SANDRA MARSHALL,

Grievant,

v v.

Docket No. 99-BOT-010

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Sandra Marshall, employed by the Board of Trustees at West Virginia University (Respondent) for nearly twenty-one years, filed a level one grievance on December 1, 1998, in which she alleged "[s]alary and longevity discrimination." For relief, Grievant requested that Respondent abide by EEOC and Affirmative Action plans. The grievance was denied at levels one and two. Grievant elected to by-pass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced her claim to level four on January 8, 1999. After a number of continuances were granted for cause, a level four hearing was conducted on June 3, 1999. Grievant was represented by Diane Parker, L.I.U.N.A., Local 814, and Respondent was represented by Kristi A. Rogucki, Esq., Assistant Attorney General. The matter became mature for decision with the receipt of Respondent's response to Grievant's proposed findings of fact and conclusions of law on July 15, 1999.

The facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by Respondent for nearly twenty-one (21) years,and is presently classified as a Program Assistant I, pay grade (twelve) 12, with an annual salary of $25,000.00, plus longevity increment.

2. Grievant was transferred to her present assignment, at the Continuing Medical Education Office, after her previous position with the Small Business Development Center was eliminated in 1995.

3. Grievant did not select her present assignment, and has been attempting to transfer elsewhere since her appointment. Between November 6, 1996, and January 28, 1999, Grievant has applied for seventeen (17) positions at WVU.

4. Many of the positions for which Grievant applied were ultimately filled with less senior employees.

5. Grievant presented her concerns to Myrtho Blanchard, WVU Director of Human Resources; however, Ms. Blanchard did not find any evidence that Grievant's nonselection was due to her salary and years of service.

6. Many of the positions for which Grievant applied were in pay grade fourteen (14). Respondent provides a salary adjustment of five per cent (5%) per pay grade for promotions and demotions. Should Grievant be appointed to a position classified as pay grade fourteen (14), she would be given a ten per cent (10%), or $2,500.00, salary increase, which would raise her base pay to $27,500.00 per year.

7. Entry level salary for positions classified at pay grade fourteen (14) is $18,780.00 per year.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden ofproving each element of her 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 (1996); 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.

Grievant questions how she could not be qualified for so many positions, and concludes that her salary makes her “too expensive” to hire. At level four, Grievant testified that her complaint is supported by interview experiences in which the interviewer made comments about not having enough money, or complained of budget cuts. She opined that these comments substantiate her concern that she has been unable to transfer due to Respondent's financial considerations, To illustrate her claim, Grievant cited her most recent application for the position of Administrative Associate with the Office of Budget Planning. The position was classified at pay grade 14, and was filled with an individual who had previously held a position of Office Administrator at pay grade 16. The successful applicant was demoted two pay grades, and accepted a ten per cent (10%) decrease in her annual base salary.

Respondent asserts that Grievant has not been subject to discrimination. Colleen Lankford, Supervisor of the Department of Human Resources, testified that all qualified applicants are referred for an interview, and that it is Respondent's policy to hire the most qualified applicant. If the most senior applicant is not selected the administrator must provide a reason for the non-selection. Ms. Lankford noted that during the interview process, the interviewer may assess and consider non-credential qualifications, such asthe depth of knowledge, interpersonal skills, demeanor and presentation of the applicant, when determining which applicant is the most qualified. Kim Kelly, Human Resources Supervisor at Health Sciences, confirmed that when Grievant applied for a position at Health Sciences, another applicant was selected because her communications style fit better with the department.

Ms. Blanchard and Ms. Kelley testified at level two that reasons given for nonselection were that she was not the most qualified applicant, she demonstrated poor interviewing skills, and that an applicant internal to the department was chosen to fill the vacancy. Both determined that there was no evidence that Grievant was not being selected based upon her years of service. Addressing the position with Budget and Planning, Respondent provided a recitation of the successful applicant's work experience to support the finding that she was more qualified than Grievant.

W. Va. Code §18B-7-1 provides that when there is more than one qualified internal non-exempt candidate for a non-exempt position, the best qualified non-exempt applicant will be offered the position. In instances where applicants are equally qualified, the non- exempt classified employee with the greatest amount of continuous seniority at that state institution shall be awarded the position. The record does not provide sufficient information to make a determination whether Grievant was more qualified than any of the other applicants for the many positions for which she has applied. Grievant's argument actually precedes a review on qualifications in that she believes she is stricken from consideration without regard to qualifications, based upon salary requirements.

There is no evidence that Respondent has acted in violation of the EEOC or itsAffirmative Action Plan. Grievant has also been unable to prove a general claim of discrimination. Naturally, none of the interviewers who have given reasons for her non- selection stated that it was due to her high salary, and there is no other evidence to support Grievant's suspicion. Undoubtedly, for a number of the positions, other applicants were determined, for legitimate reasons, to be better qualified than Grievant. However, Grievant's concern is not without merit. Certainly, it is significant that what

appears to be a good, competent, employee has applied for a number of positions within a short period of time and has not been offered one assignment.

Grievant's request, that she be treated fairly, is not unreasonable. Respondent is advised to monitor her case closely to insure that she is offered any position for which she is the most qualified applicant, and in cases where she is not selected and is the most senior applicant, to secure a complete, meaningful reason from the employing party as to why she is not selected. Reasons such as another applicant would better fit their needs, or another applicant's communication style was preferred, are vague and may be given when other concerns, such as salary, may be the motivating factor.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusion of law.

Conclusion of Law

Grievant has failed to prove any violation of the EEOC or Affirmative Action Plan, or that she has been subject to discrimination due to her salary level.

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: July 23, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE