator. He has completed several training sessions offered by equipment manufacturers, including Kubota (tractors and implements and new products), Kohler (correct repair procedures and service techniques),and Briggs & Stratton (technical update seminar).

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 (2002); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W.Va. Code § 29-6A-6.

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.

"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 andcapricious 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 Grievant 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).

At hearing, Grievant opined that he and Intervenor were equally qualified; however, he admitted that he had never operated the grass cutting machine or backhoe/loader, and had not operated a forklift since he was in the military. Nevertheless, he indicated that given some time he knew he could operate the equipment. Grievant asserts that he should have been given another opportunity to operate the equipment, but concedes that he did not request such opportunity. Grievant also suggests that the committee did not fairly rate him on his interview responses, but did not provide any evidence that the ratings were clearly wrong. He also suggested that Intervenor had been preselected, but offered no evidence to support that claim. Respondent asserts that Intervenor was clearly the best qualified applicant, and even if Grievant had been given another opportunity to operate the equipment, he would not have been selected.

Grievant simply wants promoted as indicated by his requested relief, a job in the same pay grade. At level two, he expressed his frustration, stating that it was not his intent to remain a Campus Service Worker forever, and had been led to believe that once he got his foot in the door, he could move up to another position. Grievant has since been unsuccessful in his attempt to transfer to a number of positions. Certainly, Grievant must be given preference for transfer or promotion before a new employee is hired, *but*, he still must be minimally qualified, and if another employee applies for the same position, he must be more qualified. In this instance, the determination of the interview panel that Intervenor was better qualified than Grievant was not arbitrary and capricious

Conclusions of Law

1. In order to prevail in a non-selection grievance, 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 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 Grievant 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).

3. 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 forthat 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. W. Va. Code §18B-7-1(d) establishes 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.

5. Grievant failed to prove that FSC 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 § 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: MAY 27, 2003

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Grievant elected not to file any proposals.***