THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PAIGE MUELLERLEILE,
Grievant,

v. **DOCKET NO. 2010-0231-CONS**

MARSHALL UNIVERSITY,
Respondent.

DECISION

Grievant, Paige Muellerleile, an Associate Professor in the Psychology Department at Marshall University, filed a grievance against her employer on August 19, 2009. The statement of grievance reads:

> On or about July 31, 2009, Grievants[1] 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 new faculty members in the Department of Psychology (College of Liberal Arts), and in determining the starting salary of said faculty members. (Emphasis in original).

As relief Grievant sought:

> faculty-approved establishment, implementation, and transparency in policy regarding new hire ranks and salaries in the College of Liberal Arts;[2] to

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[1] Initially there were three Grievants, but two of the Grievants withdrew their grievances during the course of these proceedings, leaving Grievant Muellerleile as the only Grievant.

[2] "The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d

> receive comparable compensation; to be made whole; and any other relief that the grievance evaluator deems appropriate.

On August 16, 2010, Grievant filed another grievance against Marshall University. The statement of grievance reads:

> On or about August 10, 2010, Grievant's salary was inverted as a result of the promotion of another faculty member, Wendy Williams,[3] who had been given a salary raise to remedy a salary inversion created by a new hire (Nick Kelling). In that hiring process, Marshall University (MU) violated common practices, established procedures, law 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 new faculty members in the Department of Psychology (College of Liberal Arts), and in determining the starting salary of said faculty members. The salaries remedies applied to some faculty were incomplete, arbitrary, and capricious. In the present case, Grievant had been given a raise to correct a salary inversion across ranks, but was not considered for the same compensation as Wendy Williams, who received a much larger salary correction. If Grievant had been apprised of the potential salary of the new hire, Grievant could have delayed promotion to receive the same compensation as Wendy Williams prior to promotion (two faculty members in history did delay promotion for this reason), but MU's representatives failed to follow hiring procedures outlined in the Greenbook, and then failed to apply salary remedies that were equitable for all faculty. (Emphasis in original).

As relief Grievant sought:

> faculty-approved establishment, implementation, and transparency in policy regarding new hire ranks and salaries in the College of Liberal Arts; to receive comparable compensation; to be made whole; and any other relief that the grievance evaluator deems appropriate.

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787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999)." *Frame v. Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001).

[3] Ms. Williams was one of the three Grievants who filed the first grievance on August 19, 2009, but later withdrew.

A conference was held at level one on the first grievance on January 27, 2010, and on the second grievance on September 10, 2010. A level one decision was issued on the first grievance on February 1, 2010, granting the grievance in part, and denying it in part. The level one decision states that the "salary inversion" created when new faculty members were hired at a higher salary than that of some current faculty, was corrected by Marshall in October 2009, by increasing current faculty salaries. A level one decision denying the second grievance was issued on September 16, 2010. Grievant appealed the first grievance to level two on February 16, 2010, and a mediation session was held on March 12, 2010. Grievant appealed the second grievance to level two on September 24, 2010, and a mediation session was held on December 1, 2010. Grievant appealed the first grievance to level three on March 24, 2010, and she appealed the second grievance to level three on December 10, 2010, where the two grievances were consolidated on January 25, 2011. Five days of hearing were held at level three before Administrative Law Judge Landon R. Brown, on June 18, 2010, at the Grievance Board's Charleston, West Virginia, office, and on August 30, 2010,[4] April 20 and 21, 2011, and July 12, 2011, in Huntington, West Virginia. Grievant appeared *pro se*, and Respondent was represented by Jendonnae L. Houdyschell, Senior Assistant Attorney General. This matter became mature for decision on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law, on September 15, 2011, and was subsequently reassigned to the undersigned Administrative Law Judge for administrative reasons, on January 24, 2012.

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[4] The first two days of hearing were held before the two grievances were consolidated. The proceedings in the first grievance were suspended while the second grievance proceeded through levels one and two of the grievance procedure.

Synopsis

Grievant asserted that Respondent acted in violation of The Greenbook when it hired a new faculty member in her Department at a salary in excess of her salary, without consulting her. Grievant further asserted that had she been advised of the situation, she could have withdrawn her promotion application, so that any salary adjustment given to her would have been made before her promotion, resulting in a higher salary after her promotion. Even though The Greenbook does not require that the salaries of faculty be adjusted when new faculty are hired at an enhanced salary, Respondent adjusted Grievant's salary so that it exceeded that of the new faculty member. No further relief can be granted. Grievant was, in fact, advised prior to her promotion of the possibility that new faculty would be offered higher salaries, and Grievant had already been promoted by the time the offer at issue had been made.

The following Findings of Fact are made based upon the evidence presented at level three.

Findings of Fact

1. Grievant has been employed by Respondent, Marshall University ("Marshall"), since August 2006, and is an Associate Professor in the Department of Psychology, College of Liberal Arts. She is considered to be an experimental psychologist, as opposed to a clinical psychologist, and she does not supervise students in clinical settings.

