

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #2

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FILED
JUL 25 11 34 AM '96
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: University System Board of Trustees TITLE NUMBER: 128

RULE TYPE: Procedural; CITE AUTHORITY: WV Code 18-1-6

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 31

TITLE OF RULE BEING PROPOSED: Classified Employees

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON Aug 26, 1996 AT 12 NOON

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Charles W. Manning, Chancellor
University System of West Virginia
1018 Kanawha Boulevard, East
Suite 700
Charleston, WV 25301

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

DEPARTMENT OF EDUCATION AND THE ARTS

Office of the Secretary

State Capitol Bldg. 1, R-151
Charleston, West Virginia 25305
Telephone: (304) 558-2440
Fax No.: (304) 558-1311

Gaston Caperton
Governor

Barbara Harmon-Schamberger
Cabinet Secretary

July 25, 1996

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, WV 25305

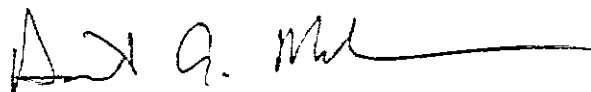
Dear Secretary Hechler,

In the absence of the Secretary, I hereby grant consent as required pursuant to WV Code §5F-2-2 for the promulgation of the following procedural rule of the University System of West Virginia Board of Trustees. A letter from the Secretary confirming such consent will follow as soon as possible.

Title 128, Series 31: Classified Employees

A copy of the rule is attached.

Sincerely,



David A. Mohr
Senior Program Analyst
on behalf of
Secretary Barbara Harmon-Schamberger

BHS:mc

Attachment

cc: Dr. Charles Manning
Dr. John Thralls

University System of West Virginia

1018 Kanawha Boulevard, East
Charleston, West Virginia 25301-2827
Telephone (304) 558-2736 Fax (304) 558-3264

Kay Goodwin
Chairman

Charles W. Manning
Chancellor

MEMORANDUM

TO: Secretary Barbara Harmon-Schamberger

FROM: Charles W. Manning, Chancellor



DATE: July 17, 1996

RE: Filing of Series 31: Classified Employees

At its July 12 meeting, the Board of Trustees approved a new policy on Classified Employees, Series 31, to be filed with the Secretary of State for the required 30-day public comment period. This rule has already received extensive review within the University System. Would you please approve this rule and forward it to the Secretary of State's Office.

If you have any questions, you may contact Margaret Robinson Buttrick or Bruce Walker. Thank you for your consideration.

cc: Dr. John Thralls
Ms. Margaret Robinson Buttrick
Mr. Bruce Walker

**TITLE 128
PROCEDURAL RULE
UNIVERSITY SYSTEM OF WEST VIRGINIA
BOARD OF TRUSTEES
SERIES 31**

TITLE: Classified Employees

SUMMARY:

Series 31 of the University System Rules, *Classified Employees*, defines various categories of classified employees and provides direction to institutions within the University System of West Virginia with regard to part-time and temporary employees, work schedules, appointment or promotion, probationary period, compensatory/overtime provisions, and posting of vacant positions.

TITLE 128
PROCEDURAL RULE
UNIVERSITY SYSTEM OF WEST VIRGINIA
BOARD OF TRUSTEES
SERIES 31

TITLE: CLASSIFIED EMPLOYEES

SECTION 1. GENERAL

- 1.1 Scope - This rule establishes procedures related to West Virginia Code 18B.
- 1.2 Authority - West Virginia Code §18B-1-6.
- 1.3 Filing Date -
- 1.4 Effective Date -

SECTION 2. DEFINITIONS

- 2.1 Part-Time Regular Employee (PTR). An employee in a position created to last less than 1,040 hours during a twelve-month period. An employee in a PTR position is not eligible for benefits, but is covered under the classification program as set out in Series 62.
- 2.2 Temporary Employee. An employee hired into a position expected to last fewer than nine months of a twelve month period regardless of hours worked per week. A temporary employee is not eligible for benefits, but is covered by the classification program as set out in Series 62.
- 2.3 Casual Employee. A casual employee position is a position created to meet specific operational needs at an institution for no more than 225 hours in a 12-month period. Individuals in a casual employee position are not eligible for benefits and are not covered by the classification program as set out in Series 62.
- 2.4 Student Employee. An employee enrolled at the institution as a student and whose primary purpose for being at the institution is to obtain an education. A student employee is not eligible for benefits and is not covered by the classification program as set out in Series 62.

