WILLIAM WINGROVE,

Grievant,

v. Docket No. 04-HE-230

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

William Wingrove ("Grievant"), employed by West Virginia University ("WVU") as a Campus Service Worker - Lead, filed a level one grievance on March 25, 2004, in which he alleged a violation of Human Resources Policy 3 when he was not selected for the position of Assistant Supervisor of Campus Services. For relief, Grievant requested instatement with back pay, and all benefits to which he is entitled. The grievance was denied at all lower levels, and was appealed to level four on June 14, 2004. A hearing was conducted to supplement the record on September 2, 2004. Grievant was represented by Mary Snelson of the West Virginia Education Association, and WVU was represented by Elaine L. Skorich, Assistant Attorney General. The grievance became mature for decision on September 24, 2004, the due date for submission of proposed findings of fact and conclusions of law.

The following facts are derived from a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by WVU for approximately twenty years, and has held the position of Campus Service Worker - Lead for five years. Grievant is a high school graduate.

2. The position of Assistant Supervisor/Campus Services was posted on theWVU Jobs Bulletin on February 12, 2004. The Jobs Bulletin is a multi-page document that includes a myriad of information, including a notice that in case of an error, the official salary, hourly rate, title, qualifications, and/or job classification shall prevail. The reader is also advised that the attached job qualification statements do not represent complete job requirements, and

lists sites where the official job descriptions may be reviewed. Under a separate heading is an advisory that "[e]quivalent combination of education and/or experience may be considered for certain positions."

3. The February 12, 2004 Jobs Bulletin included the position of Assistant Supervisor of Campus Services. Requirements for the position included, "[h]igh school diploma or equivalent. . . ." The Position Information Questionnaire ("PIQ") for the position defines "equivalent" as a "combination of education and/or experience which provide an applicant with the listed knowledge, skills and abilities to perform the essential duties and responsibilities of the job . . . ."

4. Four individuals were interviewed for the position of Assistant Supervisor, including Grievant and the successful applicant, John George. Mr. George has been employed by WVU for approximately thirty years in the custodial field, and has been a Campus Service Worker - Lead for eleven years. Mr. George has eleven years of high school education.

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); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code§ 29-6A-6. See also 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." 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, the employer has not met its burden. Id.

Grievant argues that he was more qualified than the successful applicant by virtue of having a high school diploma. This is based on his interpretation of the requirement "high school diploma or equivalent" to mean a diploma or GED. WVU asserts that equivalent is clearly defined as a combination of education and experience, and that Mr. George's experience and knowledge were determined to meet the equivalency of a high school diploma. Grievant's burden is to demonstrate Respondent violated the rules and regulations governing

hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision.

"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)." Reynolds v. Higher Educ. Policy Comm'n/W. Va. Univ. Institute of Tech., Docket No. 03- HEPC-294 (Jan. 16, 2004); Burchell v. Higher Educ. Policy Comm'n/Marshall Univ., Docket No. 02-HEPC-139 (Sept. 30, 2002); Rumer v. Bd. of Trustees/Marshall Univ., Docket No. 95-BOT-064 (May 31, 1995). In this grievance, a violation of policy would potentially render the selection clearly wrong. Administrative notice is taken of WVU Human Resources Policy 3, "Application to and Referral for Classified Positions Policy," which states in relevant part:

WVU strives to hire the best-qualified employment candidates. The selection decision is to be based on comparative analysis of the job-related qualifications of all referred candidates. Selection determinations will apply the following:

If there is more than one qualified internal non-exempt candidate for a non-exempt vacancy, the best-qualified non- exempt employee will be offered the position.

If there is more than one qualified internal non-exempt candidate for a non-exempt vacancy and the candidates are equally qualified, the more senior employee will be offered the position.

In the present case WVU determined both candidates met the minimum qualifications for the position, but it did not find Grievant and Mr. George to be equally qualified. The determination that Mr. George was the most qualified applicant was based on interview performance, knowledge of the field, experience, and background. While Grievant's interpretation of diploma or GED is understandable, a complete reading of the posting would have clarified that WVU considers "equivalent" to mean the combination of education and experience. WVU did not violate policy when it considered Mr. George's experience and knowledge equivalent to a high school diploma. Grievant has failed to prove a violation of WVU-HR-3, or that he was more qualified than the successful applicant for the position.

The above-discussion will be supplemented by the following 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 ofthe W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. The role of the undersigned is to review of the legal sufficiency of the selection process, at the time it occurred. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (Jun. 26, 1989).

3. "The exercise of administrative judgment 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." Sloan v. W. Va. Univ., Docket No. BOR-88- 109 (Sept. 30, 1989).

4. Grievant did not demonstrate a violation of Policy WVU-HR-3.

Accordingly, this 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 itsAdministrative 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 30, 2004

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE