LINDA HUNT,

Grievant,

v v.

DOCKET NO. 01-HEPC-453

WEST VIRGINIA HIGHER EDUCATION POLICY COMMISSION/MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Linda Hunt, filed this grievance against her employer, the West Virginia Higher Education Policy Commission/Marshall University ("Marshall") on April 5, 2001:

> Linda Hunt is an Assistant Professor at the Marshall University Community & Technical College. She claims that inequities exist in regard to workload and salaries between her and similarly situated staff at the college.
>
> Relief sought: She asks that her workload and salary be adjusted so that she is more in line with the other staff at the college.

The grievance was denied at level one by Grievant's immediate supervisor, Carol Perry. A level two hearing was held on May 7 and July 10, 2001, and Jonathan Brown, Grievance Evaluator, denied the grievance by decision dated July 19, 2001. Grievant by-passed level three and appealed to level four on July 30, 2001, and hearing was held in the Grievance Board's Charleston, West Virginia, office on September 21, 2001. This matter became mature for decision on October 22, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Bob Brown,West Virginia Federation of Teachers, and Marshall was represented by Kristi A.

McWhirter, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

LIV Grievant's Exhibits

Ex. 1 -

Salary chart from 1990-2001.

Ex. 2 -

Notice of Vacancy dated January 4, 1993.

Ex. 3 -

Notice of Vacancy dated January 4, 1993.

Ex. 4 -

April 3, 2001 email from Linda Hunt to Vicki Riley and Carol Perry; April 3, 2001 email from Vicki Riley to Linda Hunt.

Ex. 5 -

April 3, 2001 memorandum from Linda Hunt to Carol Perry.

Ex. 6 -

Faculty Personnel Policies.

Marshall Exhibits

Ex. 1 -

MU/MCTC Clinical Faculty Salary and Workload Chart.

Ex. 2 -

Salary chart with handwritten notations.

Testimony

Grievant testified in her own behalf. Marshall presented the testimony of Vicki Riley and Carol Perry.

FINDINGS OF FACT

The material facts in this grievance are not in dispute, and are set forth in the following findings.

1. Grievant is employed by Marshall as an Assistant Professor assigned to Marshall University Community & Technical College ("MUCTC") in a clinical faculty position teaching Developmental Math. She has held this position since the fall semester 1993.

2. Faculty classifications and salaries at Marshall are governed by 128 C.S.R. 36 (1997)("Series 36") and by the Faculty Handbook commonly referred to as the Greenbook. Pursuant to Series 36, institutions may hire temporary faculty if one of sixconditions exist. Pursuant to 3.11.4, universities may hire temporary faculty to meet the transient needs of the institution and to maintain flexibility in instruction so long as the appointment does not exceed six years as approved by the president.

3. In order to maintain flexibility in its instruction and to meet the changing needs of its developmental students, MUCTC hired all developmental faculty on a temporary basis prior to 1998. LIV Test., Riley. (See footnote 1) In an effort to retain valuable developmental faculty yet maintain the flexibility it needed in the developmental instructional areas, MUCTC changed the classification of all developmental faculty from temporary-track to clinical-track in 1998. R. Ex. 1; LIV Test., Riley; LII Tr., Riley, p. 30.

4. Temporary and clinical-track faculty are not tenure or tenure-track, are appointed only for the terms specific in their notices of appointment, and "have no other interest or right" in their employment. 128 C.S.R. 36, §§ 3.6 and 4.2

5. On January 4, 1993, MUCTC posted two Notices of Vacancy. One was for an

> Instructor/Assistant Professor Mathematics (Developmental)
> Division of Developmental & General Studies
> One Year Temporary (2 positions anticipated)

and the other was for an

Instructor/Assistant Professor Mathematics (Business and Technical)

Division of Developmental & General Studies

Tenure track position

LIV G. Exs. 2, 3.

6. Grievant applied for both postings, and was hired for the one year temporary position. She was awarded the rank of Assistant Professor on her hire date due to her three years previous higher education teaching experience and fifteen additional graduate hours beyond her master's degree.

