JOSEPH TURLEY,

Grievant,

DOCKET NO. 01-HE-128

HIGHER EDUCATION INTERIM GOVERNING BOARD/MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Joseph Turley, filed this grievance against his employer, the Interim Governing Board/Marshall University ("Marshall") on March 1, 2001 (See footnote 1) , alleging as follows: (See footnote 2)

> That M.U. failed to allow me an interview as an internal candidate as provided by M.U. policy. That Stephanie Grey told me to bring an updated letter of qualifications to my interview. This I could not do because I was denied an interview. Also, the position in question was awarded to a non- university employee. I feel I should have had an interview.
>
> Relief sought: That I be awarded the position of paygrade 9, Shipping and Receiving Asst.

The grievance was denied at level one, and a level two hearing was held on March 19, 2001. Grievance Evaluator Stephen W. Hensley recommended the grievance be denied by decision dated March 20, 2001, and that recommendation was accepted by F. Layton Cottrill, Jr., designated representative for the President of Marshall by letter dated March 21, 2001. Grievant appealed to level four on April 11, 2001, and a hearing was held in the Grievance Board's Charleston, West Virginia office on June 19, 2001. This matter became mature for decision on July 19, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Lt. Terrence Olson, and Marshall was represented by Beth Ann Rauer, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

LII Grievant's Exhibits

Ex. 1 -

October 6, 2000, January 19, 2001, February 23, 2001 Marshall University Recruiting Bulletins.

Ex. 2 -

March 5, 2001 memorandum from Stephanie L. Gray.

Ex. 3 -

January 30, 2001 letter from Charles W. Hanshaw to Carol Skaggs.

Ex. 4 -

March 19, 2001 chronological outline of grievance prepared by Lt. Terrence Olson.

LII Marshall Exhibits

None.

LIV Grievant's Exhibits

Ex. 1 -

Marshall Policies and Procedures Manual 6.100, Application for Employment, effective June 1, 2000. (See footnote 3)

Ex. 2 -

Marshall Employee Handbook, Transfers and Promotions.

Ex. 3 -

January 19, 2001 Marshall University Recruiting Bulletin.

Ex. 4 -

February 7, 2001 memorandum from Charles Newson to Carol Skaggs.

Ex. 5 -

February 7, 2001 memorandum from Stephanie L. Gray to Carol Skaggs.

Ex. 6 -

Human Resources Candidate Disposition Form, dated February 15, 2001.

Ex. 7 -

Application for Employment of Tommy Lee Burchell, dated January 24, 2001.

Ex. 8 -

Application for Employment of Gregory Lee Harmon, dated July 11, 2000.

Ex. 9 -

Application for Employment of Casey Dennis Allen, dated August 23, 1998.

LIV Marshall Exhibits

Ex. 1 -

Application Card of Joseph Turley, dated January 23, 2001.

Ex. 2 -

March 20, 2001 LII decision from Stephen W. Hensley to Dr. Dan Angel.

Ex. 3 -

Application for Employment of Joseph Turley, dated April 20, 1999.

Ex. 4 -

Blank Application for Employment.

Ex. 5 -

Matrix prepared for candidates for Shipping/Receiving Assistant.

Ex. 6 -

W. Va. Code § 18B-7-1. Seniority for full-time classified personnel; seniority to be observed in reducing work force; preferred recall list; renewal of listing; notice of vacancies.

Ex. 7 -

Interview questionnaire.

Ex. 8 -

February 14, 2001 memorandum from Carol A. Skaggs, Charles Newson, and David Arigan.

Ex. 9 -

November 28, 2000 memorandum from Charles Newson to David Harris.

Ex. 10 -

July 3, 2000 memorandum from John F. Thralls: Chancellor's Interpretive Memorandum No. 3 SB 653.

Testimony

Grievant testified in his own behalf, and presented the testimony of Stephanie Gray, Carol Skaggs, Charles Newson, David Shaffer, Dennis Casey, Tim Sowards, Jr., and Greg Harmon. Marshall presented the testimony of Stephanie Gray, and David Harris.

PRELIMINARY ISSUE

Marshall has moved to dismiss this grievance on the basis of untimeliness, and in the alternative argues that it followed all applicable statutes, policies and procedures in choosing the successful candidate for the subject position.

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29- 122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380

(Mar. 18, 1997). Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

FINDINGS OF FACT

The following facts relating to Marshall's untimeliness argument have been established by a preponderance of the evidence.

1. Grievant is currently employed by Marshall as a Building Service Worker and has been employed in that position since 1985.

2. In January 2001, Grievant applied for the posted position of Shipping and Receiving Assistant.

3. Grievant did not receive an interview for the position.

4 . The Shipping and Receiving Assistant position was eventually awarded to Greg Harmon.

5 Grievant filed his grievance over his non-selection on March 1, 2001. The level two hearing was held on March 19, 2001, and a decision adopting the level two grievance evaluator's recommendation to deny the grievance was issued on March 21, 2001, by F. Layton Cottrill, Jr., designated representative for the President of Marshall. Mr. Cottrill's letter advised Grievant that, “[s]hould you desire, this decision may be appealed by following the guidelines set forth in the West Virginia Code.”

