WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEVE BANKS, et al.,
Grievants,

v. **Docket No. 2009-1359-CONS**

MARSHALL UNIVERSITY,
Respondent,

and

HAROLD BLANCO,
Intervenor.

DECISION

The Grievants[1] filed a grievance on or around March 20, 2009, against their employer, Marshall University. The statement of grievance reads:

> On or about February 27, 2009, Grievants discovered that Marshall University (MU) violated common practices, established procedures, laws and policies, including but not limited to the August 2008 Greenbook, Chapter III, Faculty Personnel Policies, Sections 2 and 6 - Determining Starting Salaries and Rank of Incoming Members of the Faculty, by employing a new faculty member in the School of Education (SOE) of the College of Education and Human Service (COEHS), and in determining the starting salary of said faculty member.
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> For relief, Grievants seek:
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> Regarding the search for a tenure-track position for an Assistant/Associate Professor-Teacher Education SOE/COEHS, Grievants seek that (1) a new search is established, (2) all faculty from the academic unit are part of the search committee, and (3) the search committee creates the job description, (4) the search is a national search advertised in national journals, and (5) the search committee follows equal opportunity affirmative action, and diversity standards. Regarding the salary of any newcomer for the tenure-track position of Assistant/Associate Professor-Teacher Education, SOE/COEHS, Grievants seek adherence to policy with regard to determining starting salary and rank of the incoming faculty member; to be

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[1]Steve Banks, George Arthur, Mindy Backus, Paula Lucas, Ruth Ann Murphy, and James Sottile

made whole; and any other relief that the grievance evaluator deems appropriate.

Grievants' cases were consolidated on April 6, 2009. A level one hearing was held on April 7, 2009, with the grievance being denied. A level two mediation was held on September 18, 2009. Intervenor joined the grievance after level two, but prior to the level three hearing. After Grievants' timely appeal to level three, the hearing was held on March 5, 2009. Grievants were represented by Jeff Blaydes, Esq., Carbone & Blaydes, P.L.L.C. Respondent was represented by Jendonnae L. Houdyschell, Senior Assistant Attorney General, and Intervenor appeared *pro se*. This case became mature on April 16, 2010, upon the parties' submissions of findings of fact and conclusions of law.

Synopsis

Grievants assert Respondent violated the Greenbook, Marshall University's Faculty Handbook, by hiring the Intervenor.

Respondent first argues Grievants do not have standing to grieve as none of the Grievants were applicants for the position. Grievants counter by asserting they have been personally harmed because they were denied the opportunity to confer with the department chair over the hiring and that they were denied the right to be considered for a comparable salary. Grievants also aver they are within the zone of interest protected by the policy.

With respect to the merits of the grievance, Respondent asserts Grievants have failed to establish any violation of the Greenbook policy, as the administration did not assign rank or salary above what a new hire would be normally entitled.

Intervenor argues he was the successful applicant after a national search, and was chosen as the successful applicant for the position. Intervenor reiterates the standing argument asserted by Respondent.

Findings of Fact

1. On November 21, 2008, Respondent posted the position of Assistant Professor-Teacher Education, School of Education, COEHS, search number 12150. This is a tenure track position.

2. The position was advertised on-line on the Marshall University website, in the Marshall University Job Bulletin, and in the Chronicle of Higher Education.

3. A search committee was formed consisting of Dr. George Watson, Tom Klein, Albert Simon, and Dr. Stan Maynard.

4. Five individuals applied for the position. Of those five, only two were determined to meet the minimum qualifications for the position. Intervenor was one of the two applicants. Additional applications were submitted in January and were also reviewed by the hiring committee.

5. The interview committee selected Dr. Blanco as the successful candidate.

6. During the selection process, Dr. Stan Maynard was the interim chair of the School of Education. On January 1, 2009, Dr. George Watson was appointed as the chair of the School of Education, making him the chair at the time of the hiring of Dr. Blanco.

7. Dr. Blanco was originally slated to be paid $50,000.

8. Chapter III, Section 2 of The Greenbook states:

Section 2. Definition of Faculty Status and Rank

Determining Starting Salaries and Rank of 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.

2. 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 a new member of the department. The Faculty Personnel Committee shall be provided with a written explanation by the Provost or the Vice President for Health Sciences.

3. 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.

9. The members of the department were never consulted concerning Dr. Blanco's salary.

10. On January 8, 2009, Dr. Watson sent a memo to Dr. Rosalyn Templeton, Dean of COEHS, stating that he believed the base salary of $50,000 for Dr. Blanco's position would result in Dr. Blanco making more than other faculty members in the School of Education. Dr. Watson then referred to The Greenbook policy, and suggested "a renegotiation of his [Dr. Blanco's] salary or a meeting with program faculty to discuss the situation. (Level I Grievants' Exhibit 11).

11. Dr. Watson received no response to this inquiry.

12. Again on January 12, 2009, Dr. Watson sent an email to Dr. Templeton, Dr. Gayle Ormiston, Provost, and Dr. Maynard, addressing the same issue.

13. Dr. Maynard met with Dr. Watson and indicated that Dr. Blanco's position could be terminated if the paperwork was not processed. At that time, Dr. Watson signed the required paperwork.

