DAVID CREMEANS,

Grievant,

v. **DOCKET NO. 96-BOT-099**

BOARD OF TRUSTEES,

MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

As provided by W. Va. Code §§ 18-29-1, et seq., David Cremeans (Grievant) initiated the following grievance on December 14, 1995:

> Under the provisions of Series 62, as amended, and contained in Senate Bill 243, Marshall University is in violation of Section 2-2.9 of Series 62.
>
> Bill Burdette has been permitted to serve beyond the 12 month limit, as provided under West Virginia Code, as Acting Director of Human Resources. His being permitted to serve beyond his statutory limits allows him to illegally administer policies that may have a negative impact on me personally.
>
> I am asking that the position of Human Resources Director be published immediately.

Level I Grievance Form (emphasis in original).

After his grievance was denied at Level I, Grievant appealed to Level II, and a hearing was conducted on February 20, 1996. Thereafter, Marshall University President J. Wade Gilley denied the grievance at Level II on February 26, 1996. Grievant waivedLevel III as authorized by W. Va.

Code § 18-29-4(c), and appealed to Level IV on March 6, 1996. Following a series of continuances, each of which was granted for good cause, a Level IV hearing was conducted at the National Guard Armory in Charleston, West Virginia, on October 1, 1996. Thereafter, this matter became mature for decision upon receipt of the parties' post-hearing arguments on November 14, 1996.

In grievances of this nature, Grievant has the burden of proving the merits of his allegations by a preponderance of the evidence. Files v. Morgan County Bd. of Educ., Docket No. 94-32-1096 (Apr. 20, 1995); Randolph v. Harrison County Bd. of Educ., Docket No. 17-88-001-2 (June 30, 1988). Grievant alleges that Bill Burdette has been allowed to serve in an interim capacity as Marshall University's Director of Human Resources in excess of the one year time limit placed on interim appointments by the University System of West Virginia Board of Trustees' procedural rule concerning "Personnel Administration." 131 C.S.R. 62 (1994) (hereinafter "Series 62"). He specifically cites to § 2.9 which provides:

> Interim Responsibilities. A significant change in duties and responsibilities of an employee on a temporary basis justifying an interim promotion or upgrade for salary purposes. Such a temporary reassignment shall normally be for no less than four (4) consecutive weeks and no more than twelve (12) consecutive months and shall only occur when the responsibili ties being undertaken by the employee are those of another position that is vacant because of the incumbent's illness or resignation or because of temporary sufficient change in the duties and responsibilities of a filled position. If the temporary reassignment of responsibilities meets the test for a temporary upgrade or promotion under Sections 13 and 14 of this rule, the affected employee shall have his/her base salary adjusted upwards consistent with a promotion or upgrade under this rule. At the end of the temporary reassignment, the affected employee shall have his/her salary reduced to its original level including any salary increase which the employee would have received in his/her regular position.

131 C.S.R. 62 § 2.9 (1994).

Grievant contends that no employee should be permitted, either by the terms of the foregoing Procedural Rule, or the Affirmative Action Plan (G Ex A) adopted by Respondent, to occupy a position at Marshall University on an interim basis for more than one year. Grievant claims standing to challenge Respondent's failure or refusal to post the Director of Human Resources position to be filled competitively on the basis that Mr. Burdette's decisions in that capacity result in actions which directly impact on him. For example, Grievant avers that Mr. Burdette makes decisions on whether or not to publish an update to the Employee Handbook, and whether to fill a vacant position or realign job duties so that no promotion opportunity arises for Grievant. (See footnote 1)

Because Grievant does not claim to be qualified to serve as Director of Human Resources and does not appear to have any interest in applying for the position, he does not have sufficient standing to challenge Respondent's decision not to post the position. See Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994). See also Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996); Hall v. Mercer County Bd. of Educ., Docket No. 94-27-1099 (Mar. 20, 1995). Cf. Weaver v. Mason County Bd. of Educ., Docket No. 94-26-128 (Oct. 25, 1994) (employee who was not qualified to fill vacancy cannot complain about procedure employed to hire another qualified employee), and Dooley v. W. Va. Dept. of Transp., Docket No. 95- DOH-214 (Jan. 23, 1996) (employees had standing to contest policy permitting search of personal property in their workplace without demonstrating that they had actually been subjected to a search).