7. Although Grievant was hired as a temporary-track employee, pursuant to MUCTC's decision to change developmental faculty to clinical-track, Grievant's employment status changed from temporary-track to clinical-track in 1998.

8. Grievant's one year temporary contract has been renewed every year since 1993.

9. Marshall faculty salaries are determined by the aforementioned Series 36 based upon rank, discipline, experience, education and market principles/demand. LII Tr., Riley, p. 22; G. Ex. 6. Incumbent faculty may also be compensated above their base salaries for other activities that include, but are not limited to, non-teaching responsibilities, teaching electronic, Internet courses ("e-courses"), or teaching overload courses. LII Tr., Riley, pp. 21-22.

10. For developmental faculty, salaries are not paid from the normal operating budget, and are not subject to the same salary structure or increases as non-clinical-track faculty. Developmental faculty are not in as high a demand as other disciplines, and do not command a very high entry rate of pay. LII Tr., Riley, p. 22.

11. Grievant's prorated salary at the time she was hired was $910 for four months. Grievant's salary for the 1993-94 year was $20,963. Grievant's salary hasincreased every year since her employment with Marshall, and she has received the same across the board raises as other clinical-track faculty. LII Tr., Riley; G. Ex. 1.

12. Grievant teaches no e-courses or overload classes, has not assumed any other compensable non-teaching duties, nor has she applied for any promotions since her date of hire in 1993. LII Tr., Grievant, pp. 17-18; LIV Test., Grievant; LII Tr., Perry, p. 25; G. Ex. 6.

13. Grievant's salary is the highest of the five developmental math teachers. R. Ex. 1; G. Ex. 1.

14. Marshall determines faculty workloads based upon a credit-hour policy. LII Tr., Perry, p.

37. Prior to the 1998-99 academic year, statewide, all community and technical college ("CTC") professors were required to teach a minimum of twelve credit hours. Thus, if the discipline in which a professor taught carried three credit hours per class, he was required to teach a minimum of four classes or twelve credit hours. If his discipline carried a four credit hour class, he was required to teach a minimum of three classes or twelve credit hours.

15. In 1998, statewide, the CTCs switched to a fifteen credit hour policy, that is, all CTC teachers were required to teach a minimum of fifteen hours. Now, pursuant to the earlier example, if a discipline carries three credit hour courses, the professor is required to teach a minimum of five classes for fifteen credit hours. If a discipline carries four credit hour courses, the professor i0s required to teach a minimum of four courses for a total of sixteen credit hours. Because a sixteen credit hour load does not result in an additional class being taught, but only in an additional credit hour, a professor carrying a sixteen hourcredit load is not eligible for overload pay. LIV Test., Riley; Perry; LII Tr., Perry, p. 37; G. Ex. 6.

16. In order to meet the needs of their developmental math students, the MUCTC made a curriculum decision that all developmental math classes would have a lab component. By adding this lab component, these developmental classes became four credit hour courses. LII Tr., Perry, p. 36.

17. Pursuant to Grievant's request, Marshall permitted her to teach three courses in the Fall 2000 semester and four courses in the Spring 2001 semester, and permitted her to have a graduate assistant during the Fall 2000 semester. LII Tr., Grievant, p. 17; R. Ex.1.

18. Grievant has received excellent annual performance evaluations during her career with MUCTC.

DISCUSSION

As this is not a disciplinary grievance, Grievant bears the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000). A preponderance of the evidence is defined as:

> evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact sought to be proved is more probable than not.

Rider v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOR-348 (Apr. 7, 2000)(*citing* Black's Law

Dictionary (6th ed. 1991) and Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993)). Grievant alleges that other Marshall faculty of equal or lesser academic rank and/or education experience were either: (a) hired in at a salary higher than she received during her first year of employment; or (b) are currently making more than she with less experience and/or education. She further alleges that her workload is greater than that of other "similarly situated" Marshall employees. Grievant bases her claims upon the following: (a) the equal pay for equal work provisions of W. Va. Code § 29-6-10; (b) discrimination; and (c) Series 36 and provisions of The Greenbook.

