DONALD J. JERVIS,

Grievant,

v. DOCKET NO. 94-BOT-1117

BOARD OF TRUSTEES/MARSHALL UNIVERSITY,

Respondents.

D E C I S I O N

Grievant, Donald Jervis, filed this grievance on or about November 11, 1994 as follows:

> I applied for position #1215 Tradesworker. This is a lateral transfer for me. The position was filled by someone outside the Institution. This is in violation of W. Va. Code. Relief sought: To be granted the lateral transfer I applied for; and to delay the filling of this position until a decision on the grievance is final.

Following adverse decisions at the lower levels, Grievant appealed the grievance to Level IV on December 14, 1994. Hearing was scheduled for February 21, 1995, but continued pending counsel's argument on Respondents' Motion to Dismiss. A telephone conference was held with counsel for this purpose on February 17, 1995, and the parties were given until March 6, 1995 to file briefs on their respective positions. Counsel for Respondents timely filed its brief. Counsel for Grievant advised the undersigned on March 9, 1995, that he would not be submitting a brief on this issue.

The parties stipulated to the following facts.

Findings of Fact

1. Grievant was employed as a Tradesworker in the Department of Residence Services.

2. On or about September 1994, the same position in the Physical Plant was posted. Grievant applied for this position.

3. An individual with no prior Marshall employment was hired for this position.

4. Grievant resigned his position as Tradesworker and is no longer employed at Marshall

University.

Discussion

Grievant alleges that Respondents violated W. Va. Code § 18B-7-1(d) which states, in pertinent part:

> (d) A nonexempt classified employee, including a nonexempt employee who has not accumulated a minimum total of one thousand forty hours during the calendar year or whose contract does not extend over at least nine months of a calendar year, who meets the minimum qualifications for a job opening at the institution where the employee is currently employed, whether the job be a lateral transfer or a promotion, and applies for same shall be transferred or promoted before a new person is hired unless such hiring is affected by mandates in affirmative action plans or the requirements of Public Law 101-336, the Americans with Disabilities Act. . . .

Respondent argued that it complied with the statute, in that the job category posted was determined by the Affirmative Action Officer to be underutilized. Therefore, the position was advertised outside the University. Under Respondents' Guidelines for Recruitment and Hiring, if a position is advertised outside the University due to underutilization, EEO laws are followed and internal candidates are on equal status with external candidates.

Before this matter could come before this Board for hearing, Grievant resigned his position at Marshall University. Respondents filed a Motion to Dismiss the matter for mootness. Grievant's counsel opposed the Motion, alleging that the applicability of this statute, and the issue underlying this grievance was "capable of repetition, yet evading review." Super Tire Engineering v. McCorkle, 416 U.S. 115 (1974). Grievant's counsel averred that there were necessary facts which would be forthcoming to support the position that this was an issue that should be decided by this Board as an exception to this Board's Procedural Rule 4.18, which holds that:

> The Board will, under no circumstances, issue an advisory opinion, i.e., an opinion on an issue not directly before the Board in a grievance.

Following argument on this issue by telephone conference, the parties were ordered by the undersigned Administrative Law Judge to submit briefs on the issue of mootness, and the exception to the mootness doctrine that an issue should be decided if it is "capable of repetition, yet evading

review." As indicated above, Respondents' counsel filed a timely brief, and Grievant's counsel elected not to file a brief, and further advised the undersigned the necessary facts alluded to above would not be forthcoming.

Upon a review of Respondents' brief, the arguments of counsel, and the record developed in this grievance, the undersigned is of the opinion that no exception has been proven to justify the issuance of an advisory opinion on the applicability of W. Va. Code § 18B-7-1(d).

Accordingly, this grievance is hereby **DENIED** and **DISMISSED** from the Grievance Board docket.

Any 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. W. Va. Code §18-29-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

ADMINISTRATIVE LAW JUDGE

Dated: March 20, 1995