THOMAS JESSUP,

Grievant,

v. **DOCKET NO. 97-BOT-240**

BOARD OF TRUSTEES/

MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievant Thomas Jessup, a Tradesworker, pay grade 12, filed a grievance on or about January 17, 1997, alleging Respondent Board of Trustees, Marshall University ("Marshall") should have made him a Certified Tradesworker, pay grade 13, rather than a less senior Tradesworker, Jody Adkins. At Level IV he cited W. Va. Code § 18B-7-1 in support of his position. (See footnote 1)

The following findings of fact have been made from the record developed at Levels II and IV.

Findings of Fact

1. Grievant has been employed seven years as a Tradesworker, pay grade 12, in the Department of Residence Services at Marshall. As a Tradesworker, Grievant has performed plumbing, electrical and mechanical repairs, heating, ventilation and air conditioning ("HVAC")service and repairs, including freon recovery, carpentry, and other building maintenance work. Grievant holds HVAC certification.

2. Prior to January 1, 1997, Marshall had rotated the five Tradesworkers in the Department of Residence Services through various buildings and trades, including HVAC work in freon recovery. Usually an employee would work in each trade six months or more, except that employees were assigned to work in the Student Center for a year at a time.

3. Marshall believes that federal law now requires that persons who perform freon recovery hold HVAC certification. (See footnote 2) Sometime in 1996, the Job Evaluation Committee determined that employees who are required to be HVAC certified and perform freon recovery, should receive credit under the point factor methodology (See footnote 3) for holding a license or

certification. The effect of this change was that any Marshall Tradesworker in Residence Services who was HVAC certified and performed freon recovery would be placed in pay grade 13, and classified as a Certified Tradesworker.

4. Marshall then reevaluated its needs in the Department of Residence Services, and determined that only four employees were needed for freon recovery. Two Tradesworker Leads, pay grade 14, were HVAC certified. Marshall decided these two employees should be primarilyresponsible for freon recovery, and that two other employees should be chosen as back-ups.

5. Of the five Tradesworkers in the Department of Residence Services, only Grievant and Jody Adkins held HVAC certification.

6. Grievant's supervisor, Clifford Curry, recommended Mr. Adkins and Dana Edmonds as the back-ups. Mr. Edmonds was classified as an Electrician, pay grade 12, held HVAC certification, and was more senior than Grievant. The certification requirement placed Mr. Edmonds in pay grade 13, classified as a Certified Skilled Crafts Specialist.

7. A new Position Information Questionnaire ("PIQ") was prepared for Mr. Adkins' position, to reflect that he is now required to hold HVAC certification. Marshall's Human Resources Department reviewed the PIQ and changed Mr. Adkins' classification from Tradesworker, pay grade 12, to Certified Tradesworker, pay grade 13, effective January 1, 1997.

8. At the time his classification was changed, Mr. Adkins was working in the plumbing trade. He had never performed HVAC work for Marshall, although he was HVAC certified, and it was one of his job duties. Mr. Adkins had worked for Marshall one and a half years.

9. On January 1, 1997, Grievant was working in the carpentry trade. Immediately prior to his rotation into carpentry, in November 1996, he was assigned to work in the Twin Towers dormitories, and had been performing HVAC work, including freon recovery as required, among his other duties at Twin Towers. His experience in HVAC included the recovery of freon from four units at the Student Center, and at least three years of work in HVAC.

10. Grievant's duties are the same as they were prior to January 1, 1997, except Grievant is no longer allowed to recover freon from air conditioning units.

11. Mr. Adkins' duties are the same as the Tradesworkers', except that he is required tobe HVAC certified and recovers freon.

12. The Tradesworkers are still rotated through the trades and buildings.

13. Mr. Adkins was chosen as the Tradesworker required to have HVAC certification and to perform freon recovery, because he was scheduled to work in the Student Center on the next rotation, and was being groomed to replace one of the Tradesworker Leads upon his retirement.