A. Equal Pay for Equal Work

Grievant argues that Marshall's practice of hiring new employees at higher rates of pay than she received upon her initial hire violates the equal pay provisions of W. Va. Code § 29-6-10, which states, in pertinent part: "The principle of equal pay for equal work in the several agencies of the state government shall be followed in the pay plan." W. Va. Code § 29-6-10 is one part of a group of legislation wherein the Legislature created a Civil Service System for some public employees. The main purposes of this legislation are "to attract to the service of this state personnel of the highest ability and integrity" by creating a classification system and to provide security and tenure to *public employees who fall within the system*. See W. Va. Code § 26-6-1 (1977)(emphasis added); See generally, Thurmond v. Steele, 159 W. Va. 630, 225 S.E.2d 210 (1976); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965). In crafting this set of legislation, however, the Legislature specifically exempted from coverage employees of the State's institutions of higher education. Specifically, W. Va. Code § 26-6-1 (1977) states in pertinent part: "All employment positions not in the classified service, *with the exception of the board ofregents* [abolished], are included in a classification plan known as classified-exempt service." (Emphasis added). Furthermore, W. Va. Code § 29-6-4(c)(12)(1999) exempts from the civil service system "[m]embers and employees of the board of trustees and board of directors or their successor agencies." See fn. 1.

In this case, Grievant's employment with Marshall is not covered by the Civil Service System. Grievant is *not* a classified employee working within the civil service system or within any classified employee system. She is a full-time clinical-track faculty member employed by an institution of higher education formerly governed by the West Virginia Higher Education Interim Governing Board and currently governed by the Marshall University Board of Governors. (See footnote 2) Compare W. Va.

Code § 18B-8-1 (1996) with Code § 18B-9-2(a)(1995). See also Series 36. Thus, based upon the exemptions provided by the Legislature, the provisions of W. Va. Code § 29-6-10 are inapplicable, and Grievant's argument must fail.

B. Discrimination

Grievant further asserts that Marshall discriminated against her by: (a) paying new faculty with less education and experience higher entry salaries than she received during her first year of employment; (b) paying incumbent faculty with less education and/or experience at a higher rate than she; and (c) by permitting inequities to exist in her workload as compared to other Marshall faculty.

Discrimination is defined as “any differences in treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees. W. Va. Code § 18-29-3(m)(1992). An employee seeking to establish discrimination must first establish a *prima facie* case by demonstrating the following:

a. that she is similarly situated, in a pertinent way, to one or more other employee(s);

b. that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

c. that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Crock v. Harrison County Bd. of Educ., Docket No. 98-17-290 (Sept. 30, 1998)(quoting Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989)). See also, Vickers v. Bd. of Directors, Docket No. 97-BOD-112A (June 26, 1998); Arnold v. Bd. of Trustees, Docket No. 96-10-337 (July 30, 1997). If Grievant successfully proves a *prima facie* case, a presumption of discrimination exists, and the employer may rebut it by articulating a legitimate reason for its action. Grievant may still prevail if she can demonstrate the reason proffered by the employer was pretextual. Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Grievant is a clinical-track faculty employed by Marshall. Faculty salaries at Marshall are governed by W. Va. Code §§ 18B-8-1, *et seq*, Series 36 and the "Faculty Compensation Policies" section of the Greenbook. Pursuant to the guidelines set forth in these provisions, Marshall is permitted to determine entry rate salaries for new faculty pursuant to competitive market conditions, discipline, education, merit and academic rank. Similarly, Marshall is permitted to grant merit increases to incumbent faculty, as well as permitted to pay faculty additional compensation above their base pay for teaching overload courses and assuming other administrative responsibilities.

