KENT HOLLEY,

Grievant,

v. DOCKET NO. 02-HEPC-128

HIGHER EDUCATION POLICY COMMISSION/

MARSHALL UNIVERSITY BOARD OF GOVERNORS,

Respondent.

DECISION

This grievance was filed by Grievant Kent Holley against his employer, Respondent, Higher Education Policy Commission/Marshall University Board of Governors ("Marshall"). The statement of grievance reads:

> Marshall has violated Federal, State EEO and affirmative action guidelines by not posting vacant positions. This is blatantly discriminatory. Also they have violated State Code 18B-7-1 + 18B-7-1(d) + 18-29-4(c) and M.U. employee handbook pgs 64 + 65.

Grievant's representative stated at the Level III hearing that W. Va. Code §§ 18B-7-1 and 18-29-4(c) were not applicable to the grievance, and should not be in the statement of grievance. As relief, Grievant sought "Promotion to the PG - 10 Roads & Grounds Worker position." Grievant's representative clarified at the Level III hearing that Grievant was not seeking back pay. (See footnote 1) W. Va. Code §18B-7-1(d) sets forth the statutory requirements for institutions of higher education 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, as occurred in this case, 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.

The following findings of fact are made based upon the evidence presented at the Level III and IV hearings.

Findings of Fact

1. Grievant has been employed at Marshall since 1987. He was a custodian from 1987 to 2000. He has been employed in the grounds department since 2000.

2. On October 25, 2001, Marshall posted a vacancy for a Roads & Grounds Worker, Physical Plant, pay grade 10. The posting listed the qualifications as a “[h]igh school diploma or GED and one year of grounds/landscape experience. Valid driver's license preferred. Ability and willingness to work as directed; possess the ability to follow both written and verbal directions and instructions.”

3. The job description for Roads and Grounds Worker states the primary purpose of the position “is to maintain the grounds of the institution in a neat and orderly condition and enhance the appearance of the institution by planting and maintaining flowers and shrubs.” The characteristic duties indicate the employee would operate various types of light and heavy equipment, and would plant and maintain grass, flowers, shrubs, and trees.

4. Grievant applied for the posted position, as did 10 other Marshall employees.

5. A panel of four people interviewed the 11 Marshall employee applicants in December 2001. The panel members were Chris Kennedy, from the grounds department, Jeff Ellis, Safety Director at Marshall, Gus Young, Roads and Grounds Supervisor, and Anita Hill, Office Manager in the Physical Plant.

6. Each applicant who was interviewed was asked the same 13 questions. The questions were written by Mr. Young, and were job related. The selection committee then as a group rated the interviewees on a form provided by the Marshall Human Resource office, in the following categories: 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 applicant was also required to demonstrate that he was able to operate the equipment which would be used by the employee in the position. This was not a test to determine which applicant was the best equipment operator. Grievant injured his leg while at work on August 8, 2001, was off work with this injury at the time of the interviews, and was not able to demonstrate his equipment operation skills. Mr. Young was aware that Grievant was able to operate all the equipment, and Grievant was not required to demonstrate his ability to operate the equipment. Mr. Young also did not make other employees whose equipment operation skills he was aware of demonstrate that they could operate the equipment.

8. Calvin Rawlings was ranked first by the interview panel, and was selected for the posted position. Grievant did not grieve his non-selection for the position.

9. Grievant was rated fourth by the interview panel, behind Mr. Rawlings, Mark Ward, and Carl Black.

10. Early in 2002, another Roads and Grounds Worker position in the Physical Plant became vacant after an employee transferred elsewhere.

11. David Harris, Marshall's Director of Equity Programs and Associate Director of Human Resource Services, reviewed the pool of applicants from the October posting, and the eligibility of any newly hired employees. Mr. Harris decided there were no new hires who were eligible to fill the position, and that the applicant pool was large enough that this second vacancy did not need to be posted, and could be filled from the applicants for the October posting. The position was not posted, the applicants were not interviewed again, and the rankings from the interviews after the October posting were used to determine who would fill the position.

