



**Members**  
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**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**

**ARCH A. MOORE, JR.**  
Governor

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FRANCES N. MOONEY

v.

Docket No. 06-86-150-1

MARSHALL UNIVERSITY

DECISION

Grievant, Frances Mooney, was employed by the Department of Medicine at Marshall University on September 13, 1982 as a secretary I. In October, 1983 she was reclassified as a secretary II and at the time of the grievance was earning an annual salary of \$9,816.00. In January, 1986, Elizabeth Diane Smith was employed by Dr. Maurice A. Mufson, chairman of the department of medicine, as a secretary II at an annual salary of \$10,248.00; this grievance ensued.<sup>1</sup>

On February 17, 1986 grievant requested a level two hearing with Dr. Dale F. Nitzschke, president of Marshall

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The starting salary for a secretary II, pay grade 4, the position involved herein, is \$9,756.00. The entry level salary for this position had increased over the years but grievant's salary had not increased at the same rate. The grievance was denied at level one by Dr. Mufson on February 13, 1986. The grievance was filed pursuant to Code, 18-29 et seq., and not under the Board of Regents Policy No. 52.

University, and a hearing was held on February 27, by a grievance committee presumably appointed by Dr. Nitzschke. The Committee issued a memorandum dated March 3, 1986 but there is nothing in the record to indicate that a written decision was rendered at the level two grievance procedure as required by Code, 18-29-6.<sup>2</sup> On March 26, 1986 grievant appealed to level four and an evidentiary hearing was conducted on April 28, 1986.

At the level four hearing grievant testified that Ms. Smith had been employed as a dispatcher with the Department of Public Safety and implied that either Dr. Mufson or his office manager knew Ms. Smith previously; that that had influenced the decision to hire Ms. Smith at a rate in excess of five percent above the entry level salary for the position of secretary II. Grievant requested that her salary be increased to a comparable level to that of Ms. Smith, retroactive to January 13, 1986 or that her

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The memorandum noted that the "perception of fairness was violated..." but that "...the decision made by Dr. Ginsberg must stand." The committee acknowledged that Chancellor Ginsberg followed BOR 62 but that policy bulletin was not introduced into evidence and is not in the record. It noted that he was apparently unaware of the impact it had upon the other secretaries and recommended that a desk audit be performed on grievant's position and a reclassification of grievant's position be considered. The personnel department completed the desk audit on March 10th and the recommendation that grievant's position be reclassified as Medical Secretary, pay grade five, was communicated to grievant on March 11, 1986.

classification be changed to medical secretary.<sup>3</sup>

Dr. Mufson testified that the secretary position became vacant in May, 1985, the announcement was posted and only five applications were received; that of the five Ms. Smith was the only applicant interviewed because she was "clear and away" the best candidate of those available. He stated that Ms. Smith required a higher salary than that which was offered on the announcement because she was already employed with a state agency at a much higher salary and she was available on short notice. He advised Ms. Smith that he would attempt to obtain five percent above the entry level and discussed this with President Nitzske, who forwarded the request to the Board of Regents. Mr. Edward Grose, vice chancellor of the board, returned the personnel action form with the comment that the salary request exceeded the entry level, to resubmit it at \$9,756.00

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Grievant stated that she had not originally requested a reclassification but that the grievance committee had done so in its memorandum at level two. The reclassification request was pending in the Governor's office at the time of the level four hearing but both parties agreed that the reclassification was not tied to the instant grievance. However, it is apparent that the reclassification would resolve this grievance.

and it would be processed.<sup>4</sup>

Thereafter, Dr. Mufson talked with Chancellor Ginsberg, who agreed with Dr. Mufson, and the "justification" letter and other documents were forwarded to the Governor's office for approval on October 31, 1985, and were approved. Dr. Mufson further testified that prior to her application neither he nor his office manager had known Ms. Smith and that there was no "favoritism" involved. He added that prior to the hiring freeze imposed by Governor Moore lateral transfers were quite common between Marshall University and other state agencies; that Ms. Smith was the best candidate available with experience who could work with confidential material and that he needed someone at that time without repeating the entire employment procurement process.<sup>5</sup>

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According to the testimony, Mr. Grose did not have the "justification" material available to him when he returned the personnel action form. Code, 18A-4-5b permits a county board of education to establish salary schedules in excess of state minimums but requires uniformity of salary among all employees performing like assignments. This is apparently the county counterpart to the Board of Regents policy involved herein.

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In response to Dr. Mufson's comment that confidentiality was a requisite in the position for which Ms. Smith was selected, grievant stated that her job entailed dealing with medical records, patient diagnoses,  
(footnote continued)

Mr. Paul J. Michaud, director of personnel at Marshall University, testified that the justification for hiring in at a higher salary is predicated upon a "market concept" policy which permits Marshall University to be competitive in the marketplace; that it occurs occasionally, usually in the higher level of personnel classifications and not at the secretary level with any frequency. He agreed that on its face it appeared to be unfair to other employees but that this system had perpetuated itself over the years; that it is an unwritten policy known to department heads, if not employees.<sup>6</sup> Counsel for Marshall University contends grievant has failed to establish any specific identifiable

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(footnote cont.)

hospital billing, etc., and other confidential matters. In addition, the evidence is that on the personnel action form Ms. Smith was listed as a new employee, not as a lateral transferee.