Likewise, the West Virginia Supreme Court of Appeals has addressed the process by which the state's institutions of higher education determine faculty salaries in W. Va. Bd. of Regents v. Decker, 191 W. Va. 567, 447 S.E.2d 259 (1994). Although this case addressed a claim brought pursuant to the West Virginia Human Rights Act ("Act"), its holding is nevertheless applicable to Grievant's claim. In Decker, a faculty member employed in the industrial and labor relations department of West Virginia University's ("WVU") College of Business and Economics alleged that WVU's practice of hiring new faculty with salaries at or above his current salary violated the age discrimination provisions of the Act. The professor specifically alleged that such a practice resulted in the disparate treatment of older incumbent employees, as well as resulted in a disparate impact uponthose same employees. In support of his claim, the professor introduced evidence that WVU hired faculty in other disciplines at rates of pay higher than his current salary. In finding that the professor could not make a *prima facie* case of disparate treatment, but could make a *prima facie* case of disparate impact, the Court nevertheless approved of the way institutions of higher education determine entry rates of new faculty. In addition, it held that, so long as the institution could show that paying new hires in the same discipline more than the current salaries of older incumbent employees within the same discipline was a business necessity, no age discrimination will be deemed to have occurred. The Court specifically held:

> There is nothing . . . that forbids employers from paying workers based upon their market value. In specialized fields, subtle distinctions in technical knowledge may be rewarded by greater compensation. *Syl. Pt.* 3, Decker.

> A university does not engage in . . . discrimination when it pays new faculty . . . based upon their market value generally prevailing for entry level faculty in their respective, specific disciplines. *Syl. Pt. 5*, Decker.

> Decisions by the University with regard to starting salaries or wage increase for faculty other than the College of Business and Economics, industrial labor relations department, are irrelevant to the conditions of . . . [the professor's]. . . employment. Decker at 263.

Here, Grievant is a clinical-track faculty member teaching developmental math at MUCTC. Thus, in evaluating Grievant's discrimination claims, pursuant to Decker, this Grievance Board must determine whether Grievant was treated differently than other clinical-track, developmental math faculty employed at MUCTC with regard to her salary and workload, and whether Marshall has a legitimate, nondiscriminatory reason for that difference in treatment. Grievant submitted no evidence that she was treated any differently than other MUCTC developmental math teachers. In support of all of her claims, Grievant submitted only a salary chart detailing the current and base salaries of twelve other Marshall faculty, and presented testimony regarding the work loads of other faculty. However, none of the faculty listed on Grievant's salary chart or in her testimony are full-time developmental math faculty at MUCTC. Thus, pursuant to the holding in Decker, Grievant is not similarly situated to any of those individuals, and any information regarding decisions made by Marshall regarding their employment is irrelevant to any of her discrimination claims.

Marshall submitted into evidence of starting salaries and workloads of other MUCTC developmental math faculty which shows it hired four new developmental math instructors at a higher entry rate than Grievant. R. Ex. 1. However, this entry rate was not higher than Grievant's current salary. Further, the new hires were employed by Marshall years after Grievant was hired, and logically, the market rate for developmental math instructors was higher in 2000 than in 1993. Grievant offered no evidence of pretext, and thus Grievant's claim of discrimination must fail.

Grievant has likewise failed to prove inequities exist in her teaching workload as compared to other developmental math faculty. At Marshall, each lab class taught is equal to four credit hours and five contact hours. In this case, Grievant's workload in terms of credit/contact hours in Spring 2001 was equal to, and in the Fall 2000, less than, those of her developmental math colleagues. In fact, at Grievant's request, Marshall permitted her to teach only three classes during the Fall semester while other developmental math teachers taught four courses. Other MUCTC professors whose courses are only threecredit hours are required to teach five classes in order to meet the fifteen hour credit

hour minimum. Thus, Grievant has failed to meet her burden that inequities exist in her teaching workload.

C. Violations of Series 36 and the Greenbook

Grievant has failed to produce any evidence that Marshall violated the provisions of Series 36 and/or the Greenbook with regard to her salary and/or her workload. First, pursuant to Series 36 and the Greenbook, faculty salaries may be determined by academic rank, discipline, market value, merit and other compensable duties assumed by the faculty member. See G. Ex. 6 and 128 C.S.R. 36. As a clinical track faculty member, Grievant is not subject to the normal salary structure or increases as tenure track faculty, and nothing in Series 36 or the Greenbook prohibits Marshall from paying new hires their current market rate. Second, Grievant is the highest paid developmental math faculty member. Third, Grievant's workload was the same as other developmental faculty during the Spring 2001 semester, and was lighter than those same faculty during the Fall 2000 semester. Finally, nothing in Series 36 or the Greenbook prohibits Marshall from requiring MUCTC faculty to teach a minimum of 15 credit hour courses, nor does either source require Marshall to compensate Grievant for teaching one credit hour, versus one class, above the fifteen credit hour minimum.

