JEFFREY TOMBLIN,

Grievant,

v **DOCKET NO. 01-HE-359**

HIGHER EDUCATION INTERIM GOVERNING

BOARD / MARSHALL UNIVERSITY,

Respondent.

DECISION

This grievance was filed on March 15, 2001 by Jeffrey Tomblin, a Building Service Worker I at Marshall University. His Statement of Grievance reads, "'Internal Candidates' are guaranteed an interview if [they] meet the minimum qualifications for the position." No specific relief was requested in the original grievance, but prior to the Level IV hearing, Grievant's representative submitted a request for relief which states that the redress Grievant is seeking is "[t]hat he be awarded the PG-9 position of Shipping and Receiving Assistant or another position equal to PG-7 or above to a PG-9. (This would include any BSW lead positions.)"

At the Level IV hearing, Grievant was represented by Lt. Terrence Olson and Respondent **(See footnote 1)** was represented by Beth Rauer, Esq. This matter became mature for adecision on September 13, 2001, after the parties submitted their proposed findings of fact and conclusions of law. At the Level IV hearing, Respondent's attorney presented a motion to dismiss the Grievance due to an untimely appeal to Level IV.

The following facts are derived from a preponderance of the evidence presented at the Level II and IV hearings:

FINDINGS OF FACT

1. Grievant Jeffrey Tomblin is a building service worker employed by Respondent Marshall University (MU) and has worked for MU in various capacities since 1994. He filed this grievance at Level I on March 7, 2001. A Level I decision denying the grievance was rendered on March 15, 2001. Grievant appealed to Level II on March 19, 2001.

2. A Level II hearing was held on April 10, 2001 and a Level II Decision denying the grievance was issued by F. Layton Cottrill, Jr., on April 12, 2001.

3. The Level II Decision comprised a letter by Mr. Cottrill adopting the findings of the Grievance Evaluator and a memorandum setting forth the Grievance Evaluator's findings.

4. Mr. Cottrill's letter stated in part, “Should you desire, this decision may be appealed by following the guidelines set forth in the West Virginia Code.”

5. The original Grievance Form lists April 17, 2001 as the date it was filed at Level III and May 11, 2001 as the date it was filed at Level IV. May 11 is 21 days after the Level II decision was issued. 6. Neither Respondent nor Grievant were able to produce any record of the Grievance having actually been filed at Level III. There is likewise no record that a Level III hearing was waived by either party.

7. The Grievant's appeal to Level IV of the grievance procedure was transmitted by fax to the Grievance Board by his representative on May 18, 2001 and was mailed by the Grievant on or about May 21, 2001.

8. Grievant approached David Harris, Marshall University Director of Equity Programs and Associate Director of Human Resource Services, and stated that he wanted to appeal to Level III. Mr. Harris explained that Level III was usually skipped and that Grievant should proceed to make his appeal to Level IV. When Grievant insisted that he wanted to file a Level III appeal, Mr. Harris referred him to the Classified Staff Handbook which lists the procedure and appropriate addresses. Grievant, who appeared frustrated, left without looking at or taking the handbook Mr. Harris referred to.

9. Grievant received a Classified Staff Handbook when he was first employed and it and any updates are freely available online.

10. Mr. Harris had no further communication from Grievant regarding this grievance until he received notice of the Level IV appeal.

11. In January, 2001 MU posted a position opening for a Shipping/Receiving Assistant, with an application submission deadline of February 2, 2001. [Lvl. II Resp. Exh. No. 2]

12. The recruiting bulletin for this position listed as the necessary qualifications and duties of the position:

> Qualifications: High school graduation of GED; six months of general warehouse experience (includes receiving, shipping, and inventory control); good communication skills; ability to lift 50-75 pounds with ease; valid driver's license and ability to drive delivery truck; operate pallet jacks, and tow motor. Successful applicant must be able to obtain a tow motor certification, if not certified, before date of hire; computer knowledge preferred. Duties: deliver to campus departments; load and unload trucks;

enter information into computer; tag equipment; move furniture for yard sales.

13. Grievant submitted a standard MU Application for Employment for the Shipping/Receiving Assistant position to the MU Department of Human Resources on January 25, 2001.