14. Grievant is at least as qualified as Mr. Adkins to recover freon.

Discussion

The burden of proof is upon Grievant to establish his allegations by a preponderance of the evidence. Canterbury v. Putnam County Bd. of Educ., Docket No. 40-86-325-1 (Jan. 28, 1987). Grievant relied upon W. Va. Code §18B-7-1(d) in support of his argument that his seniority over Mr. Adkins required that he be placed in the Certified Tradesworker position. That Code Section provides:

> 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. If more than one qualified, nonexempt classified employee applies, the best-qualified nonexempt classified employee shall be awarded the position. In instances where such classified employees are equally qualified, the nonexempt classified employee with the greatest amount of continuous seniority at that state institution of higher education shall be awarded the position. A nonexempt classified employee is one to whom the provisions of the federal Fair Labor Standards Act, as amended, apply.

In his effort to bring Marshall's action within the provisions of W. Va. Code § 18B-7-1(d), Grievant argued that Mr. Adkins was promoted into a newly created position. Marshall pointed outCode § 18B-7-1(d) is applicable only when there is a "job opening." Marshall argued there was no job opening, because Mr. Adkins was not placed in a vacant or newly created position, but was upgraded.

Promotion is defined as:

> Movement from a position requiring a certain level of skill, effort and authority to a vacant or newly created position assigned to a different job title and higher pay grade requiring a greater degree of skill, effort, and authority.

128 C.S.R. 62 § 2.8. Upgrade is defined as:

> An advancement of the employee's current position to a higher pay grade as a result of a significant change in the position's existing duties and responsibilities. When a position is upgraded, the employee does not move to a different position in a higher pay grade. Rather, it is the employee's position that is moved to a higher pay grade because of a significant increase in the position's existing responsibilities, as

> determined by job evaluation.

128 C.S.R. 62, § 2.10. Series 62 further provides at Section 14.1 that:

> Upgrades result from the process of job evaluation where a determination is made that a significantly higher level of skill, effort, and responsibility exists in the employee's current position.

Marshall argued the addition of the certification requirement equated to a significant change in the position's existing duties and responsibilities.

It is clear that Mr. Adkins' duties did not change. He had always been responsible for freon recovery as required, although the percentage of time he spends performing this duty may have changed. Looking at what happened to Mr. Adkins in a vacuum, the change in his Job Title and pay grade was neither a promotion or upgrade, but was the result of the reevaluation of one point factor by the Job Evaluation Committee. See Flowers, et al., v. Bd. of Trustees/W. Va. Univ., Docket No. 94-BOT-237 (Jan. 31, 1995). However, if this is what had occurred, Grievant's job duties alsoshould have been reevaluated, and his Job Title should have been changed, because he too performed HVAC work requiring certification, and he held the required certification.

What occurred here, however, was a reorganization of the duties of the Tradesworkers. While, "[t]he responsibility for assigning tasks and duties to a position belongs to the supervisor" (131 C.S.R. 62 § 10.1), this "discretion is not unfettered. Taking the argument to its logical extreme, an employee's duties could be completely changed, with no semblance of the former remaining, and other individuals would be precluded from open and fair bidding on what, in essence and in totality, is a new position . . .." McCuskey v. Univ. of W. Va. Bd. of Trustees, Docket No. 91-BOT-522 (Mar. 6, 1992). "It is well settled that an employer cannot avoid lawful job-posting requirements by assigning vastly-different duties to an employee and then seeking his reclassification. See, e.g., Savilla v. Putnam Co[unty] Bd. of Educ., Docket No. 89-40-546 (Dec. 21, 1989)." Id. See also, Billups, et al., v. W. Va. Dept. of Transp./Div. of Highways, Docket Nos. 94-DOH-168, 177, 169, 170 and 212 (May 4, 1995).

Marshall changed the duties of the Tradesworkers, removing a duty from the Tradesworkers which would have placed them in a higher pay grade, and creating one position in that higher pay grade which performed this duty. Thus, Mr. Adkins was promoted into a newly created position. While Marshall cannot be faulted for its efforts to minimize its costs, the manner in which it achieved its goal was unfair, and arbitrary and capricious. While Marshall's witnesses continued to repeat that Mr.