2. Marshall has in place a faculty handbook "for policy/governance/procedure," which is called "The Greenbook." Chapter III of The Greenbook sets out "Faculty

Personnel Policies." Section 2 of Chapter III, entitled "Definition of Faculty Status and Rank," provides, in pertinent part, as follows:

> Determining Starting Salaries and Rank of Incoming Members of the Faculty
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> 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.
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> 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 the new member of the department. The Faculty Personnel Committee shall be provided with a written explanation by the Vice President for Academic Affairs or the Vice President for Health Sciences.
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> 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.

3. The Department of Psychology at Marshall began searching for a new faculty member in 2006. Offers of employment had been made to more than one applicant, and those offers had not been accepted.

4. The Chair of the Department of Psychology, Steven Mewaldt, sent an email to all faculty members in the Psychology Department in November 2008, advising them of a meeting to be held the next day "to discuss the salary issue for new faculty we might hire." Chair Mewaldt included with the email information he had received from David

Pittenger, Dean of the College of Liberal Arts, noting the need to offer a competitive salary to new faculty, that he was prepared to make "special considerations for rank and salary," and that a "robust budget" had been established for the hiring of new faculty. The record does not reflect any further details of this faculty discussion.

5. On June 17, 2009, Marshall offered Nick Kelling a position as an Assistant Professor in the Department of Psychology, in writing, at a salary of $45,000.00 annually, and he accepted this offer. Grievant's salary was higher than Dr. Kelling's. Department Chair Mewaldt spoke with faculty members in the Department who were making less than $45,000.00, about the salary issue, advising them that Marshall intended to increase their salaries. Marshall did increase the salaries of faculty in the Psychology Department who were making less than $45,000.00, to an amount higher than this.

6. On June 22, 2009, Marshall offered Jennifer Tiano a position as an Assistant Professor in the Department of Psychology, in writing, at a salary of $50,000.00 annually, and she accepted this offer. Dr. Tiano is a licensed psychologist in West Virginia, and is a clinical psychologist who can supervise students in clinical settings. Prior to the written offer, Dr. Tiano was offered a salary in the upper $40,000's by Dean Pittenger. Dr. Tiano told Dean Pittenger that she would not accept that salary, but she would consider $50,000.00.

7. Dean Pittenger set the salary range for Dr. Tiano's hiring. He spoke with Department Chair Mewaldt about the salary, and thought that Chair Mewaldt had consulted with the faculty in his department about this issue. He believed that Chair Mewaldt was in agreement with the salary for Dr. Tiano and Dr. Kelling.

8. Chair Mewaldt sent the Psychology faculty an email on June 2, 2009, announcing that Dr. Tiano had verbally accepted an offer of employment. In that email Chair Mewaldt expressed satisfaction with this achievement, stating, "Jennifer accepted *our offer* today! The clinical position is filled!" (Emphasis added.)

9. Grievant was promoted from Assistant Professor to Associate Professor in April 2009. Immediately prior to her promotion to Associate Professor, Grievant's salary was $45,416.00 annually. After her promotion, her salary was $49,958.00. Marshall then adjusted her salary by $542.00, after Dr. Tiano and Dr. Kelling were hired, making her salary $50,500.00. This salary adjustment was possible because Marshall had set aside a limited pool of money, which it split among the faculty members whose salaries were lower than Dr. Kelling's.

10. Wendy Williams was an Assistant Professor at Marshall, whose salary was adjusted as a result of Dr. Kelling's employment. Dr. Williams was promoted to Associate Professor after her salary adjustment, with a 10% salary increase on promotion. This salary increase on her promotion resulted in Dr. Williams' salary being higher than Grievant's for the first time, even though Grievant was hired one year after Dr. Williams. Dr. Williams has since resigned her employment with Marshall.

11. Margaret Rensenbrink is a faculty member in the Department of History. She applied for promotion during the 2008-2009 school year. She was told by Department of History Chair Dan Holbrook and by Phil Rutherford that her salary would be increased because of the salary of a new faculty member. Dr. Rensenbrink withdrew her application for promotion until after the salary adjustment was effective in order to maximize her salary on promotion.

Discussion

Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

Grievant argues that various provisions of The Greenbook were violated by Respondent. However, Grievant has failed to demonstrate that she has suffered any harm as a result of any particular alleged violation. Ultimately, the issue is whether Grievant's salary was inverted by the hiring of Dr. Kelling or Dr. Tiano; that is, were Dr. Kelling or Dr. Tiano hired in at a salary higher than Grievant's? Grievant's salary was always higher than Dr. Kelling's, and in addition, her salary was, in fact, adjusted by Respondent so that it is now higher than Dr. Tiano's. Grievant argues, however, that the salary adjustment was arbitrary and capricious, pointing to various alleged improprieties and errors. All of Grievant's efforts, however, do not provide the undersigned with any authority to increase her salary. The Greenbook does not require that a faculty member's salary be adjusted at all. The Greenbook states that faculty "will be considered for comparable compensation" when a new faculty member is hired in at a higher salary. In this case, Marshall not only considered adjusting the salaries of existing faculty, it made salary adjustments from a <u>limited pool of funds</u>, increasing the salary of Grievant, as well as other faculty members.

