WILLIAM PRICE, et al.,

Grievants,

v.

DOCKET NO. 04-HE-369

MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievants, William Price, Seth Bush, Leslie Frost, and Robert Morgan, filed the following Statement of Grievance on September 7, 2004, with Marshall University ("Marshall" or "MU"), stating:

> Marshall University and its President, have been, and continue to be in violation of [the] Greenbook, Chapter III, "Conditions of Appointment of Full- time faculty," Section B, paragraphs 3 &4 [sic]. These paragraphs mandate "comparable compensation" for those with comparable training, experience, competence and responsibilities. This mandate was ignored in the salary considerations of Drs. Jaroslava Miksovska and Rudolf Burcl vis-a-vis the grievants listed above.
>
> Relief Sought: Salary increases that reflect the training, experience, competence, responsibilities, and rank of each grievant relative to the salaries of Drs. Jaroslava Miksovska and Rudolf Burcl.

This grievance was denied at all lower levels, and Grievants appealed to Level IV on October 13, 2004. A Level IV hearing was held in the Grievance Board's Charleston, West Virginia office on January 20, and February 3, 2005. This matter became mature for decision on March 7, 2005, upon receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

___Grievants assert MU did not follow Greenbook Policies for hiring new faculty members, and engaged in discrimination when they did not receive the same level of compensation as these new hires. (See footnote 2) Grievants want their salaries raised to 108% of their individual CUPA ratings. (See footnote 3) This acronym stands for College and University Professional Association. This

Association puts out a yearly national salary survey for four year colleges and universities by rank and discipline.

Respondent maintains there was no violation of Greenbook Policies, and Grievants are not similarly situated to the new hires.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants are employed by MU as faculty in the Chemistry Department. Grievants Frost, Price, and Morgan are Associate Professors with tenure, and Grievant Bush is an Assistant Professor without tenure. Their rates of pay for nine months are $47,361, $47,272, $47,361, and $42,863, respectively.

2. Grievants were the four lowest ranking chemistry faculty members with the lowest number of years of service prior to the hiring of Drs. Miksovska and Burcl. All other faculty members are tenured, full professors. 3. During the 1988-1989 academic year, the then-Chair of the Chemistry Department explained to the Dean of the College of Science that it was appropriate for a new professor to be hired with a competitive salary that exceeded other faculty because of his post-doctoral experience, the current national market conditions, and the fact that the new hire would not receive a salary increase the next year. Resp. No. 6 at Level III. 4. During the 1999-2000 academic year, the then-Dean of the College of Science explained to the Dean of Academic Affairs that it was necessary to pay a "salary of this magnitude" to hire the then-applicant, Grievant Bush, in order to obtain a qualified person. At the time this action was contemplated, Grievants Morgan, Frost, and Price, who were then Assistant Professors, agreed with this offer to Grievant Bush even though this action would result in salary compression. Resp. No. 5 at Level III.

5. Both the President of MU and the state legislature are encouraging research and grant writing as ways to fund the cost of higher education and to promote state development.

6. During the 2002-2003 academic year, MU's Chemistry Department searched for a faculty member with expertise in biochemistry to fill a major grant requirement. MU was unsuccessful.

7. During the 2003-2004 academic year, MU's Chemistry Department again searched for a faculty member with expertise in biochemistry. Unless the biochemistry position was filled, MU would

lose a large amount of grant money. Dr. Miksovska was offered the position, but would not come for a salary of less than $50,000.

8. The usual past practice was to offer new hires one dollar less than the lowest paid faculty member, which would have been a little more than $42,000. As reflected byFindings of Fact 3 and 4, it appears this practice was not always followed. Dr. Miksovska would not accept this amount.

9. The salary for Dr. Miksovska was discussed by the faculty, and although there was no formal vote taken, the majority of the Department agreed with the offer of $50,000, as long as all current faculty with lower salaries would be raised to exceed Dr. Miksovska's "as soon as practicable."

10. Dr. Miksovska accepted the offer on or about December 15, 2003, and assumed her position the following June. In accepting MU's offer, Dr. Miksovska agreed to an addendum to her contract that Grievants do not have.