Curry had been told to give his supervisor the names of his two "best people," Mr. Curry was not called to testify to explain why Mr. Adkins was a better choice than Grievant, and the only witness familiar with the abilities of Mr. Adkins and Grievant could only say that Mr. Curry was impressed that Mr. Adkins was at the top of his class, Mr. Adkins had received a favorablerecommendation from the Marshall Physical Plant on his work as a temporary employee, and that Mr. Adkins was chosen because he happened to be scheduled to rotate into the Student Center next, and was being groomed to replace one of the Tradesworker Leads. That witness, Al Ward, Supervisor of Building Trades, further stated, however, that Grievant and Mr. Adkins were equally qualified to perform HVAC work.

Grievant disputed that Mr. Adkins could have been at the top of his HVAC class, testifying that one simply completes the required number of hours in a satisfactory manner. Marshall presented no evidence that it was some other class which was referred to, or any proof that Mr. Adkins was in fact at the top of a class. It was quite arbitrary to base a decision which would place the person chosen in a higher pay grade than the other Tradesworkers upon the happenstance of which employee would be in the Student Center next. A coin toss would have been as appropriate.

It goes without saying that it is highly inappropriate to groom one employee for a particular position without going through a fair selection process. Further, this reasoning simply supports Grievant's argument that this was not an upgrade. "In most cases [involving whether a position should have been posted rather than duties reassigned], the focus is eventually upon what if any evidence is presented to show that the employer was seeking to favor one employee by depriving others of the opportunity to bid on positions." Billups, supra.

Grievant did not ask that the position be posted, but asked that he be placed in the position, as he was more senior than Mr. Adkins. W. Va. Code § 18B-7-1(d) provides that the more senior of two equally qualified internal applicants is to be awarded a newly created position. In this case, no one was given the opportunity to make application. The relief sought by Grievant would only perpetuate the unfairness. The undersigned may "provide such relief as is deemed fair and equitablein accordance with the provisions of this article . . .." W. Va. Code § 18-29-5(b). Neither party presented the undersigned with any citation to a statute, regulation or policy which states what must occur when a position is created. The language of W. Va. Code § 18B-7-1(d) indicates that there is a posting requirement. The appropriate relief is to require that the position be filled in the same manner that any

newly created position is to be filled.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to establish his allegations by a preponderance of the evidence. Canterbury v. Putnam County Bd. of Educ., Docket No. 40-86-325-1 (Jan. 28, 1987).

2. Grievant proved a new position was created which was improperly filled by Mr. Adkins; and that he, as well as any other interested person, should have been afforded the opportunity to apply and compete for the position. McCuskey v. Univ. of W. Va. Bd. of Trustees, Docket No. 91-BOT-522 (Mar. 6, 1992). See also, Billups, et al., v. W. Va. Dept. of Transp./Div. of Highways, Docket Nos. 94/DOH/168, 177, 169,170 and 212 (May 4, 1995).

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART**. Respondent is **ORDERED** to treat the Certified Tradesworker position as a newly created position, and to take those actions required of it when a new position is created, including advertising the position if that is what is required. If Grievant is then selected for the position, Respondent is **ORDERED** to pay him backpay as though he had been placed in the position effective January 1, 1997. Grievant's request that he be placed in the position is **DENIED**.

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.

BRENDA L. GOULD

Administrative Law Judge

Dated: January 20, 1998

Footnote: 1

The grievance was denied at Level I on January 28, 1997. Following a Level II hearing held on April 10, 1997, the grievance was denied at Level II on April 15, 1997. Respondent waived participation at Level III, and Grievant appealed to Level IV on May 12, 1997. The Level IV hearing was held on September 18, 1997, and this matter became mature for decision upon receipt of the last of the parties' post-hearing written arguments on October 27, 1997.

Footnote: 2

The parties did not advise the undersigned as to when this requirement became effective, nor did they provide a reference to this requirement, but the personnel in charge of the Department of Residence Services were not aware of this requirement until the Job Evaluation Committee acted in 1996 to give credit for HVAC certification.

Footnote: 3

"Point factor methodology: The instrument used to assign weights to the factors. The total of the weights determines the pay grade to which a job title is assigned." 131 C.S.R. 62 21 2.28.

"Factor. One of the thirteen (13) items used to evaluate jobs. The items are knowledge, experience, complexity and problem solving, freedom of action, breadth of responsibility, scope and effect, intrasystems contacts, external contacts, direct supervision exercised, indirect supervision exercised, working conditions, physical coordination, and physical demands." 131 C.S.R. 62 § 2.27.