12. Mark Ward was selected for the second Roads and Grounds Worker position.

13. The interview panel rated Mr. Ward as average in the categories motivation, maturity - responsibility, preparation - technical/educational, and initiative. The panel rated him above average

in the remaining categories.

14. The interview panel rated Grievant as average in the categories motivation, maturity - responsibility, poise, preparation - general knowledge of job and institution, initiative, and employment record. The panel rated him above average in the remaining categories.

15. Mr. Ward has worked in the grounds department for over five years, including the last two years as a Campus Service Worker II. He has been a Marshall employee for 20 years.

16. Grievant has operated various types of equipment most of his life, and is a very good equipment operator. Mr. Ward has also operated equipment for a number of years. Both Grievant and Mr. Ward are capable of operating the equipment used by a Roads and Grounds Worker.

17. On February 25, 1999, Grievant was issued a certification indicating successful completion of the Mitsubishi Forklift Safety/Training Course. Mr. Ward has not completed this course, nor is completion of this course a requirement for the position at issue.

18. The interview panel did not test the applicants to determine which of them was the best equipment operator, nor could it do so, as Grievant was physically unable to perform this test at the time. Grievant was still off work due to his injury at the time the second position was filled. Grievant did not indicate he was physically able to perform such a test at that time. The interview panel did not believe that the applicants' equipment operation skills was the determining factor in the decision as to who was the best qualified applicant.

Discussion

Grievant bears the burden of proving his allegations by a preponderance of the evidence. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). Grievant argued first, that the second Roads and Grounds Worker vacancy had to be posted, citing the provisions of Marshall's Affirmative Action Policy. Grievant argued that, because the position was not posted, he was not allowed to apply, and was not granted an interview, as is required by the Marshall employee handbook. Marshall pointed out that Grievant was considered for the position at issue, and was interviewed. It argued it was not required to post the position, and that it had a long-standing practice of using a pool of applicants from a prior posting, noting it had a large applicant pool from the first posting for the same job title in the same department, and there were no new hires who would be eligible should they wish to apply. Grievant argued he should have been granted another interview,

because the interview panel could have been different, and he may have had a bad day when he interviewed and would have done better if given another opportunity.

Grievant also argued he was the most qualified candidate, and that he was discriminated against because he was off work with an injury. He argued the position was not posted because Mr. Young was angry that he was injured. Marshall disputed these allegations.

Finally, Grievant argued the posted position should not have been awarded to Mr. Rawlings in late 2001 or early 2002, because, although the posting says a driver's license is preferred, the job description for a Roads and Grounds Worker says this is a requirement, and Mr. Rawlings did not have a driver's license at the time. Respondent argued this issue could not be bootstrapped to this grievance, which was filed complaining that the position filled by Mr. Ward had not been posted. The undersigned agrees. The grievance was filed after the position was filled by Mr. Ward, and complains of it not beingposted. Neither the Level I nor Level II decisions make reference to Mr. Rawlings' placement in the first position. At the Level III hearing, Grievant's representative raised the issue of whether a driver's license was required. Mr. Harris, who was representing Marshall at that hearing, stated Mr. Ward and Grievant both had a driver's license, and Grievant's representative agreed, but said that was not what he was talking about. Mr. Harris stated Mr. Ward was the successful applicant. Neither Grievant nor his representative clarified at that time that Grievant was asserting a flaw in the selection process when Mr. Rawlings was selected. In fact, when the grievance evaluator asked at the end of the Level III hearing if the “summary of the two parts we've been talking about” were that Grievant believes he was the best qualified, and that the second job should have been posted, Grievant's representative stated, “[t]hat's our position, Your Honor.” Whether Mr. Rawlings was qualified for the first opening is a different grievance, and will not be addressed here. W. Va. Code § 29-6A-3(j). The undersigned would note, however, that had Mr. Rawlings not been qualified for the position, Mr. Black was also ranked ahead of Grievant by the interview panel, and his qualifications for the position were not made a part of the record.