Grievant's contention that Mr. Burdette, in his capacity as Interim Director of Human Resources, is responsible for administering and implementing policies which directly impact upon Grievant does not establish standing to challenge either Mr. Burdette's appointment to or continued tenure in his present capacity. In other words, Grievant has standing to challenge Mr. Burdette's implementation or application of a policy which directly applies to him. See McFadden v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995). However, Grievant may not "bootstrap" his standing to challenge specific personnel actions into standing to challenge the capacity of the person taking such actions. See Mills v. W. Va. Dept. of Transp., Docket No. 92-DOH-053 (Apr. 24, 1992).

Even if Grievant did have standing to contest Mr. Burdette's continued interim appointment, such appointment does not appear inconsistent with either Series 62 or Respondent's Affirmative Action Plan. See G Ex A. Clearly, Respondent is obligated to comply with the terms of Series 62. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1997); Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94- PEDTA-448 (Mar. 31, 1995). However, Series 62 defines a "regular" employee as an "employee in a classified position" (131 C.S.R. 62 § 2.1.1 (1994)) and a "non-classified" employee as "an employee who is responsible for institutional policy formation and reports directly to the president of the institution, or other positions designated by the president." 131 C.S.R. 62 § 2.1.7 (1994). Further, employees in classified positions are "covered under the classification program set out" in Series 62 (131 C.S.R. 62 § 2.1.1 (1994)) but non-classified employees "are not subject to the

classification program." 131 C.S.R. 62 § 2.1.7 (1994). Mr. Burdette occupies a non-classified position and the Director of Human Resources is also a non-classified position. Thus, the Series 62 provisions which limit interim appointments, in accordance with the plain language of the procedural rule, do not apply to the positions held by Mr. Burdette.

Likewise, assuming that Respondent's Affirmative Action Plan applies to all positions at the institution, including Director of Human Resources, (See footnote 2) Grievant failed to establish that the Plan's "good faith" provision, or any other specific provision, precludes Respondent from combining the duties of two non-classified positions so as to avoid having to hire another employee to fill a "vacant" position.

In its post-hearing argument, Respondent requested an award of attorney's fees and costs for having to defend against a frivolous claim. This Grievance Board has previously determined that it does not have authority to award attorney's fees at Level IV. Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986). See Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996). Moreover, W. Va. Code § 18-29-8 explicitly provides that, at Levels I through III of the grievance procedure for education employees, the employer must bear the costs of preparing transcripts for hearings, while the parties are each responsible for their other costs. But see Sharp v. Kanawha County Bd. of Educ., Docket No. 20-85-001 (Dec. 27, 1985).

In the absence of specific statutory authority, litigants are normally responsible for their own fees and costs. See generally Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975). Under the grievance procedure for state employees, this Grievance Board has explicit authority to allocate costs in "extreme instances" of bad faith conduct by one of the parties. W. Va. Code § 29-6A-8. See Knight v. W. Va. Dept. of Tax & Revenue, Docket No. 91-ABCC-221 (June 16, 1992). This standard is similar to the grounds for awarding attorney's fees to prevailing defendants under the federal Civil Rights Act of 1964, where courts must determine that the claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1977).

This Board's authority to allocate costs at Level IV of the grievance procedure for education employees is controlled by W. Va. Code § 18-29-5(b):

> Hearing examiners are hereby authorized and shall have the power to . . . allocate costs among the parties in accordance with section eight [§ 18-29-8] of this article, . . . provide such relief as is deemed fair and equitable in accordance with the provisions of this article, and such other powers as will provide for the effective resolution of

grievances not inconsistent with any rules or regulations of the board or the provisions of this article.

Assuming, without deciding, that this Grievance Board has authority to award costs in cases of extreme bad faith under the general authority contained in W. Va. Code § 18-29-5(b), any determination of extreme bad faith must be made on a case-by-case basis. See Sullivan v. School Bd., 773 F.2d 1182, 1188-90 (11th Cir. 1985). This grievance does not challenge a well-settled principle of law but rather an issue of first impression with this Grievance Board. In these circumstances, the undersigned finds that this grievance was not so lacking in arguable merit as to warrant an award of costs to Respondent. See Sullivan, supra; Knight, supra. Further, Respondent did not present any evidence at Level IV to document its costs. (See footnote 3) Accordingly, no award of costs may be made. (See footnote 4) See Chafin, supra.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter:

FINDINGS OF FACT

1. Grievant is employed by Marshall University as a Press Operator II in the Office of Printing Services.

2. The Director of Human Resources position at Marshall University is a non- classified position. See G Ex N. This position became vacant upon the departure of Queen Foreman, the previous occupant.

3. Prior to Ms. Foreman's departure, Bill Burdette was employed by Marshall University as Director of Government Relations/Special Projects Coordinator. That position is also non-classified. See G Ex N. On July 17, 1994, Mr. Burdette was appointed Acting Director of Human Resources and continued serving in that capacity through the date of the Level IV hearing, October 1, 1996.