6 . On March 29, 2001, Grievant went to the Human Resources office to amend his grievance form, and was advised by David Harris, Assistant Director of Human Resources, that he could not amend the grievance. 7 . While in the office that day, Mr. Harris asked Grievant whether he had filed a level four appeal. Grievant replied he thought it was Marshall's responsibility, and Mr. Harris told him it was the grievant's responsibility to contact the Grievance Board and file an appeal. March 29, 2001 was the last day for timely filing an appeal to level four.

8 . Grievant did not file his appeal to level four until April 11, 2001, even after being advised by Mr. Harris that he was responsible for filing the appeal. LIV Marshall Ex. 2.

DISCUSSION

By Grievant's own admission, he did not timely file the level four appeal in this grievance. The appeal to either level three or level four must be filed within five working (5) days of receiving the level two decision. See W. Va. Code § 18-29-4. Grievant testified he was advised by Mr. Harris on March 29, 2001 (the last day for an appeal to be filed), that he was responsible for notifying the Grievance Board of his intention to appeal. Grievant signed on his grievance form that he appealed to level four on March 29, 2001. However, the evidence demonstrates that Grievant faxed in his appeal to level four on April 11, 2001, and his grievance was docketed in to the Grievance Board's docket on that day. Clearly, April 11, 2001, was well outside the five-day time limitation prescribed by statute.

Grievant's only stated reason for the delay in filing his level four appeal was that he was confused about the grievance procedure. While Mr. Cottrill's level two letter did not specifically tell Grievant where or with whom to file his appeal, it clearly informs Grievant that, “should [he] desire, this decision may be appealed by following the guidelines set forth in the West Virginia Code.” Even though the letter makes it clear it is Grievant'sresponsibility for taking the appeal forward, had Grievant's delay been only a matter of days, the undersigned would have been inclined to show some leniency. However, even after talking to Mr. Harris on March 29, 2001, and being told that he was responsible for filing his appeal with the Grievance Board, Grievant waited until April 11, 2001, to file his appeal. Grievant's confusion over the grievance process does not excuse such a long delay in filing his appeal, especially after being told by Mr. Harris that he needed to send in his appeal paperwork. Grievant clearly had all the documentation he needed when he signed his grievance form on March 29, 2001, and has offered no explanation why he delayed until April 11, 2001, to actually file the appeal. Therefore, Marshall's Motion to Dismiss is Granted.

CONCLUSIONS OF LAW

1. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96- 29-122 (July 31, 1996); Hale v. Mingo

County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket NO. 96-20-380 (Mar. 18, 1997).

2. Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445(July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

3. W. Va. Code § 18-29-4(d) provides that "[i]f the grievant is not satisfied with the action taken by the chief administrator or, if appealed to level three, the action taken by the governing board, within five days of the written decision the grievant may request, in writing, on a form provided by the employer, that the grievance be submitted to a hearing examiner. . .".

4. The level two decision was issued on March 21, 2001, and did not file his appeal to level four until April 11, 2001. Grievant has failed to provide an adequate excuse for his failure to timely file his appeal to level four.

Accordingly, this grievance is **DISMISSED.**

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

MARY JO SWARTZ

Administrative Law Judge

Dated: August 28, 2001

Footnote: 1

At the time the grievance was filed, the grievance procedure for higher education employees was governed by the education employees' grievance procedure contained in W. Va. Code §§ 18-29-1, et seq. Higher education employees are required to follow the grievance procedure for state employees set out in W. Va. Code §§ 29-6A-1, et seq. for grievances filed after July 1, 2001. See W. Va. Code § 18B-2A-4 (2001).

Footnote: 2

This grievance was filed in March 2001, at which time state institutions of higher education were governed by the West Virginia Higher Education Policy Commission ("HEPC") and the West Virginia Higher Education Interim Governing Board ("IGB"). W. Va. Code §§ 18B-1-2 (2000); 18B-1B-1 (2000); 18B-1C-2 (2000). On July 1, 2001, the IGB ceased to exist and was replaced by a Board of Governors at each institution. W. Va. Code §§ 18B-1-2; 18B-2A-1 (2001); 18B-2A-4 (2001).

Footnote: 3

Although state institutions of higher learning ceased to be governed by the University Systems of West Virginia Board of Trustees ("BOT") and the Board of Directors of the State College System ("BOD"), on July 21, 2000, the HEPC adopted a resolution retaining the BOT and BOD rules previously in effect and contained in Titles 128 and 131 of the Code of State Rules. See Chancellor's Interpretative Memorandum No. 6 (July 26, 2000). The Legislature also specifically provided that any orders, resolutions, policies or rules adopted by the BOT, the BOD, or the IGB and in effect on July 1, 2001, would be transferred to the HEPC and continue in effect until rescinded, revised, altered, amended or transferred to the institutional governing boards. W. Va. Code § 18B-1-3(h)(2001).