In support of his argument that the vacancy had to be posted Grievant presented two pages from Marshall's Affirmative Action Plan, pages iv and 146. Page 146 has a number of points listed. The one which is applicable here begins:

> - - Announce, post, advertise all employment, promotion and transfer opportunities, including acting, interim, temporary, part-time appointments.

This point obviously cannot stand alone. Something on one of the preceding pages explains what this point is in reference to. This point standing alone does not support Grievant's contention that Marshall acted in violation of policy here in not posting a second time.

Even if Grievant demonstrated a policy violation in the failure to post, Grievant was in fact considered for the position, and he did receive an interview. A grievant challengingan action based upon a policy violation must demonstrate that the violation, more likely than not, affected the outcome. “Otherwise, if the same result would have inevitably been reached, the procedural violation will be considered as 'harmless error.' Bradley[v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999)]; Dadisman v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 98-RS-023/040 (Mar. 25, 1999).” Wines v. Jefferson County Bd. of Educ., Docket No. 00-19-394 (July 9, 2001). Grievant did not indicate he had a bad interview, or that he had any problem with interviews. His representative simply speculated that he might have performed better in a second interview, or that he might have done better with a different interview panel. Any policy violation in the posting procedure used here would be considered harmless error.

In order to prevail in his argument that he should have been selected for the position at issue, Grievant must demonstrate he was the best qualified candidate to fill the subject job opening posted at Marshall, as Mr. Ward was the more senior applicant, and was entitled to the position if he and Grievant were equally well qualified. The undersigned would note again at this point that Mr. Black was also ranked ahead of Grievant by the interview panel; however, the record does not reflect Mr. Black's qualifications.

"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. 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 didthe decision-maker know of Grievant's abilities when deciding Grievant was not the best qualified

candidate for the position.

Grievant's belief that he is better qualified than Mr. Ward for the position at issue centered around his abilities as an equipment operator, and the fact that he holds a forklift certification while Mr. Ward does not. Respondent did not dispute that Grievant is a very good equipment operator, and certainly he would do a fine job operating the equipment as required in the job. Grievant pointed out he has not had an accident while operating equipment at Marshall, while Mr. Ward backed into a dumpster one time with a flatbed truck, and on another occasion cracked the plastic hose on the leaf vac when he was learning to drive the dump truck with the leaf vac attached. However, the position at issue involves more than the operation of equipment, and the interview panel ranked the applicants based upon 10 categories. Grievant has not demonstrated that these 10 categories were not properly used to rank the applicants, or that the applicants' equipment operation skills should have been the deciding factor. The decision of the interview panel that Mr. Ward was better qualified than Grievant was not arbitrary and capricious.

As to Grievant's argument that he was discriminated against, W. Va. Code § 29-6A- 2(d) 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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

The anti-discrimination provision of the Workers' Compensation statute states that "[n]o employer shall discriminate in any manner against any of his present or former employees because of such . . . employee's receipt of or attempt to receive benefits under this chapter." W. Va. Code § 23-5A-1 (1978). The West Virginia Supreme Court of Appeals has held that, in order to make a prima facie case of discrimination under this section, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee. Syl. Pt. 1, Powell v. Wyoming Cablevision, Inc., 184 W. Va. 700, 403 S.E.2d 717 (1991); Sizemore v. Peabody Coal Co., 188 W. Va. 725, 426 S.E.2d 517 (1992); St. Peter v. AMPAK-Division of Gatewood Prods., Inc., 199 W.Va. 365, 484 S.E.2d 481 (1997); Rollins v. Mason County Bd. of Educ., 200 W.Va. 386, 489 S.E.2d 768 (1997). Once a prima facie case has been made, the burden is then upon the employer to show a "legitimate, nonpretextual, and nonretaliatory reason" for its actions. Powell, supra, 184 W. Va. at 705; Simons v. W. Va. Dep't of Transp., Docket No. 98-DOH-137 (Dec. 17, 1999).