11. This addendum to Dr. Miksovska's contract specified certain conditions that she must meet to obtain promotion and tenure. (Grievants' contracts are covered by the general promotion and tenure guidelines and rules. (See footnote 4)) This contract notes Dr. Miksovska would be given resources and money to assist her in establishing a research program, as well as a three-course reduction in teaching responsibilities during her first year. These resources were contingent upon satisfactory progress toward promotion and tenure and satisfactory performance evaluations, not only in research but also in teaching and advising. Dr. Miksovska's "position was unique in terms of remuneration, start-up resources, and release time, and thus different from previous appointments in the institution. Therefore, criteria for promotion and tenure modified from the existing guidelines will be applied to your position, to underscore research achievement as an essential criterion." These differences in Dr. Miksovska's criteria for promotion and tenurewere further delineated and required Dr. Miksovska to have research as an area of excellence in promotion to both associate and full professor. Additionally, for promotion to associate professor, Dr. Miksovska was required to have at least one publication in a peer-reviewed journal "of high quality and visibility" a year; sustained external support for an independent research program; and peer-reviewed and/or invited presentations at national meetings. Further, requirements for promotion to full professor were also set forth, as was a listing of what documentation would be required in the areas of teaching and service. Jt. No. 1B at Level III.

12. During the 2003 - 2004 academic year, the Chemistry Department posted an open

position, meaning many types of advanced chemistry training would be considered. After a review of many applicants and several interviews, Dr. Burcl was the successful applicant. In fact, because Dr. Burcl appeared to be one of the last remaining acceptable candidates, Joseph Bragin, Dean of the College of Science, paid for his travel from England for the interview. Dr. Burcl was not MU's first choice, and Dean Bragin was not willing to go lower into the applicant pool.

13. Although no formal meeting was held, the faculty, through informal discussion, came to a consensus that Dr. Burcl should be offered the same salary as Dr. Miksovska with the same understanding that all current faculty with lower salaries would exceed Dr. Burcl's salary "as soon as practicable." (See footnote 5) This consensus was reported to Vice- President Denman by letter dated May 10, 2004. Resp. No. 2 at Level III. 14. Dr. Burcl accepted the offer on, or about, May 18, 2004, and assumed his position the following August. In accepting MU's offer, Dr. Burcl agreed to an addendum to his contract that Grievants do not have.

15. This addendum to Dr. Burcl's contract specified certain conditions that he must meet to obtain promotion and tenure. This contract notes he would be given resources and money to assist him in establishing a research program, as well as a reduced instructional load during his first year. (See footnote 6) The resources given to Dr. Burcl were contingent upon satisfactory progress toward promotion and tenure which would include "development of an independent research program of high quality as demonstrated by regular publications in peer reviewed journals, application for external support and other measures of excellence in scholarship as outlined in paragraph b." In exchange for these resources and a reduced load, Dr. Burcl's criteria for promotion and tenure were modified "to place emphasis on research productivity. . . ." This difference in Dr. Burcl's criteria for promotion and tenure was further specified by requiring him to have research as an area of excellence in promotion to associate professor. Additionally, excellence in research was to be demonstrated by publications in a peer-reviewed journal "of high quality and visibility"; external support of an independent research program; and peer-reviewed and/or invited presentations at national meetings. Further requirements for promotion to full professor were outlined, including achieving national or international stature in his field of research. Additionally, the type of documentation that would be required in the areas of teaching and service were identified. Jt. No. 1B at Level III. 16. The salary increases each faculty member receives are based on his or her target percentage of CUPA. This acronym stands for College and University Professional Association, and this Association compiles a national faculty

salary survey every year by discipline and rank, including new hires.

17. In approximately June of 2004, after discussion and review, MU passed a faculty-agreed upon method of calculating and assigning faculty increases. The money designated for increases is divided into two pots: one for equity raises and the other for merit increases. Equity raises are used to increase faculty members' salaries to a set percentage of the market value. For example, for the 2003-2004 school year, all the chemistry faculty, who were not at the 77.44% level of their CUPA target salary were raised to this point by the equity money. Grievants did not receive any equity money because their salaries were already above the target salary.

18. Grievants Frost, Price, Morgan, and Bush are at 87.9%, 86.65%, 85%, and 89.4%, of their CUPA target rates, respectively. All other faculty members in the Chemistry Department, all of whom are full professors, are at approximately 78% of their target salaries. All members of the Chemistry faculty received merit increases, including Grievants.

