**JOSEPH BRUMFIELD,**

**Grievant,**

**v.** **DOCKET NO. 02-HEPC-339**

**HIGHER EDUCATION POLICY**

**COMMISSION/MARSHALL UNIVERSITY,**

**Respondent.**

**DECISION**

In a grievance filed July 26, 2002, Joseph Brumfield stated: "Marshall U. violated 18b-7-1(d) by not hiring me for a vacant Campus Service Worker 2 position. They hired an employee with about 1 yr. of service, I have 9 years of service." As relief, he seeks "to be promoted to Campus Service Worker 2 and to receive back pay and interest from the date of 7-17-02."

This grievance was denied at levels one, two and three, and was submitted by the parties for decision based on the lower-level record, supplemented by proposed findings of fact and conclusions of law to be filed by November 22, 2002, whereupon the matter became mature for decision at level four. (See footnote 1)

I find the following facts have been proven by a preponderance of the evidence contained in the record:

FINDINGS OF FACT

1. Grievant is a Building Service Worker I employed at Marshall University (MU), with ten years of seniority.

2. On or about May 17, 2002, Respondent posted a job vacancy for a Campus Service Worker II, Physical Plant, Search Number 10688. [Recruiting Bulletin No. 20, level three Grievant's exhibit no. 1.] Grievant and others applied for the job.

3. Of 22 applications received in response to the posting, three internal candidates were referred to the Physical Plant from Human Resource Services for interviews: Grievant, Troy A.

Cooper and Cecilia R. Scarberry. [Memorandum dated June 6, 2002, level three Grievant's exhibit no. 5.] Only Grievant and Ms. Scarberry (who had less than 2 years of seniority) were considered for the position, although all three internal candidates completed the interview process. Mr. Cooper did not possess a valid driver's license, one of the minimum qualifications for the position.

4. Charles Young, Roads and Grounds Supervisor, put together an interview committee as soon as he received the referrals. The committee comprised himself, Safety Director Jeff Ellis, Office Manager Anita Hill and Lead Worker Christopher Kennedy.

5. Interviews were held on June 18, 2002. A standard Interview Rating Form, provided by Human Resource Services, was completed by the committee for all interviewees. The interviewees were asked the same 12 questions, given the same amount of time for the interview, and were given the same hands-on competency test. (See footnote 2) The entire process took about 45 minutes. 6. The Interview Rating Form, which is not to be completed in the presence of the applicant, requires the prospective employee to be rated in ten areas on a scale of “Outstanding,” “Above Average,” “Average” or “Below Average.” Grievant was rated average in nine areas and above average in one area, while Ms. Scarberry was rated average in six areas and above average in four areas. These forms were completed as the consensus of the committee after the interviews were concluded.

7. The forms also have a section for additional comments. On Grievant's form, the committee remarked, “Lacking in knowledge of equipment. Verbal references not suitable. Not recommended.” [Level three Grievant's exhibit no. 2, page 1.] On Ms. Scarberry's form, it was noted, “Excellent reference, past experience and knowledge of equipment and job.” [Level three Grievant's exhibit no. 6, page 1.]

8. Of the 12 interview questions, three were objective with right or wrong answers, and the rest were subjective. Each committee member asked three questions, and each completed his or her own copy of the question sheet by recording the applicant's answers and/or his or her subjective impressions. Of the right/wrong questions, both Grievant and Ms. Scarberry answered the same one incorrectly (No. 8). See portions of level three Grievant's exhibits nos. 2 and 6.

9. The hands-on competency test was administered in the same way to each applicant. For this test, a lawnmower, leaf blower and gas-powered string trimmer were placed in the bed of a golf cart-like “ClubCar” in the garage and a walk-behind Gravely mower was parked beside it, a few feet

away from a workbench. [Pictured in level three Respondent's exhibit no. 1.] The candidates were instructed to demonstrate the proper operation of each piece of equipment. While they were taking the test, the committee completed an Equipment Verification Form, noting the candidate's ability to properly checkand ready the equipment before starting, starting the equipment, demonstrating operational knowledge, and shutting it down.

10. No candidate completed the hands-on test flawlessly. However, the committee noted two specific deficiencies in Grievant's performance that contributed significantly to its decision against recommending him. Both Grievant and Ms. Scarberry started the Gravely in gear, and allowed it to surge forward. Grievant stopped it by shutting it off, and Ms. Scarberry shifted it out of gear. Neither requested any safety equipment such as gloves or goggles or hearing protection, neither checked the oil level in the Gravely or the lawnmower, and neither was able to engage the blade on the Gravely. However, unlike Ms. Scarberry, Grievant started the lawnmower while it was still in the ClubCar, instead of lifting it out and placing it on the ground first.

