THOMAS P. KIRWAN,

Grievant,

v. **DOCKET NO. 98-BOT-335**

BOARD OF TRUSTEES/

MARSHALL UNIVERSITY,

Respondent.

DECISION

This grievance was filed by Grievant Thomas P. Kirwan against the Board of Trustees/Marshall University, Respondent ("Marshall"), alleging "discriminatory hiring practices" related to a posted Office Courier position. As relief, Grievant sought "reopening job for fair treatment of Marshall applicants." (See footnote 1)

The following findings of fact have been properly made from the record developed at Levels II and IV.

Findings of Fact

1. Grievant has been employed by Marshall four years. He is currently a Building Service Worker, a nonexempt classified staff position in pay grade 4.

2. Marshall posted a vacancy for an Office Courier (Mail Room), pay grade 6, in late May or early June, 1998. The position is a classified staff position. The job posting provided as follows:

> **Qualifications:** high school diploma or GED; West Virginia Class E driver's license or equivalent as required under state law to operate a motor vehicle and a good driving record. Ability to lift mail bags and boxes of materials up to 75 lbs. Thorough knowledge of traffic regulations and safety precautions; knowledge about basic automotive needs; basic knowledge of postal rules and regulations and good communication skills to deal with people daily. Provide courier service between Marshall University Huntington campus and Marshall University Graduate College South Charleston campus for pick up and delivery of mail, books, films, documents, etc. Maintain vehicle in clean, orderly and safe operating condition and report any vehicle malfunction to supervisor; perform maintenance in emergency situations as needed. Sort, post, and distribute United States and University mail, and perform other

related duties as assigned. University application must be completed in Human Resources by **June 8, 1998.**

3. David Harris, the Director of Equity Programs at Marshall, determined that the Office Courier position was underutilized under Marshall's affirmative action plan, meaning that Marshall has had difficulty in hiring females and/or minorities to fill positions in this job category. For purposes of making this determination, the Office Courier position is classified with other service positions in category "EE06." He explained that the best qualified candidate should always be hired, regardless of whether there is underutilization, but as between two equally qualified candidates, the female or minority candidate should be hired over the non-female or non-minority candidate into an underutilized position. 4. Thirty-nine people who applied for the position, including Grievant and the successful applicant, Amanda Standifur, were found by Marshall's Human Resources Office to be minimally qualified for the position.

5. The Office Courier position reports to Penny Smoot. Marshall policy requires that all minimally qualified employee applicants be interviewed. In this case, there were eight minimally qualified employee applicants who had to be granted an interview, including Grievant. Ms. Smoot chose one non-employee applicant to interview, Ms. Standifur. The Human Resources Office sent Ms. Smoot the employment applications for these nine applicants, and a letter with the interviewees listed, on June 18, 1998. Later that same day the Human Resources Office sent her the application of one additional non-employee applicant, James Layne, and Ms. Smoot added his name to the list at the end of the letter of applicants to be interviewed. Ms. Smoot did not know why Mr. Layne's application was sent to her, and none of the witnesses called to testify in this grievance knew why this was done.

6. On June 19, 1998, Ms. Smoot and Dr. William Deel, Ms. Smoot's supervisor, interviewed nine applicants, including Mr. Layne. One of the employee applicants did not appear for the scheduled interview. Ms. Smoot and Dr. Deel used Marshall's Interview Rating Form in rating those interviewed. The interviewees were rated on the form in the areas of motivation, breadth of interests and thinking, maturity - responsibility, poise, ease of expression, interest in personal improvement, preparation - technical/educational, preparation - general knowledge of job and institution, initiative, and employment record.

7. Each interviewee was asked whether he or she had a basic knowledge of postal rules and regulations. Ms. Standifur was the only interviewee who responded thatshe did. Grievant responded

that postal regulations change all the time, he had not worked in that field for four or five years, and he could learn the regulations.

8. Grievant did not receive the highest rating of outstanding in any of the ten areas rated. He received a rating of above average in six of the areas, and the lower rating of average in four of the areas.

9. Ms. Standifur received a rating of outstanding in eight of the areas rated, and above average in the other two areas. She was selected for the position because Ms. Smoot and Dr. Deel decided from the interview that she was the best qualified applicant for the position. She had a good interview, answering all the questions asked affirmatively, and demonstrating excellent demeanor and poise. She demonstrated a thorough knowledge of postal regulations, and presented a pleasant personality.

10. Prior to her selection, Ms. Standifur was employed for at least one year as a temporary worker at Marshall in the mailroom, in the Lead position.

11. Temporary workers are not considered Marshall employees. They are considered external candidates.

12. Grievant was employed by Pitney Bowes for 25 years installing and repairing equipment, including equipment in the Marshall mailroom, and instructing users on use of the equipment. Ms. Smoot was aware Grievant had installed equipment, but she was not aware he had instructed users on use of postal equipment, and Grievant did not make her aware of this.

Discussion

Grievant argued Ms. Standifur should not have been interviewed because there were qualified employees, and she was not an employee. Grievant also questioned Ms.Standifur's qualifications for the position, and argued it was discriminatory to train her to do the job while she was working as a temporary performing the duties of another position, and then select her as the best qualified. He argued that underutilization was "used to further a personal agenda," to place Ms. Standifur in the position.