CONCLUSIONS OF LAW

1. As this is not a disciplinary grievance, Grievant bears the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000). 2. W. Va. Code § 29-6-10 states, in pertinent part: “The principle of equal pay for equal work in the several agencies of the state government shall be followed in the pay plan.” W. Va. Code § 29-6-10 is one part of a group of legislation wherein the Legislature created a Civil Service System for some public employees. The main purposes of this legislation are “to attract to the service of this state personnel of the highest ability and integrity” by creating a classification system and to provide security and tenure to *public employees who fall within the system*. See W. Va. Code § 26-6-1 (1977)(emphasis added); See generally, Thurmond v. Steele, 159 W. Va. 630, 225 S.E.2d 210 (1976); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. In crafting this set of legislation, however, the Legislature specifically exempted from coverage employees of the State's institutions of higher education. Specifically, W. Va. Code § 26-6-

1 (1977) states in pertinent part: "All employment positions not in the classified service, *with the exception of the board of regents* [abolished], are included in a classification plan known as classified-exempt service." (Emphasis added). Furthermore, W. Va. Code § 29-6-4(c)(12)(1999) exempts from the civil service system "[m]embers and employees of the board of trustees and board of directors or their successor agencies."

4. Thus, based upon the exemptions provided by the Legislature, the provisions of W. Va. Code § 29-6-10 are inapplicable to Grievant.

5. Discrimination is defined as "any differences in treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees. W. Va. Code § 18-29-3(m)(1992). An employeeseeking to establish discrimination must first establish a prima facie case by demonstrating the following:

a. that she is similarly situated, in a pertinent way, to one or more other employee(s);

b. that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

c. that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Crock v. Harrison County Bd. of Educ., Docket No. 98-17-290 (Sept. 30, 1998)(quoting Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989)). See also, Vickers v. Bd. of Directors, Docket No. 97-BOD-112A (June 26, 1998); Arnold v. Bd. of Trustees, Docket No. 96-10-337 (July 30, 1997).

4. "There is nothing . . . that forbids employers from paying workers based upon their market value. In specialized fields, subtle distinctions in technical knowledge may be rewarded by greater compensation." W. Va. Bd. of Regents v. Decker, 191 W. Va. 567, 447 S.E.2d 259 (1994).

5. "A university does not engage in . . . discrimination when it pays new faculty . . . based upon

their market value generally prevailing for entry level faculty in their respective, specific disciplines." *Syl. Pt. 5*, Decker, supra.

6. Starting salaries or wage increases for faculty other than the MUCTC are irrelevant to the conditions of Grievant's employment. See Decker, supra. 7. Grievant has failed to produce any evidence that Marshall violated the provisions of Series 36 and/or the Greenbook with regard to her salary and/or her workload.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. 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 record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: November 29, 2001

Footnote: 1

In order to address the deficiencies in basic skills of incoming freshmen, MUCTC offers developmental classes. Developmental classes are taught on a high school level.

Footnote: 2

Classified employment in the West Virginia higher education system is governed by W. Va. Code §§ 18B-9-1, et. seq. (1989). On January 1, 1994, the West Virginia higher education system implemented a new job classification system, known as the Mercer reclassification project. Pursuant to the Mercer reclassification project, the Job Evaluation Committee ("JEC") was created to make job evaluation and classification decisions and was charged with implementing the equitable and uniform system of job classification for higher education classified employees mandated by W. Va. Code § 18B-9-4

(1989). See 128 C.S.R. 62-11.5, -18.1, et seq. (1994). Thus, even if Grievant were a classified employee within the higher education system, the terms of her employment would not be governed by the civil service system established by W. Va. Code § 29-1-1 and Code § 29- 6-10 still would be inapplicable.