14. The Application for Employment, in the Personal Information section, asks, “Do you possess a valid driver's license? [ ] Yes [ ]No.” Grievant accidentally left this question blank, although he does have a valid West Virginia driver's license with a Class D (commercial up to 26,000 pounds) endorsement. [Lvl. II Resp. Ex. No. 3]

15. MU's personnel handbook states, “it is the employee's responsibility to assure that his/her university application is up-to-date. Applicants whose files are not completed by the posted deadline will not be considered.” [Resp. Ex. No. 6]

16. Stephanie Gray, Human Resources Assistant III in the MU Department of Human Resources, reviewed all the applications that were submitted for the opening. After consulting her supervisor, she rejected Grievant's application as incomplete because the driver's license question was not checked. She made no effort to contact Grievant. She ultimately sent a list of seven names to Central Receiving for that department to interview for the position. 17. The successful applicant, Greg Harmon, did not present a complete application by the deadline stated on the job posting. He was a probationary employee at the time he applied, although he was full-time regular at the time of the interview. MU's personnel handbook states, “Employees may not apply for transfer or promotion during a probationary period without written permission from their immediate supervisors.” [Resp. Ex. No. 6]. Mr. Harmon's application did not include such written permission and his supervisor did not grant written permission until February 7, 2001. [Gr. Exh. No. 2]

18. Another applicant whose name was forwarded by Ms. Gray was Greg Gibson. Mr. Gibson's application showed no general warehouse experience and thus failed to indicate that he possessed one of the minimum qualifications. [Gr. Exh. No. 3] Nevertheless, his name was forwarded by Ms. Gray, he was granted and interview and was ranked third of the seven candidates by the committee. [Resp. Exh. No. 5]

19. Carol Skaggs is the supervisor for Central Receiving at MU, the department that posted the job opening in question. She was part of the committee that interviewed candidates for the opening. This committee only interviewed applicants whose names were forwarded to them by MU's personnel

office, and Grievant was not on the list. [Resp. Exh. No. 3] Unless a name was on the list, the interview committee had no way of knowing whether a particular person applied or what was represented on his or her application.

20. Ms. Skaggs reviewed Grievant's application at the Level IV hearing, and testified that she probably would have ranked Grievant fifth or sixth of eight applicants, had he been considered. The successful applicant was selected unanimously. TommyBurchell, the second most-favorable candidate, was more qualified than Grievant and would have been selected had Mr. Harmon not been in the candidate pool.

DISCUSSION

Because a determination that the appeal was untimely is dispositive of the case, the motion to dismiss will be addressed first. Respondent argues that Grievant should be held to the same standard as Respondent would be if it had defaulted by failing to timely render a decision. However, Respondent had a duty to inform Grievant in its Level II decision as to the correct method for appeal. The Level II Decision must provide the name and address of the person at the next level to whom appeal should be made (See footnote 2) . Instead, the Level II decision referred Grievant to some unspecific section of the West Virginia Code. When Grievant sought clarification, he was given different advice by Mr. Harris.

Because the grievance process “is intended to be a fair, expeditious and simple procedure, rather than a procedural quagmire,” it is preferable to decide each grievance on its merits. (See footnote 3) “The timeliness of a grievance claim is not a cut-and-dried issue because a tribunal must apply . . . the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps.” (See footnote 4) When a Respondent fails to render a decision within the allowed time, it is permitted to tender a reason that will excuse theuntimely action. (See footnote 5) The Grievant should be given the same consideration. Here, the notice provided in the Level II decision was insufficient to ensure that Grievant would know how and where to properly appeal that decision. The notice must provide explicit information, rather than a vague reference to an unsupplied source that confuses many attorneys. Given that the untimely appeal was caused in part by the Respondent, Grievant has demonstrated a valid excuse for the failure to meet the statutory time requirement. Accordingly, Respondent's motion to dismiss based on the untimeliness of Grievant's Level IV appeal is

OVERRULED.

Looking now at the merits of the grievance, Grievant contends that he should have been granted an interview for this position because he is an internal candidate who meets the minimum qualifications, even if his application did not specifically indicate that he did. Respondent asserts that it properly declined to consider Grievant because his application for the position indicated on its face that he did not meet the minimum qualifications, because it did not show that he possessed a valid driver's license. Grievant claims this assertion to be discriminatory because other applicants for the same position were granted an interview although their applications were incomplete or showed they did not meet the minimum qualifications. Further, he claims that his application did not show that he was unqualified, since neither “yes” nor “no” was checked in response to the driver's license question, and Respondent should have either presumed the answer was “yes,” or contacted Grievant for clarification. Taking Grievant's second contention first, no evidence was presented that it was Respondent's responsibility to make sure any person's job application was complete. To the contrary, MU's Personnel Handbook clearly makes this the employee's responsibility. While it certainly would have taken a minimal amount of time for Respondent to check with Grievant on which box should be checked, the undersigned may only require MU to follow established policies. Due to the volume of job applications received by MU's personnel office, making even a minimum effort to make sure each is accurate, multiplied by the number of applications received, would be impractical.