11. Based on the interviews, competency tests and the applicants' references, the committee unanimously decided that Ms. Scarberry was the better-qualified applicant, and so selected her for the position.

12. Although Human Resource Services determined that females were underutilized in this job family, because she was considered most qualified, Ms. Scarberry's sex was not a factor in the selection.

13. Grievant received notice that he had not been selected for the position on or about June 24, 2002. (See footnote 3) This grievance was filed on July 26, 2002. Respondent asserted that this grievance was not timely filed at level one. [Level three joint exhibit no. 2.]

## DISCUSSION

Because this grievance does not involve a disciplinary action, Grievant bears the burden of proving his case by a preponderance of the evidence. Grievant's primary contention is that, since he has greater MU seniority than Ms. Scarberry, he should have been awarded the job. He also argues that he was as qualified or better qualified than the successful applicant. Respondent contends that seniority is not a factor except as a tie- breaker between equally-qualified candidates, but Ms.

Scarberry was more qualified than Grievant and the job was properly awarded to her.

Respondent also asserted in its level four written argument that the grievance was untimely. West Virginia Code § 29-6A-3(2) provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing." This same assertion was made at level one, where the grievance was denied because it was found to be untimely. Unfortunately, Grievant did wait too long to file this grievance. A grievance must be filed with the immediate supervisor of the grievant "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . ." W. Va. Code § 29-6A-4(a). Grievant became aware that he was not awarded the job on June 24, 2002, and filed this grievance on July 26, 2002, 24 days later. Grievant provided no explanation that would justify the delay or extend the time limit. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997). Respondent has proven that this grievance was untimely filed, and so it must be denied on that basis. Even if it had been timely filed, it is doubtful Grievant would have prevailed on his argument that he should have been awarded the position based on his seniority. While he is correct that seniority can play a role in the selection process, it only does so when the candidates are equally qualified. "[I]f there is more than one minimally qualified, internal candidate, the institution may decide who shall be promoted or transferred based upon a "best-qualified" standard. Only when the institution decides two or more internal candidates are equally qualified is seniority determinative. Fry v. Bd. of Trustees/Marshall Univ., Docket No. 95-BOT-376 (Mar. 24, 1996)." Burchell v. Higher Educ. Policy Comm'n/Marshall Univ., Docket No. 02-HEPC-139 (Sep. 30, 2002). Respondent, through its interview process, did not find Grievant and the successful candidate to be equally qualified, so seniority could not be a factor in the selection.

As Grievant's representative pointed out at the level three hearing, much of the interview process is subjective, but that factor should not be considered a flaw in the process. All the applicants are rated based on the impressions they give the interviewers in areas such as motivation, maturity and responsibility, poise and initiative, among others. The applicants are given the same chance of casting favorable impressions on the independent minds of the interviewers. These areas of

consideration are highly relevant to the selection, and it is easy for reasonable minds to differ in their evaluations of these areas. *See*, Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). Since the final determination hinges in part on the subjective evaluations of the interviewers, the undersigned Administrative Law Judge would not be able to substitute his judgment for that of the hiring committee. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). *See generally*, Harrison v. Ginsberg, 169 W. Va. 162, 286S.E.2d 276 (1982); Trimboli v. Dep't of Health and Human Resources, Docket No. 93- HHR-322 (June 27, 1997).

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. West Virginia Code § 29-6A-3(a)(2) provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing."

3. A grievance must be filed with the immediate supervisor of the grievant “[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .” W. Va. Code § 29-6A-4(a).

4. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH- 060 (July 16, 1997).

5. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Heckler

v. Randolph County Bd. of Educ., Docket No. 97- 42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).

6. Respondent met its burden of proving this grievance was not timely filed.

7. "A grievance shall be filed within the times specified in [W. Va. Code § 29- 6A-4] and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article is the maximum number of days allowed . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment." W. Va. Code § 29-6A-3(a)(1).

8. Grievant exceeded the maximum number of days allowed for filing a grievance, but did not present any evidence that would permit the time limits to be extended.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of itsAdministrative 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: January 3, 2003** _____

**M. Paul Marteney**

**Administrative Law Judge**

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*Footnote: 1*

*Grievant is represented by Chris Barr, W. Va. Federation of Teachers, AFL-CIO, and Respondent is represented by Jendonnae L. Houdyschell, Esq., Assistant Attorney General.*

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*Footnote: 2*

*Ms. Hill was not present for the competency tests due to an accessibility limitation of the garage where the test was held.*

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*Footnote: 3*

*The letter so advising Grievant was mistakenly dated May 21, 2002, but was actually sent in June. Level three Grievant's exhibit no. 3; Level three trans. p. 31.*