2.5 Classified Employee. An employee who is covered by the provisions of the classification program outlined in this rule as set out in Series 62.

2.6 Exempt. Employees not covered by the Fair Labor Standards Act (FLSA) for overtime purposes as set out in Series 62.

SECTION 3. PART-TIME AND TEMPORARY EMPLOYEES

3.1 Institutions shall not hire part-time employees solely to avoid the payment of benefits or in lieu of full-time employees and shall provide all qualified classified employees with nine-month or ten-month contracts with the opportunity to accept part-time or full-time summer employment before new persons are hired for the part-time or full-time employment. Consequently, institutions may only employ individuals into temporary positions when the function of the position is expected to require less than nine (9) consecutive months of employment (regardless of hours worked per week) to equal the full-time equivalency of the position.

3.2 Classified employees who are employed in less than twelve-month positions and who meet the minimum qualifications of a position shall be provided with an opportunity to accept part-time or full-time summer employment before new persons shall be hired for those positions.

SECTIONS 4. WORK SCHEDULES

4.1 Each institution shall establish a policy, with the advice and assistance of staff council and other groups representing classified employees, which shall: address any institution-specific procedures concerning the use of flexible work schedules, job sharing, and four-day work weeks; discourage temporary, non-emergency changes in an employee's work schedule; and provide a mechanism for changes in, and notification of, changes in work schedules. This policy shall also provide that, where possible, the institution shall provide the employee with a fifteen (15) day notice of such changes. Institutions shall develop such policies within 90-days of the effective date of this rule.

SECTION 5. APPOINTMENT OR PROMOTION

5.1 Pursuant to W.Va. Code §18B-7-1(d), non-exempt classified employees who apply for and meet the minimum qualifications as determined by the institutional human resources director or other designee of the president for a posted non-exempt position within an institution and are currently

employed at the institution shall be hired into the posted position prior to hiring someone from outside the institution.

- 5.2 If more than one qualified, non-exempt classified employee applies, the best-qualified non-exempt classified employee shall be awarded the position. In such cases, if the employees are equally qualified, the employee with the greatest amount of continuous seniority at the institution shall be awarded the position. A random selection method such as drawing of lots, rolling dice, or selection of playing cards shall be utilized if two or more employees have equal qualifications and seniority. Such method shall be mutually agreed upon by the affected employees and approved by the President or her/his designee. If the employees cannot agree on a random selection method, the President of the institution shall use the drawing of lots to determine rankings.
- 5.3 Provisions of this section shall not apply to casual, temporary and student employees, nor shall they apply to exempt positions.
- 5.4 Pursuant to W. Va. Code §18B-7-1d, the provisions of this section shall not take precedence over the mandates in an institution's affirmative action plan adopted pursuant to the provisions of Executive Order 11246 or pursuant to any other federal or state requirement. In no event shall an institution's affirmative action plan require the use of quotas to meet its affirmative action goals or require the hiring of an unqualified person for any non-exempt position.

SECTION 6. PROBATIONARY PERIOD

- 6.1 Full-time regular classified employees shall serve a six-month probationary period beginning at the original date of employment.
- 6.2 At the end of three-months and the end of the six-month probationary period, the employee shall receive a written evaluation of her/his performance and shall be informed as to whether her/his employment will continue beyond the probationary period. As with all positions, continued employment is based on adequate funding, satisfactory performance and adherence to system and institution rules and regulations.