While Grievant does not agree with the adjustment made to her salary, Marshall was simply not required to make any adjustment at all. Accordingly, whether the thought process used to determine the dollar amount of the adjustments was based on the proper information is irrelevant.

Grievant is also seeking a declaration that Respondent's action was wrong. Pursuant to the Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008), "A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested."

> When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998). In addition, the Grievance Board will not hear issues that are moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996).

Pritt, et al., v. Dep't of Health and Human Res., Docket No. 2008-0812-CONS (May 30, 2008). In situations where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. 'This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991).' *Priest v. Kanawha*

County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

This Grievance Board has continuously refused to address issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Stepp v. Dep't. of Trans./Div. of Highways,* Docket No. 06-DOH-215 (Oct 27, 2006) citing *Dooley v. Dep't. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991). "[R]elief 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." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993). Typically, a Grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987). Thus, relief such as a public apology is not available from this Grievance Board. *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (Mar. 9, 2004); *Hall v. W. Va. Div. of Corr.*, Docket No. 89-CORR-687 (Oct. 19, 1990). "The Grievance Board has also held, 'a letter stating that actions of certain employees were inappropriate is in the nature of a request for an apology, which is not available from this Grievance Board.' *Emrick, supra*." *Lawrence v. Bluefield State College*, Docket No. 2008-0666-BSC (June 19, 2008).

While Grievant may believe that the faculty in the Psychology Department were not properly consulted, and that Chair Mewaldt did not recommend the hiring of Dr. Tiano at

a salary of $50,000.00, the record reflects that the faculty were well aware that Marshall was having trouble recruiting new faculty, and that the administration was prepared to offer higher starting salaries. Chair Mewaldt's email announcing that Dr. Tiano had accepted an offer certainly gives the appearance that he was on board with the hiring. Regardless, however, of whether Marshall followed The Greenbook procedure to a tee, the only relief the undersigned could grant would be to tell Marshall to follow the procedure in the future, which is illusory, speculative and premature.

The undersigned would also point out that the Grievance Board has already addressed the issue of what consultation of faculty is required when hiring new faculty at an enhanced salary, in *Price, et al., v. Marshall University*, Docket No. 04-HE-369 (May 19, 2005). In that Decision, the Administrative Law Judge found no Greenbook violation, and also noted that The Greenbook does not require that the faculty agree with the salary to be offered to the new hire.

> 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[t] 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 position and 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. 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 [sic] the agreement of the faculty. Accordingly, the undersigned Administrative Law Judge finds no violation of the Greenbook.

(Footnote omitted.)

Grievant also argued she should have been told that Dr. Tiano would be hired at a salary of $50,000.00, so that she could have withdrawn her application for promotion, as others in a different department did, and pointed to the fact that Dr. Williams ended up making more than her by being promoted after the salary adjusted, arguing that this also somehow violated The Greenbook. First, The Greenbook provisions placed into the record do not address the salary of an existing faculty member eclipsing that of another faculty member as a result of a promotion, and Grievant did not point to any such provision. Second, Dr. Williams has resigned her employment, so the issue is now moot. Third, Grievant was, in fact, advised in November of 2008, prior to her promotion, that the administration was prepared to offer higher salaries to new faculty, but chose to continue with her application for promotion. Finally, Grievant's promotion was approved in April 2009. Dr. Tiano was not hired until June of 2009, and the initial offer to her was at a salary less than $50,000.00, which she refused to accept. There is no evidence in the record that anyone at Marshall could have told Grievant prior to her promotion that Dr. Tiano would be hired at a salary that would be higher than Grievant's; however, it is clear that Grievant was made aware prior to her promotion that competitive salaries would likely be offered to attract the needed faculty members, and she made her decision to proceed with her application for promotion anyway.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov.

29, 1990). *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).

2. This Grievance Board has continuously refused to address issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Stepp v. Dep't. of Trans./Div. of Highways,* Docket No. 06-DOH-215 (Oct 27, 2006) citing *Dooley v. Dep't. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991). "[R]elief 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." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993). Typically, a Grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987). Thus, relief such as a public apology is not available from this Grievance Board. *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (Mar. 9, 2004); *Hall v. W. Va. Div. of Corr.*, Docket No. 89-CORR-687 (Oct. 19, 1990). "The Grievance Board has also held, 'a letter stating that actions of certain employees were inappropriate is in the nature of a request for an apology, which is not available from this Grievance Board.' *Emrick, supra*." *Lawrence v. Bluefield State College*, Docket No. 2008-0666-BSC (June 19, 2008).

3. Grievant failed to demonstrate that she was entitled to any salary adjustment, or to any other available relief.

Accordingly, 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: February 27, 2012