4. Marshall University President J. Wade Gilley appointed Mr. Burdette to perform multiple duties in an effort to reduce the total number of positions at the institution, given concerns regarding current and projected budgetary limitations impacting the payroll.

5. The Director of Human Resources at Marshall University is in a position to make determinations which impact on Grievant's terms and conditions of employment, including, but not limited to, influencing determinations regarding which classified positions will be filled or eliminated

(including specific positions for which Grievant is qualified), and how, when and if the Classified Staff Handbook will be updated to reflect policy changes impacting the working conditions of classified staff employees, including Grievant.

6. Grievant has not indicated an interest in obtaining the position of Director of Human Resources, and has not established that he holds the minimum qualifications necessary for such position.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving each element of a grievance of this nature by a preponderance of the evidence. Randolph v. Harrison County Bd. of Educ., Docket No. 17-88-001-2 (June 30, 1988).

2. "An employee does not ordinarily have standing in the grievance procedure to protest the employment status of a fellow employee unless harm is shown." See Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Mills v. W. Va. Dept. of Transp., Docket No. 92-DOH-053 (Apr. 24, 1992). See also Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996); Hall v. Mercer County Bd. of Educ., Docket No. 94-27-1099 (Mar. 20, 1995).

3. The fact that Bill Burdette, in his capacity as interim Director of Human Resources, has made decisions which impact on Grievant's working conditions and opportunities for promotion, does not give Grievant standing to challenge Respondent's decision to assign such duties to Mr. Burdette indefinitely, or to leave the Director of Human Resources position "vacant" for more than one year. See Pomphrey, supra; Mills, supra.

4. An administrative law judge at Level IV will not rule upon a legal claim in a grievance which was not properly presented for consideration at the lower levels of the grievance procedure. See W. Va. Code § 18-29-3(j); W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993); Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995); Anderson v. Wyoming County Bd. of Educ., Docket No. 93-55-183 (Sept. 30, 1993).

5. This Grievance Board does not have authority to award attorney's fees at Level IV. Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986); See Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996). 6. Assuming that this Grievance Board can award costs to the prevailing party under W. Va. Code § 18-29-5(b) in instances where the losing party has engaged in extreme bad faith, such determinations must be made on a case-by-case basis.

See Sullivan v. School Bd., 773 F.2d 1182, 1188-90 (11th Cir. 1985). In the circumstances presented here, Respondent did not establish that this grievance was so patently frivolous as to warrant an award of costs. See Knight v. W. Va. Dept. of Tax & Revenue, Docket No. 91-ABCC-221 (June 16, 1992). See generally Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1977). Moreover, Respondent did not establish its costs on the record, thereby precluding such an award. See Chafin, supra. See also Railway Express, Inc. v. Piper, 447 U.S. 752 (1980).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Cabell County or the Circuit Court of Kanawha 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: December 30, 1996

Footnote: 1 Grievant cited specific instances where employees in Printing Services were assigned new duties, and received "promotions" without the positions being posted, contending that these actions must necessarily have been approved by Mr. Burdette. At Level IV, Grievant sought to amend his relief to include posting (publication) of these positions, identified as the Director of Printing Services and Administrative Associate. Respondent did not consent and objected to such an amendment. Although evidence regarding these positions is admissible to support Grievant's original claims, any request to rescind these actions and publish the resulting "vacancies" substantially alters the original grievance within the meaning of W. Va. Code § 18-29-3(j) and may not be addressed at Level IV. See W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993); Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995); Anderson v. Wyoming County Bd. of Educ., Docket No. 93- 55-183 (Sept. 30, 1993).

Footnote: 2 Respondent argued that the Director of Human Resources was "exempt" from the Affirmative Action Plan. Although the undersigned was unable to discern any clear and unequivocal exemption of such executive positions from the general goals of the Plan, this issue need not be decided as Grievant's position is without merit in any event.

Footnote: 3Such sanctions should not be imposed without fair notice and an opportunity to contest the issue on the record. See Railway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980).

Footnote: 4Likewise, no decision can be made on Respondent's request for an Order requiring Grievant to compensate Respondent's employees who appeared as witnesses at Level IV pursuant to subpoenas issued at Grievant's request in accordance with W. Va. Code §§ 18-29-5(b) and 29A-5-1(b). Although W. Va. Code § 29A-5-1(b) clearly states "[a]ll such fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued," the undersigned is not authorized to award relief to employers under the education employees' grievance procedure. See generally, Chafin, supra.