SECTION 7. COMPENSATORY/OVERTIME PROVISIONS

- 7.1 Non-exempt employees may receive compensatory time off in lieu of overtime pay. All hours worked beyond 37½ and up to and including 40

hours are calculated at the employee's regular hourly rate. Time worked beyond 40 hours in a work week are to be calculated at a rate of one and one-half times the regular hourly rate.

- 7.2 A written agreement between the employee and the institution shall exist when the employee chooses compensatory time off in lieu of overtime pay. The written agreement may be modified at the request of either the employee or employer at any time but under no circumstances shall a change in the agreement deny the employee compensatory time heretofore acquired.
- 7.3 Within 60 days of passage of this rule, institutions shall develop an agreement form for compensatory time accumulation in lieu of overtime payment and shall specify the required approval process which must be completed before a non-exempt employee may work beyond 37½ hours.
- 7.4 Employees may accumulate up to two hundred forty hours (240 hours) of compensatory time and shall be paid for all hours worked above the maximum accrual.
- 7.5 Employees in public safety, seasonal work, and/or emergency response categories may accumulate up to four hundred eighty hours (480 hours) and shall be paid for all hours worked above the maximum accrual.
- 7.6 Compensatory time must be used within one year of accrual. The use of compensatory time off shall be requested two weeks in advance of the use of the time off. Approval of the request shall be contingent upon whether it will unduly disrupt the operation of the institutional unit.
- 7.7 Should an individual's employment be terminated, any unused compensatory time shall be reimbursed as follows:
 - 7.7.1 The average regular rate received by such employee during the first three years of the employee's employment; or,
 - 7.7.2 The final regular rate received by such employee, whichever is higher.
 - 7.7.3 An employee may not work overtime unless approved in advance per institutional policy.

SECTION 8. POSTING

- 8.1 Each institution shall develop a policy for posting of classified positions both internally and externally in order to provide employees adequate time to make application for positions. Institutions shall develop such policy within 90-days of the effective date of this rule.

- 8.2 Posting shall not apply to casual or temporary positions.

July 16, 1996

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Classified Employees

Type of Rule Legislative Interpretive XX Procedural

Agency University System Board of Trustees

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$ None	\$ None	\$ None	\$ None	\$ None
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates

3. Objectives of these rules

To outline and expand upon provisions of WV Code which relate to classified employees such as flexible work time, compensatory time or overtime payment, probationary period, etc.

4. Explanation of Overall Economic Impact of Proposed Rule

A. Economic Impact on State Government

None

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

None

C. Economic Impact on Citizens/Public at Large

None

Date:

7/17/96

Margaret H. Buttrick

Signature of Agency Head or Authorized Representative



MEMORANDUM

To: Secretary of State Ken Hechler

From: Bill Weiss *Bill Weiss*
WVU Staff Council Vice-President and
Legislative Committee Chair

Re: University System Board of Trustees
Proposed Procedural Rule Series 31 - Classified Employees

Date: August 22, 1996

The WVU Staff Council is concerned about several items in the BOT's proposed Procedural Rule Series 31. In addition to other concerns classified employees may have with the proposed rule, WVU Staff Council requests the following three points be addressed and modified before the rule becomes effective.

1 - SECTIONS (sic) 4. WORK SCHEDULES Item 4.1:

The WVU Staff Council is concerned the proposed rule regarding non-emergency changes to work schedules is meaningless. The proposed rule states: "where possible, the institution shall provide the employee with a fifteen (15) day notice of such change." The "where possible" loophole in the proposed rule will do little to ensure that employees receive reasonable notice to be able to make necessary adjustments in their personal lives. Many employees will need to make arrangements for the care of dependents, changes to education, car pooling and other commitments, when a non-emergency change to a work schedule is made. Some employees have experienced non-emergency shift changes.