19. Contrary to Grievants' assertions, while some salary compressions and inversions may corrected by the next round of raises, they are not always corrected and there is no policy that mandates these compressions or inversions be corrected. Test. McGuffey, Level IV Hearing.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

I. Violation of Greenbook

Grievants cite to Chapter III, Faculty Personnel Policies, Definition Fiscal Operations Faculty Status, Section B of the Greenbook to support their assertions:

B. Rank for Incoming Members of the Faculty

1. New members of the faculty shall be assigned academic rank and salary by

the university administration on the basis of qualifications for the various ranks.

. . .

3. Experience has shown, however, that on certain occasions special problems arise in connection with the determination of academic ranks and salaries of new entrants to the faculty. Such problems usually involve the evaluation of related work experience, private instruction without college credit, and the procurement of faculty in fields of extreme scarcity. If at any time the administration feels that it is advisable to assign rank or salary above that to which a newcomer would be normally entitled under this plan, the recommendation shall come from the department chairperson after he/she has conferred with the members of the department, especially those who hold ranks comparable to or above that of the new member of the department. The Faculty Personnel Committee shall be provided with awritten explanation by the Vice President for Academic Affairs or the Vice President for Health Sciences.

4. Should new faculty members be employed at salaries higher than those being paid to current members of the staff who hold positions with comparable responsibilities and who have equivalent training, experience and competence, the latter will be considered for comparable compensation. The competence is to be determined by the chairperson of the department in consultation with other members of the department with equal or higher rank.

(Emphasis added).

5. The Vice President for Academic Affairs or the Vice President for Health Sciences shall send to the Faculty Personnel Committee a summary statement concerning each new faculty member which will include training, experience, salary, and rank assigned.

Grievants assert MU has violated this portion of the Greenbook and as a result their salaries should be increased to 108% of their individual CUPA's. MU's argument is in two parts. First, MU maintains there was no need to follow this portion of the Greenbook because the new hires do not have "comparable responsibilities." Respondent notes that in accepting their contracts, Dr. Miksovska and Dr. Burcl have signed away their right to choose in what areas they will be closely evaluated on a yearly basis, as well as, how they must achieve excellence when they seek promotion and tenure. It is certain that any tenure-track faculty member would agree that this is an important concession. (For further discussion of this issue please see the next section of the Discussion.)

Respondent's second argument is that there was no violation of the Greenbook. Although no formal vote was taken either time, the faculty conferred and there was a consensus that $50,000

would be the compensation for the new hires. While the parties can argue a length about whether there was "extreme scarcity" and what exactly that term means, the fact of the matter was MU had much difficulty filling the biochemistry positionand had difficulty finding a quality candidate for the open position. While faculty members have the right to a great amount of input, the final decision on salary and competency must rest with the dean and vice president, who have the overview of the entire Department as well as the college. (See footnote 7) The Greenbook Section cited by Grievants says the Department Chair is to make his recommendation after he "has conferred with the members of the department, especially those who hold ranks comparable to or above that of the new member of the department." This is what happened here, and the faculty agreed with the higher salaries; however, it should be noted this Section does not required the agreement of the faculty. Accordingly, the undersigned Administrative Law Judge finds no violation of the Greenbook.

II. Discrimination

Over the objection of Respondent, Grievants were allowed to present evidence of discrimination at Level IV. 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." Notice is taken that the West Virginia Supreme Court of Appeals has revised the legal test for discrimination/favoritism claims raised under thegrievance procedure statutes. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 8)

> (a) that he or she has been treated differently from one or more similarly- situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievants assert they have been discriminated against because the two newly hired faculty

members received salaries above theirs. Grievants have failed to meet their burden of proof as they are not similarly situated to the individuals to whom they compare themselves. First, Grievants have been employed by MU for at least four years and were hired under different CUPA assessments and different contracts. See W. Va. Univ. v. Decker & W. Va. Human Rights Comm'n, 191 W. Va. 567, 447 S.E.2d 259 (1994). Three of the four Grievants have already received tenure which represents job security. (See footnote 9) Id. Itis an unfortunate occurrence in all areas of state government that new employees are frequently hired with higher salaries than incumbents. This actuality usually does not demonstrate discrimination, and does not do so in this instance.