Grievant's primary contention has more teeth. While Respondent contends that it had no duty to interview Grievant because his application was incomplete, Grievant has shown that Respondent did interview other applicants whose applications were incomplete or did not show that they met the minimum qualifications. Discrimination is defined in W. Va. Code § 18-29-2(m) 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." To make a *prima facie* case of discrimination, Grievant must show:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c) that the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

Lawton v. Hancock County Bd. of Educ., Docket No. 00-15-275 (Jan. 30, 2001). While Grievant has met his burden of proving the first two elements of the test, he has not proven the third; the unfair difference in treatment did not cause a substantial inequity. Even if Grievant had been granted an interview, he was not more qualified than the successful applicant, and he would not have been offered the job. If the undersigned were to require MU to interview Grievant for the position, the outcome would be no different than if he had been interviewed with the other candidates. Had the successful candidate not been granted an interview, Grievant would not have been selected even if he had been considered. If Grievant had been added to the list as the eighth candidate, he would not have been selected. Consequently, although Grievant has been treated differently than some other applicants, no substantial inequity resulted. Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the Grievance Board. (See footnote 6)

The following conclusions of law support the above discussion:

CONCLUSIONS OF LAW

1. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). A preponderance of the evidence isgenerally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

2. Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02

(June 17, 1996). *See* Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

3. The time deadline for appeal of a Level II decision is set forth in W.Va. Code § 18-29-4(c), which states in pertinent part:

> Within five days of receiving the decision of the chief administrator, the grievant may appeal the decision to the governing board of the institution or may proceed directly to level four. An appeal to the governing board shall set forth the reasons why the grievant is seeking a level three review of the decision of the chief administrator.

4. "The timeliness of a grievance claim is not a cut-and-dried issue because a tribunal must apply . . . the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possiblefrom unreasonable procedural obstacles and traps." Hale v. Mingo County Bd. of Educ., 199 W.Va. 387, 484 S.E.2d 640 (1997).

5. W. Va. Code §18-29-3(i) requires that "decisions rendered at all levels of the grievance procedure shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefor, and shall be transmitted within the time prescribed to the grievant and any representative named in the grievance. If the grievant is denied the relief sought, the decision shall include the name of the individual at the next level to whom appeal may be made." Simply stated, "[t]he notice which advises the petitioner of his right to request a level four hearing must include instructions on where this request is to be filed." Syl. pt. 1, Duruttya v. Bd. of Educ. of the County of Mingo,181 W. Va. 203, 382 S.E.2d 40, (1989).

6. In the event that a late filing is excusable by virtue of innocent mistake, excusable neglect, unavoidable cause, fraud, misrepresentation or other misconduct of an adverse party, or any other reason justifying relief from the running of the time period, then timely filing shall not be considered mandatory. Bailey v. Southern W.Va. Community College, 170 W. Va. 771; 296 S.E.2d 901 (1982).

7. Where a Respondent fails to include the information required by West Virginia Code § 18-29-3(i) in a decision denying the Grievance, contributing to Grievant's failure to timely file his appeal, Grievant's failure is excused by Respondent's misconduct.

8. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving

by a preponderance of the evidence that Respondent discriminated against him in the application of a statute, policy or rule under which he works. ProceduralRules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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 §§ 18-29-2, 18-29-6.

9. Discrimination is defined in W. Va. Code § 18-29-2(m) 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."

10. In order to establish a *prima facie* case of discrimination, a grievant must demonstrate:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and,
>
> (c) that the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

Lawton v. Hancock County Bd. of Educ., Docket No. 00-15-275 (Jan. 30, 2001); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). *See* Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

11. Grievant failed to establish a *prima facie* case of discrimination by not proving that the difference in treatment to which he was subjected caused a substantial inequity because he would not have been the successful applicant. Relief which entailsdeclarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the Grievance Board. Burchell v. Higher Educ. Gov. Bd./Marshall University, Docket No. 01-HE-370 (Aug. 28, 2001); Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993).

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. Any such appeal must be filed within thirty 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.

_____

M. Paul Marteney

Administrative Law Judge

Dated: September 17, 2001

Footnote: 1

When this grievance was filed, state institutions of higher education were governed by the West Virginia Higher Education Policy Commission ("HEPC") and the West Virginia Higher Education Interim Governing Board ("IGB"). W. Va. Code §§ 18B-1-2 (2000); 18B-1B-1 (2000); 18B-1C-2 (2000). On July 1, 2001, the IGB ceased to exist and was replaced by a Board of Governors at each institution. W. Va. Code §§ 18B-1-2; 18B-2A-1 (2001); 18B-2A-4 (2001).

Footnote: 2 *W.Va. Code § 18-29-3(i).*

Footnote: 3

Harmon v. Fayette County Bd. of Educ., Docket No. 98-01-111 (July 9, 1998); Duruttya v. Bd. of Educ. of Mingo County, 181 W.Va. 203, 382 S.E.2d 40 (1990).

Footnote: 4 *Hale v. Mingo County Bd. of Educ., 199 W.Va. 387, 484 S.E.2d 640 (1997).*

Footnote: 5 *Higginbotham v. W.Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997).*

Footnote: 6

Burchell v. Higher Educ. Gov. Bd./Marshall Univ., Docket No. 01-HE-370 (Aug. 28, 2001); Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993).