The WVU Staff Council has been advised that although WVU Physical Plant has a policy requiring 30 day notice before a non-emergency change to an employee's work schedule is made, the work schedule for "Midnight Shift Custodians" (over 100 employees) was recently changed from 4pm-12pm to 5pm-1am with only a few days notice given to the employees. There was not an emergency change.

Thus, the WVU Staff Council suggests a mandatory minimum of a fifteen (15) day notice and thirty (30) day notice "where possible" would better enable employees to adjust their personal schedules to non-emergency changes to work schedule.

The inclusion of Staff Councils and other groups representing classified employees in the establishment of policy, as stated in 4.1, will be beneficial when the advice and assistance provided by these groups is welcomed and acted upon fairly.

2 - SECTION 5. APPOINTMENT OR PROMOTION Item 5.4:

The WVU Staff Council is concerned about the first sentence of Item 5.4. It proposes that institutional policy take precedence over West Virginia state law. The referenced sentence follows,

"Pursuant to W.V. Code 18B-7-1d, the provisions of this section shall not take precedence over an institution's affirmative action plan adopted pursuant to the provisions of Executive Order 11246 or pursuant to any other federal and state requirement."

A WVU employee grievance regarding W.V. Code 18B-7-1d was recently GRANTED by the West Virginia Education and State Employees Grievance Board. Essentially the DECISION held that W.V. Code 18B-7-1d, not WVU policy, was paramount. The BOT/WVU then appealed the WVE&SEGB ruling to the Kanawha County Circuit Court. The referenced sentence of the proposed rule essentially puts into policy the same point as the BOT/WVU's argued, but not accepted by the WVE&SEGB. The BOT/WVU arguments were restated in their appeal to the court.

Thus, the WVU Staff Council requests the above referenced sentence be deleted from the proposed rule, pending the appeal.

SECTION 7. COMPENSATORY/OVERTIME PROVISIONS Item 7.2:

Item 7.2 of the proposed rule requires a written agreement between the employee and the employer if the employee chooses compensatory time off (CTO). Thus, if the employer does not agree to it, the classified employee shall be denied the use of CTO,

Many WVU classified employees want to be able to chose the form of compensation for overtime; either to be paid or to receive CTO for overtime. Although the employer shall determine if overtime is offered, employee seek to determine if pay or CTO is received.

The WVU Staff Council suggests that enabling employees to chose the form of compensation they receive for overtime will enhance employee morale and productivity, and will also reduce arbitrary and capricious decisions by lower level supervisors regarding how overtime is distributed and compensated.

Thank you for your consideration.

cc: Sen. Lloyd Jackson, Co-Chair LOCEA
Del. Roman Prezioso, Co-Chair LOCEA
Frank Stanley, BOD ACCE Chair
Joe Taylor, BOT ACCE Chair



WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD

GASTON CAPERTON
Governor

JAMES PAUL GEARY
Chair

DAVID L. WHITE
Member

RONALD WRIGHT
Director

401 Davis Avenue
Suite 315
Elkins, WV 26241
Telephone 637-0280
ON NET 557-0280
FAX 637-0281

DONALD ROGERS

v.

Docket No. 95-BOT-074

WEST VIRGINIA UNIVERSITY,
ELIZABETH RHODES, INTERVENOR

DECISION

Grievant, Donald Rogers, employed by West Virginia University (WVU) as a Building Service Worker, filed a level four grievance on February 9, 1995, in which he complained that he was the most qualified applicant for the position of Building Service Worker - Lead. A level four hearing was conducted on April 27, 1995, supplementing the lower-level record. The matter became mature for decision with the conclusion of briefing on June 6, 1995.

The facts of this matter are not in dispute. Grievant was first employed by WVU as a Custodian I in 1975. After eleven months in that position he was promoted to Custodian II. Approximately two years ago the position title was changed to Building Service Worker. Since 1977 Grievant has "filled in" as Lead Building Service Worker, logging some six hundred forty-seven (647) hours in that role.