14. Dr. Watson then sent another email on January 14, 2009, expressing his disappointment that neither the Provost nor the Dean responded to his inquiries. Dr. Watson once again brought The Greenbook policies to the administration's attention.

15. Dr. Blanco's starting salary was reduced to $48,000.

16. Dr. Watson sent another email to Dr. Ormiston regarding the hiring of Dr. Blanco at a lower salary, and once again Dr. Watson reminded her of the policy set forth in The Greenbook.

Discussion

Standing

Respondent has brought a Motion to Dismiss asserting Grievants do not have standing to bring this grievance. Grievants have responded. A claim that the Grievants lack standing is an affirmative defense. When the employer asserts an affirmative defense, the defense must be proven by a preponderance of the evidence. Procedural Rules of the W. VA. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *See Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998).

Standing is a party's right to make a legal claim or seek judicial enforcement of a

duty or right. BLACK'S LAW DICTIONARY 1442 (Eighth Edition 2004). It is necessary for Grievants to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [they seek] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979).

There are basically two ways to establish standing: (1) by injury in fact or (2) by establishing that the grievants interests are within the zone of interest protected by constitution, statute or regulation. *See Dixon & Johnson v. Monroe County Bd. of Educ.*, Docket No. 01-31-599 (Feb. 28, 2002).

Respondent's arguments are two fold. First, Respondent argues Grievants have not been personally harmed, and therefore cannot establish standing in that manner. Second, Respondent asserts Grievants do not have standing because they do not allege any violation of any specific statute or constitutional guarantee. Instead, Grievants allege a violation of a policy.

With respect to whether the Grievants have been personally harmed, The Greenbook does provide that, once the department chairperson confers with members of the department, should the new hire be employed at a higher salary, comparable faculty shall be considered for comparable compensation. Grievants were personally harmed because, not only were they denied the right to confer with the department chair, but they were also denied the right to be considered for comparable salary.

Grievants are also within the zone of interest protected by the policy. The West Virginia Supreme Court has held, "An administrative body must abide by the remedies and

procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977)." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999). Like a regulation or statute, policies are enforceable before the Grievance Board and in circuit court. Grievants have an interest in ensuring Respondent abides by the policies it sets forth. For the above stated reasons, Grievants have standing to grieve the issue of whether Respondent followed its employment policy.

Merits

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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

When looking at The Greenbook policy, it clearly states in Chapter III, Sections 2 and 6, that "the faculty shall be assigned academic rank and salary by the university

administration on the basis of qualifications." That provision of the policy occurred in Dr. Blanco's hiring.

The second provision reads that, "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 Grievants were not consulted with respect to Dr. Blanco's salary. Respondent contends it did not have to consult with the members of the department because the administration did not believe Dr. Blanco's salary was above that for a newcomer. There was much testimony about how Dr. Blanco's salary was determined. However, Dr. Blanco's salary was reduced from $50,000 to $48,000, and this reduction came after Dr. Watson's email. To the undersigned, this is indicative that the administration recognized that, while Dr. Blanco was an important hire, the administration recognized some disparity with his salary when looking at the salaries of current employees.

This is the exact issue Respondent's policy attempts to address prior to the new hire. Respondent argues that the Grievance Board has already recognized that the section of The Greenbook which requires consultation does not require the agreement of the faculty, and ultimately the decision on salary must rest with the dean and vice president. *See Price, et al. v. Marshall University*, Docket No. 04-HE-369, (May 19, 2005). However, in Price, Respondent conferred with the faculty prior to hiring. That did not happen here. While Respondent is absolutely correct that the policy does not require an agreement, it does require a consultation, and that was not done in this case. Accordingly, this grievance

is granted with respect to conferring with members of the department regarding Dr. Blanco's salary.

However, Grievants also request the undersign require that a new search be established, that all faculty from the academic unit are part of the search committee, that the search be advertised in national journals and the search committee follow equal opportunity, affirmative action, and diversity standards. Grievants point to no policy requiring that all faculty from the academic unit be part of the search committee. Respondent also advertised the position nationally, and lastly, the committee did follow equal opportunity, affirmative action, and diversity standards. Therefore, with respect to those issues, this grievance is denied.

Conclusions of Law

1. A claim that the Grievants lack standing is an affirmative defense. When the employer asserts an affirmative defense, the defense must be proven by a preponderance of the evidence. Procedural Rules of the W. VA. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *See Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998).

2. It is necessary for Grievants to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [they seek] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979).

3. The West Virginia Supreme Court has held, "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt.

1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977)." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999).

4. Grievants have standing.

5. 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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

6. Grievants met their burden of proof with respect to Respondent not conferring with the members of the department prior to hiring Intervenor.

7. With respect to all other claims, Grievants have not met their burden.

Accordingly, this grievance is **GRANTED IN PART, DENIED IN PART**. It is GRANTED with respect to following the policy related to meeting with members of department. Respondent is **ORDERED** to instruct the department chairperson to confer with members of the department regarding Dr. Blanco's salary. It is further ORDERED that

any current employees who hold positions with comparable responsibilities and who have equivalent training, experience and competence, shall be considered for comparable compensation. With respect to all other claims, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: October 13, 2010

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Wendy A. Elswick
Administrative Law Judge