Marshall argued that Ms. Standifur was the most qualified applicant. It denied any predisposition to hire Ms. Standifur.

The burden of proof was upon Grievant to demonstrate that Marshall acted in an arbitrary and capricious manner, or was clearly wrong in deciding Ms. Standifur was the best qualified candidate to

fill the subject job opening posted at Marshall. Booth v. W. Va. Bd. of Trustees at 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.

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. Fry v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 95-BOT-376 (Mar. 27, 1996). That Code Section provides:

> (d) A nonexempt classified employee, including a nonexempt employee who has not accumulated a minimum total of one thousand forty hours during the calendar year or whose contract does not extend over at least nine months of a calendar year, 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, 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. A nonexempt classified employee is one to whom the provisions of the federal Fair Labor Standards Act, as amended, apply.

More simply put, an employee must be placed in a vacancy over a new hire, unless, (1) the employee is not minimally qualified, or (2) the hiring is affected by mandates in an affirmative action plan or the Americans with Disabilities Act. 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 Director of Equity Programs determined that the posted position was underutilized. Grievant presented no evidence that Mr. Harris' determination was manufactured or otherwise in error. As the hiring was affected by Marshall's affirmative action plan, the statutory preference for employees was not applicable in this situation and Marshall could hire a non-employee.

In this case, Grievant did not undertake the responsibility to make known to the interviewers any

knowledge he possessed of postal regulations or his prior work experience with postal meters. Accordingly, Grievant's knowledge and ability in this area, if any, cannot be considered by the undersigned in evaluating whether Grievant should have been selected. Even if it were considered, however, Grievant did not produce anyevidence from which the undersigned could conclude that he is more qualified than, or even as qualified as Ms. Standifur.

As to Grievant's argument that it was discriminatory to train Ms. Standifur to perform the duties of the position so she would be the best qualified, Grievant failed to produce any evidence of bad motive, or any law which precludes Marshall from hiring temporary employees and then employing them later. While this series of events certainly had the potential to give Ms. Standifur an advantage, it was not illegal.

W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Ridinger, et al., v. Hancock County Bd. of Educ., Docket No. 97-15-452 (Mar. 31, 1998); West v. Putnam County Bd. of Educ., Docket No. 97-40-524 (Mar. 20, 1998); Steele, et al., v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant was treated exactly the same as all other employees. He was not discriminated against in any manner in regard to his employment. Finally, Grievant argued the fact that only one non-employee applicant (Ms. Standifur) out of 31 non-employee applicants was selected by Ms. Smoot to be interviewed, supported his argument that Ms. Smoot and Dr. Deel had decided before the interviews were conducted that Ms. Standifur would be selected. He further questioned when Mr.

Layne's name was included as an interviewee, and asserted that his name was later added by someone to the list of interviewees to bolster Marshall's position, when someone discovered the selection would be questioned. As evidence of this, he pointed to the fact that Mr. Layne's name was hand-written at the end of the list of applicants to be interviewed in the June 18, 1998 letter to Ms. Smoot from the Human Resources Office, but no date was noted on the document to indicate when this was done; and as the Interview Rating Forms were not dated, he could not tell when Mr. Layne was interviewed.

The evidence does not support Grievant's bald accusations. Ms. Smoot and Dr. Deel testified that Ms. Standifur simply presented herself as the best qualified candidate, and they had no intention of selecting her prior to the interviews. Several witnesses testified that it was quite reasonable and normal to interview only a few applicants, such as nine, and attempting to interview 39 people would be difficult. In this case, there was no choice but to offer interviews to eight of the applicants, as Marshall required that all internal candidates be offered an interview.

Ms. Smoot credibly testified that the Human Resources Office sent Mr. Layne's application to her later the same day the other applications were sent to her, June 18, 1998, and she had then hand-written his name at the end of the list of applicants be interviewed. She and Dr. Deel both testified that Mr. Layne was interviewed the same day all the other applicants were interviewed. The undersigned was presented with notestimony to the contrary, and no legitimate reason to question the veracity of this witness testimony.

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. 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. The statutory hiring preference for higher education employees found in W. Va. Code § 18B-7-1(d) was not applicable in this case, because the hiring was affected by Marshall's affirmative action plan.

3. "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. Booth v. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994).

4. Grievant failed to demonstrate he was more qualified than Ms. Standifur , that Marshall personnel acted in an arbitrary and capricious manner in the selection process,that the hiring was contrary to any law, policy or regulation, or that he was the victim of discrimination.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: January 21, 1999

Footnote: 1

The grievance was filed on or about July 7, 1998, and was denied at Level I on July 10, 1998. Grievant appealed to Level II, where a hearing was held on August 4, 1998. A decision denying the grievance at Level II was issued on August 17, 1998. Level III was waived by Grievant, and appeal was made to Level IV on August 27, 1998. A Level IV hearing was held on December 15, 1998, with Grievant appearing pro se with assistance from Thomas Bergquist, and Michael L. Glasser, Esquire, representing Respondent. This case became mature for decision on December 31, 1998, the deadline for submission of written argument. Respondent's written argument was received late, on January 5, 1999. As it was received prior to the issuance of this decision, and Grievant would not be prejudiced in any way by its late submission, it will be considered as though timely filed. Grievant declined to submit written argument.