On April 12, 1994, a position vacancy was posted for Building Service Worker - Lead. Six individuals submitted applications for the position. Domenick Rocca, Building Service Supervisor, conducted interviews for the five applicants who appeared. Mr. Rocca filed a report with Robert Radcliff, Assistant Director/Building Services in which he summarized his conclusions regarding each applicant. In reference to Grievant he stated:

Donnie has 18 years of custodial service at WVU. He has filled in on numerous occasions for a Lead Position. He is familiar with all the buildings in my section and routinely flexes his schedule to accommodate building activities. He fills in at the Facilities Building when that Lead Worker is off and is familiar with the setups required, etc.

Based on the above, I feel Donnie Rogers best meets the overall qualifications for the position and I recommend he be offered the Lead Building Service Worker.

In reference to Elizabeth Rhodes, the Intervenor, Mr. Rocca stated:

Elizabeth has 16 years of custodial experience at WVU. However, she has never worked in a lead capacity. She has at times carried a radio and sometimes assisted in training new employees. Other than the building she presently works in, she has only worked in one other building on the Downtown Campus. She does not have the demonstrated ability to operate and train others in the use and care of floor maintenance equipment. She has never worked midnight shift, but is willing to give it a try.

Mr. Rocca ranked Intervenor as his second choice.

Both Mr. Radcliff and Paul Walden, Assistant Director of Finance and Administration, approved Mr. Rocca's selection of Grievant and the matter was sent to the Affirmative Action/Equal Employment Opportunity Office for review. Jennifer McIntosh, Director of Affirmative Action/Equal Employment Opportunity, reported that the Physical Plant exhibited underutilization of Asians and females in this position. Because Grievant was not in a protected class, Ms. McIntosh requested that the Physical Plant review their selection since two females had applied for the position and both Grievant and Intervenor were determined to be "substantially equally qualified."

Mr. Walden testified that in compliance with Ms. McIntosh's recommendation, the applicants were reviewed. After finding Intervenor capable of performing the duties of lead worker, she was awarded the position. He stated that if Intervenor had not been found qualified, the Physical Plant's original recommendation of Grievant would not have been changed.

Grievant asserts that he is entitled to the position as the most qualified applicant. He represents that he is most qualified because he meets all of the qualification standards listed on the position description. Grievant particularly notes his ability to demonstrate the proper methods and operation of equipment, an essential function of the position. He further claims that he is competent to perform all the job

functions of the position, with the exception of maintaining time cards, a minor duty.

Grievant asserts that his expertise has been gained by working on a "strip, wax, and shampoo" crew for two years and his substantial experience acting as lead worker. Additionally, he has two more years seniority, and experience, than Intervenor. Grievant argues that WVU has offered no evidence to prove that Intervenor has the necessary abilities or that she meets all of the qualification standards for the position. Grievant further notes Mr. Rocca's comment that Intervenor lacked the "demonstrated ability" to train other employees to use the floor care equipment.

Having established a basis for the conclusion that he was more qualified than Intervenor, Grievant asserts that he is entitled to the position by W.Va. Code §18B-7-1(d) which provides:

A non-exempt classified employee. . . who meets the minimum qualifications for a job opening at the institution where the employee is currently employed, whether the job be a lateral transfer or a promotion, and applies for same shall be transferred or promoted before a new person is hired unless such hiring is affected by mandates in affirmative action plans or the requirements of Public Law 101-336, the Americans with Disabilities Act. If more than one qualified, non-exempt classified employee applies, the best-qualified non-exempt classified employee shall be awarded the position. In instances where such classified employees are equally qualified, the non-exempt classified employee with the greatest amount of continuous seniority at that state

institution of higher education shall be awarded the position.

Grievant concludes that application of the foregoing statute makes it clear that he was entitled to the position because he was the most qualified applicant. In the alternative, if both he and Intervenor are determined to be equally qualified, the provision still supports his selection for the position because he has more seniority.

WVU argues that because it is a contractor to the federal government it is required to comply with the goals and objectives in the area of affirmative action as set forth in Executive Order 11246.¹ Further, WVU is required by Title 128, Legislative Rules of the University of West Virginia Board of Trustees, Series 45, to develop and implement an affirmative action policy consistent with Board, State and Federal Regulations.² The decision to place Intervenor, rather than Grievant, in the position of lead worker was simply the application of the required Affirmative Action

¹Executive Order 11246 requires that federal contractors take affirmative action to ensure that applicants are hired and treated without regard to race, color, religion, sex, age, or national origin. This plan is applicable to both initial employment and promotion. Specific goals and timetables for the attainment of full and equal employment are to be utilized.

²Pursuant to this rule, WVU has promulgated an extensive Affirmative Action/Equal Opportunity plan in compliance with 41 CFR60-2.13(a). The documentation for the AA/EEO program, submitted as WVU Exhibit No. 4, includes the current employment data for job groups as well as the availability of Black, Hispanic, Asian, and Female employees, and whether these protected groups are underutilized.

policy.

At level four, Ms. McIntosh explained her determination regarding the personnel action. After reading the job description she ascertained that the assignment was not complicated and did not require extensive training or knowledge. She next reviewed the applications of Grievant and Intervenor, particularly noting their experience and training. Consideration was given to the Physical Plant's position. Ms. McIntosh stated that the Affirmative Action review did not require a determination of which applicant was most qualified, only a finding that they were substantially, equally qualified.

Having met that threshold, Ms. McIntosh noted that Grievant's emphasis on his experience as a substitute lead worker is not persuasive in this situation because women are traditionally not given the opportunity to substitute as a lead worker. Further, experience as a lead worker was not a requirement for the position. She also noted that no additional weight was given to Grievant's experience in more buildings because the work was the same whatever the location. Given the uncomplicated nature of the work, Intervenor's lack of experience working with floor cleaning equipment was deemed an inadequate basis for denial of the opportunity for promotion. Finally, seniority was not considered because the

Affirmative Action demands were overriding in this instance.³

The level two decision indicates that Grievant conceded that he and Intervenor were "substantially equally qualified." Because Grievant revisited this issue at level four, a finding is made, based upon a review of the evidence, that the applicants were indeed "substantially equally qualified." This conclusion is based upon Mr. Rocca's evaluation of the applicants and a review of the job description which states the general function of the incumbent is to "clean and maintain in an orderly condition institutional buildings and facilities. . . while overseeing the work of a crew of building service workers."

Both Grievant and Intervenor have been employed as Building Service Workers for many years. Although Grievant has had considerable experience working in a lead role, there is no evidence that Intervenor was afforded that opportunity. In regard to Intervenor's lack of demonstrated ability to operate and train others in the use of floor care equipment, it must be determined that a lack of opportunity to work extensively with a "strip, wax, and shampoo crew" does not indicate that she is incapable of performing the duties of the position. Finally, Mr. Rocca testified that some training

³Ms. McIntosh noted that while "housekeeping" jobs such as this are traditionally female dominated, the reverse is true at WVU. Her research into the situation revealed that when the local mining industry began downsizing, displaced men began accepting these positions and now hold the majority of them.

would have been necessary for either individual upon their promotion.

Notwithstanding the determination regarding qualifications, Grievant must prevail based upon seniority as provided by Code §18B-7-1(d). The first section of the statute establishes that a current employee is entitled to a lateral transfer or promotion prior to a new person being hired, "unless such hiring is affected by mandates in affirmative action plans. . . ." Later, in the same section, it is stated that instances in which more than one qualified, non-exempt employee applies for a position and the employees are equally qualified, the employee with the greatest amount of seniority at that institution shall be awarded the position. No mention of affirmative action plans is made at this point.