Grievant pointed out that Mr. Young did not believe Grievant when he had come to him and told him he had injured himself and needed to go to the doctor, and that Mr. Young had written something to this effect on the accident report after Grievant had signed it. Grievant then argued he was not selected for the position because he was still off work due to his injury at the time the position needed to be filled. Mr. Young did not dispute that he initially did not believe Grievant. He testified he had told Grievant the employees would have to work overtime, Grievant was not pleased with this, and then shortly thereafter Grievant came to his office stating he had been injured and had to go to the doctor. Mr. Young also acknowledged that the position needed to be promptly filled because they were nearing the summer mowing and planting season, but stated that if Grievant had been the better candidate, he would have been placed in the position and he would have made do in some way.

Grievant has not demonstrated he was discriminated against. He was not selected for the position at issue for a legitimate job-related reason. He was not the most senior, or the most qualified applicant. Further, the failure to post was not discriminatory, and, as noted above, Grievant was not harmed by the failure to post.

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. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. Under the facts of this case, W. Va. Code §18B-7-1(d) required Marshall to hire the best qualified employee applicant to fill the posted position of Roads and Grounds Worker. If the applicants were equally qualified, Marshall was required to hire the most senior of the equally qualified employee applicants.

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 anarbitrary 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 did not demonstrate he was better qualified than the successful, more senior applicant.

5. W. Va. Code § 29-6A-2(d) 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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

6. Once a prima facie case of discrimination has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

7. The anti-discrimination provision of the Workers' Compensation statute states that "[n]o employer shall discriminate in any manner against any of his present or former employees because of such . . . employee's receipt of or attempt to receive benefits under this chapter." W. Va. Code § 23-5A-1 (1978). The West Virginia Supreme Court of Appeals has held that, in order to make a prima facie case of discrimination under this section, the employee must prove that: (1) an on-the-job injury was sustained; (2)proceedings were instituted under the Workers' Compensation Act, and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee. Syl. Pt. 1, Powell v. Wyoming Cablevision, Inc., 184 W.Va. 700, 403 S.E.2d 717 (1991); Sizemore v. Peabody Coal Co., 188 W.Va. 725, 426 S.E.2d 517 (1992); St. Peter v. AMPAK-Division of Gatewood Prods., Inc., 199 W. Va. 365, 484 S.E.2d 481 (1997); Rollins v. Mason County Bd. of Educ., 200 W. Va. 386, 489 S.E.2d 768 (1997). Once a prima facie case has been made, the burden is then upon the employer to show a "legitimate, nonpretextual, and nonretaliatory reason" for its actions. Powell, supra, 184 W. Va. at 705; Simons v. W. Va. Dep't of Transp., Docket No. 98-DOH-137 (Dec. 17, 1999).

8. Grievant has not demonstrated discrimination in the hiring process. He was not selected because Mr. Ward was more senior than Grievant, and Grievant was not better qualified than Mr. Ward. The position was not posted because there was a large pool of qualified applicants from a previous posting.

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 (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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 30, 2002

Footnote: 1

The grievance was filed on or about March 28, 2002, and was denied at Level I on April 8, 2002. Grievant appealed to Level II on April 11, 2002, and a decision denying the grievance at Level II was issued on April 15, 2002. Grievant appealed to Level III, where a hearing was held on April 24, 2002. A Level III decision denying the grievance was issued on April 30, 2002. Appeal was made to Level IV on May 8, 2002. A Level IV hearing was held on June 6, 2002. Grievant was represented by Terry Olson, and Respondent was represented by Jendonnae L. Houdyschell, Esquire. This case became mature for decision upon receipt of Respondent's reply brief on July 15, 2002. In Respondent's reply brief it asked that Grievant's written argument be stricken because the filing deadline was July 8, 2002, and Grievant's argument was mailed two days late. While Grievant's argument did include responses to Respondent's written argument, it is likely this would have occurred had the argument been timely submitted, as Respondent mailed its argument several days early, on July 3, 2002. Further, both parties were allotted a reply period. Grievant's written argument will not be stricken. However, Grievant did reference factual information about another selection in point number six, without placing this information into the record as evidence. This information will not be considered.