The second factor that demonstrates Grievants are not similarly situated to Dr. Miksovska and Dr. Burcl is the differences in their contracts defining specific job responsibilities. Dr. Miksovska and Dr. Burcl are required to have research as an area of excellence for promotion and tenure decisions. Grievants have not been restricted to research as an area of excellence. They may choose teaching as an area of excellence and only need to demonstrate satisfactory performance in the area of research. A review of the curriculum vitae of Grievants during their time at MU clearly demonstrates most of them would not have met the criteria set out for Dr. Miksovska and Dr. Burcl. Grievants Frost, Morgan, and Price have been at MU for seven years and Grievant Bush has been there for four years. Grievant Frost has published two articles during her time at MU, and in one of those she was listed as the eighth contributor. Her last publication was in 2001. Grievant Price has published two articles and a book chapter during his time at MU. The information submitted by Grievant Morgan did not list any publications, but otherdocuments indicate he has published at some point in time during his twelve years in academia. Grievant Bush appears to have published one article during his time at MU. (See footnote 10) According to Grievants' own review, Dr. Miksovska already has thirteen peer-reviewed publications and a book chapter, and Dr. Burcl already has twenty-two peer-reviewed publications. Grt. No. 4 at Level III.

Accordingly, Grievants have not established they are similarly situated to the new hires or that they have the same "actual job responsibilities."

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of

proving their 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 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. Grievants have not met their burden of proof and established a violation of the Greenbook.

3. 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." In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly- situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

4. Grievants have not met their burden of proof and established they are similarly situated to the new hires, or that they have the same "actual job responsibilities." Accordingly, this grievance is **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 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: May 19, 2005

Footnote: 1

Grievants were represented by Grievant Price, and Marshall was represented at Level IV by Jenndonnae Houdyschell, Senior Assistant Attorney General.

Footnote: 2

Contrary to Grievants' assertion in their proposals, Respondent did not stipulate Grievants were similarly situated to the new hires.

Footnote: 3

Initially, Respondent thought Grievants were seeking the usually given increase when new hires came in with higher salaries, which would have been to the same rate as the new hires or a little above.

Footnote: 4

For example, Grievants may elect to demonstrate excellence in either teaching or research.

Footnote: 5

Grievants testified they were not asked about Dr. Burcl's salary. Grievant Bush testified he would have agreed with the salary, with the proviso that the lower salaries would be increased.

Footnote: 6

Dr. Burcl has not been given this course reduction, and Dr. Bragin indicated he would check into this failure.

Footnote: 7

Grievants assert the Vice President for Academic Affairs had not yet sent a written explanation of the salaries of the new hires to the Faculty Personnel Committee. This assertion was supported by an unsigned e-mail dated September 29, 2004, but there was no testimony about this issue, and Grievants did not question Vice President Denman about this

issue at Level IV. Given this limited evidence, the undersigned Administrative Law Judge cannot find this assertion is proven.

Footnote: 8

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Footnote: 9

As aptly stated by Justice Richard Neely in Decker:

> *The record reveals that Dr. Decker has tenure. That is something for whichevery young professor yearns, and achieving such a position removes a substantial part of job-related stress. A young faculty member who must reasonably expect not to receive tenure after several probationary years, because increasingly universities are reluctant to award such status, must be compensated with short-term cash for what he or she fails to receive in long-term job security. Young faculty want money for being ridden hard and put away wet. Furthermore, we may reasonably infer from the record that tenured professors have preference over young, probationary faculty with regard to such things as course scheduling, the type of courses taught, office space, access to logistical support, travel budgets and other matters that are of supreme importance to the average executive or professional employee.*

Footnote: 10

In this review, the undersigned Administrative Law Judge only counted published articles and did not have information about whether Grievants' articles were in peer- reviewed journals. Additionally, there was some question about which articles should be credited to Grievants' time at MU, as an article written and accepted before coming to Marshall would frequently not be published until after a faculty member assumed a new position. The undersigned recognizes that other areas are important in achieving excellence in research, such as writing grants and obtaining patents, but chose this criteria for comparison, as is was so clearly spelled out in Dr. Miksovska's and Dr. Burcl's contracts.