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A department head cannot initiate and effectuate the salary increase on his own. It must be first approved by the president of the institution, then the chancellor of the board of regents and finally by the office of the Governor. This procedure is used in extraordinary circumstances and counsel for Marshall contends that because of the checks and balances involved the likelihood of abuse is remote. This part of the policy, the procedure part, is in writing, presumably in BOR 62. Grievant testified that she was not aware of the policy and that, in fact, when she was hired by Dr. Mufson he advised her that he wished that he could offer her more money, but could not.

violation of any policy or rule under which grievant works or any discrimination.

Code, 18-29-1 provides that the purpose of the grievance procedure is to reach solutions to problems which arise between employers and employees to the end that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served. Reliance upon unwritten policies by school officials is not conducive to good employee relations, has the inherent appearance of unfairness and is not condoned by the courts. State ex rel. Hawkins v. Tyler Co. Bd. of Educ., 257 S.E. 2d 908 (W.Va. 1981). Cf. Beverlin v. Bd. of Educ. of Lewis Co., 216 S.E. 2d 554 (W.Va. 1975). Moreover, it appears that the situation was exacerbated by the conduct of the grievance process employed in this case.<sup>7</sup>

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As noted earlier there is no record of a hearing having been conducted herein or a written decision having been rendered. The grievance committee noted that the "perception of fairness was violated" and the only justification offered for the salary differential is the "market concept" policy advanced at level four. The evidence is scant on this policy and admittedly it might find appropriate application in the area of professional personnel recruitment; however, it does not appear that the policy was intended to apply to lower service personnel positions. The entire issue is obscured by the failure to render a written decision containing findings of fact and conclusions of law which perhaps could have resolved this case at a lower level. Henceforth this hearing examiner will remand such cases for compliance with Code, 18-29-6. Cf. Burks v. McNeel, 265 S.E. 2d 651 (W.Va. 1980).

In addition to the foregoing factual recitation the following specific findings of fact are appropriate.

1. Grievant has been employed at Marshall University, Department of Medicine, for almost four years and is presently classified as a secretary II, pay grade 4, with an annual salary of \$9,816.00.

2. In January, 1986, Ms. Elizabeth Diane Smith was employed as a Secretary II in the Department of Medicine at a starting salary approximately five percent higher than entry level. This translates to a salary which is \$36.00 per month in excess of grievant's salary.

3. There is a practice and/or policy at Marshall University whereby applicants for employment may be offered a salary higher than entry level when there is sufficient justification. This practice and/or policy is known to department heads but not generally to employees and is ostensibly partly written and partly unwritten.

4. The reasons given for the hiring of Ms. Smith at a salary higher than entry level were reviewed by the president of Marshall University, the chancellor of the board of regents and the office of the Governor; the salary request was approved at each level.

5. There was no probative evidence that the hiring of Ms. Smith at the increased salary was the direct result of "favoritism" or "discrimination" by the chairman of the department of medicine or the office manager thereof. Any "favoritism" or "discrimination" was inherent in and flowed from the application of the practice and/or policy.

#### CONCLUSIONS OF LAW

1. Code, 18-26-8 empowers the Board of Regents to determine, control, supervise and manage the financial business of the state colleges and universities.

2. Code, 18-26-8(12) requires the Board of Regents to administer a uniform system of personnel classification and compensation for all employees other than faculty and policy level administrators.

3. Code, 18-26-8(b) authorizes the Board of Regents to promulgate rules and regulations as it may deem necessary and convenient to insure the full implementation of its powers and duties.

4. Code, 18-26-8b requires the Board of Regents to file a copy of any rule that it proposes to promulgate or adopt with the legislative rule-making review committee. "Rule" means a regulation, standard, statement of policy,



or interpretation of general applications and future effect.

5. Courts look with disfavor upon the invocation and reliance upon unofficial and/or unwritten policies by school officials.

6. Code, 18-29-2(a) defines "grievance" as is here pertinent, as any claim by an employee of the Board of Regents alleging a discriminatory or otherwise aggrieved application of unwritten policies or practices of the Board or any action, policy or practice constituting a substantial detriment to or interference with job performance.

✓ 7. Code, 18-29-2(m) defines "discrimination" 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.

✓ 8. Code, 18-29-2(o) defines "favoritism" as unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another employee.

9. The application of the practice and/or policy in the instant case amounts to "discrimination" and "favoritism" as contemplated by Code, 18-29-2(m) and (o).

10. Code, 18-29-4(b) provides that the grievant may appeal the decision of the immediate supervisor to the chief administrator and that the chief administrator or


his or her designee shall conduct an evidentiary hearing and shall issue a written decision within five days of the hearing.

11. Code, 18-29-6 provides that every decision pursuant to a hearing shall be in writing and shall be accompanied by findings of fact and conclusions of law.

12. The above provisions of Code, 18-29-4(b) and Code, 18-29-6 are mandatory and on appeal to level four of the grievance procedure the case will be remanded for compliance therewith.

For the foregoing reasons the grievance is allowed and grievant is entitled to have her salary upgraded to that of Ms. Smith, retroactive to January 13, 1986. However, the effect of this decision is to be applied prospectively and not retrospectively in other grievances.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County and such appeal must be filed within thirty (30) days of receipt of this decision. (Code, 18-29-7) Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

  
LEO CATSONIS  
Hearing Examiner

Dated: July 1, 1986