The canons of statutory interpretation require that when the language is clear and unambiguous and the legislative intent is plain, a statute is not to be interpreted, but only applied. State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968). W.Va. Code §18B-7-1(d) clearly grants specific rights regarding transfer and promotion to non-exempt, classified, employees at institutions of higher learning. Employees are to be given priority over non-employees, the best qualified employee is to be selected over less qualified employees, and in cases where employee applicants are equally qualified, the selection is to be based upon seniority.

Acknowledgment of exceptions to the rule, i.e., affirmative action plans and the Americans with Disabilities Act (ADA), is made in situations involving the hiring of new employees.

These exceptions are not included in the second clause of the paragraph which addresses instances when multiple, equally-qualified employees apply for a position. The wording of this provision clearly requires that these decisions be made entirely on the basis of seniority. This provision is not consistent with the affirmative action plan as explained by Ms. McIntosh; however, it is clear and unambiguous and must be applied accordingly. Consistent with Code §18B-7-1(d), Grievant, as the most senior of two, equally-qualified applicants, is entitled to the position of Lead Building Service Worker.

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

FINDINGS OF FACT

1. In April 1994, WVU posted a position vacancy for Building Service Worker - Lead.
2. Six individuals submitted applications for the position, including Grievant and Intervenor.
3. At the time of the posting both Grievant and Intervenor were employed by the WVU Physical Plant as Building Service Workers. Grievant had accrued eighteen years' experience and Intervenor had sixteen years' experience.

4. Grievant was determined to be the most qualified candidate and was recommended for the position.

5. Upon review by the Director of the Affirmative Action/Equal Opportunity Office, the Physical Plant was asked to reconsider the recommendation based upon an underutilization of females in this area.

6. In compliance with the request, the recommendation was reviewed. Upon concluding that Intervenor was capable of performing the duties of the position, and was substantially equally qualified, she was given the promotion.

CONCLUSIONS OF LAW

1. In non-disciplinary matters it is incumbent upon the Grievant to prove the elements of the grievance by a preponderance of the evidence. Napier v. Marshall University, Docket No. 91-BOT-105 (June 24, 1991); Durrett v. Fairmont State College, Docket No. 89-BOR-122 (Feb. 20, 1990).

2. W.Va. Code §18B-7-1(d) provides that when more than one qualified, non-exempt, classified employee applies for a position, the best qualified applicant shall be awarded the assignment, and that seniority shall be the determining factor between equally qualified applicants.

3. A statute which is clear and unambiguous shall be applied without interpretation. State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968).

4. The language of W.Va. Code §18B-7-1(d) is clear and

the plain meaning expressed therein shall be applied as written.

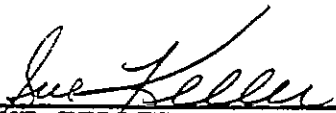
5. Grievant has proven by a preponderance of the evidence that he is entitled to the position as a matter of law.

Accordingly, the grievance is GRANTED and WVU Ordered to place Grievant into the position with all back pay and benefits to which he is entitled.

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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATED

August 25, 1995


SUE KELLER
SENIOR ADMINISTRATIVE
LAW JUDGE

Certificate of Service

I, Sue Keller, Senior Administrative Law Judge, for the West Virginia Education and State Employees Grievance Board, do hereby certify that I have this 25th day of August, 1995, served a true copy of the foregoing DECISION upon the following by mailing to them by Certified United States mail in a properly addressed and stamped envelope to their addresses as follows:

Donald Rogers
Route 1 Box 157A
Spraggs, Pennsylvania 15362

Dr. Joe Simoni
WVU-ACE
1137 Van Voorhis Road
Morgantown, West Virginia 26505

Elizabeth Rhodes
Route 2 Box 90
Smithfield, Pennsylvania 15478

Rosemary Humway, Esquire
State College and University Systems
1018 Kanawha Boulevard, East
Charleston, West Virginia 25301

Jon Reed, Esquire
Office of the President
West Virginia University
P.O Box 6001
Morgantown, West Virginia 26505-6001



SUE KELLER
SENIOR ADMINISTRATIVE LAW JUDGE