JOSEPH BRUMFIELD,

Grievant,

v. **DOCKET NO. 02-HEPC-180**

HIGHER EDUCATION POLICY COMMISSION/

MARSHALL UNIVERSITY,

Respondent.

DECISION

In a grievance filed April 5, 2002, Joseph Brumfield stated: “Marshall has violated Federal, State, EEO and Affirmative Action guidelines by not posting vacant positions. This is blatantly discriminatory. They have also violated state code 18B-7-1 & 18B-7-1(d) & 18-29-4(c) and the M.U. employee handbook pgs. 64 & 65.” As relief, he seeks “promotion to the pg-8 Campus Service Worker 2, (Grounds Crew).”

Having been denied at the lower levels, a Level IV hearing was held at the Grievance Board's Charleston office on September 10, 2002. Grievant appeared with his representative, Lt. Terry Olson, and Respondent was represented by counsel, Jendonnae Houdyschell, Esq., Assistant Attorney General. The parties agreed to submit their proposed findings of fact and conclusions of law by October 11, 2002, whereupon the matter became mature for decision. (See footnote 1)

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. In December, 2001, Respondent Marshall University's (MU) Human Resource Services posted a job vacancy labeled, “Search No. 10591. Campus Service Worker II, Physical Plant.” The position was full-time, classified non-exempt, pay grade 8. Nothing in the text of the posting indicates the applicants will be considered for more than one position.

2. Grievant, a 10-year employee of MU, did not see this posting and did not apply.

3. There were two internal candidates (MU employees) who did apply, as well as five external candidates. Both internal candidates were found to be qualified after interviews. One of the internal applicants declined the position. Pursuant to MU policy, the position was awarded to the remaining internal candidate on January 30, 2002.

4. On or about February 6, 2002, there was a second opening for a similar job. This second job was not posted. Respondent, following a practice it has used for six and a half years, instead interviewed the remaining applicants for the first job opening, all of whom were external. The position was awarded to Regina Hamlin.

5. Grievant saw Ms. Hamlin on the job and recognized she was a new employee, and made inquiries as to which job she filled. He filed this grievance when he learned her position had not been posted.

6. Grievant met the minimum qualifications for the second position.

DISCUSSION

In a non-disciplinary grievance such as this, Grievant must prove his allegations by a preponderance of the evidence. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). Grievant argues that while MU's employee handbook states “it is the employee's responsibility to apply for vacant positions when they are advertised,” Respondent denied him the opportunity to do so when it did not post the second position. Respondent argues it followed a well-established practice of using an existing pool of applicants when a similar job becomes open within a short time of a prior posting. In support of his position, Grievant submitted in evidence two pages of MU's Affirmative Action Plan. In an almost identical prior grievance, Grievant's representative made the same argument with the same evidence. As in that case, Respondent here made the same argument that it followed a practical unwritten policy it has used to good effect for several years. In that decision, the Administrative Law Judge stated:

> In support of his argument that the vacancy had to be posted Grievant presented two pages from Marshall's Affirmative Action Plan, pages iv and 146. Page 146 has a number of points listed. The one which is applicable here begins:
>
> > - - Announce, post, advertise all employment, promotion and transfer opportunities, including acting, interim, temporary, part-time appointments.

> This point obviously cannot stand alone. Something on one of the preceding pages explains what this point is in reference to. This point standing alone does not support Grievant's contention that Marshall acted in violation of policy here in not posting a second time.

Holley v. Higher Educ. Policy Comm'n/Marshall Univ., Docket No. 02-HEPC-128 (Aug. 30, 2002). This evidence is no more enlightening now than it was in Holley, and still does not establish a violation of a policy applicable to Grievant's employment. Given that the cover page of the policy bears the title, "MARSHALL UNIVERSITY 1993-1998 AFFIRMATIVEACTION PLAN," the undersigned has some doubt as to whether the quoted section is even still in effect. Level III Exhibit No. 2.

Respondent's employee handbook, in regard to transfers and promotions, states in part, "It is the policy of Marshall University to promote from within whenever possible. To implement this policy, internal candidates who meet the minimum qualifications are guaranteed an interview." Level III Exhibit No. 4. (See footnote 2) This, however, is a brief summary of a broader policy. (See footnote 3) Although the entire handbook was not submitted in evidence, the undersigned, in the interest of completeness and accuracy, takes judicial notice that the preface to the employee handbook states that the handbook "is **NOT** an employment contract or a promise of specific treatment. It is a reference to inform and assist with general policies." [Emphasis in original.]

This statement of policy describes the requirements of one of the Code sections Grievant alleges a violation of:

> A nonexempt classified employee . . . who meets the minimum qualifications for a nonexempt job opening at the institution where the employee is currently employed, whether the job is a lateral transfer or a promotion, and applies for the job shall be transferred or promoted before a new person is hired unless the hiring is affected by mandates in affirmative action plans or the requirements of Public Law 101-336, the Americans With Disabilities Act [42 U.S.C. §§ 12101 *et seq*.]. If more than one qualified, nonexemptclassified employee applies, the best-qualified nonexempt classified employee shall be awarded the position. In instances where the 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. . . .

W. Va. Code § 18B-7-1(d). Under this section, a qualified employee *who applies for the job* is entitled to hiring preference over an external candidate, but not over a better qualified or equally-qualified but more senior employee who also applies.

Respondent's practice of using an existing pool of candidates without posting the new position not only conflicts with the policy statements contained in the handbook, its vague and amorphous terms conflict with a basic obligation of Respondent to have a policy on job posting. “Each institution shall develop a policy for posting of classified positions both internally and externally in order to provide employees adequate time to make application for positions. Institutions shall develop such policy within 90-days of the effective date of this rule.” 133 C.S.R. 39 § 8.1 Respondent, having no policy where it is by law required to have a policy, may not rely on a practice that conflicts with the requirements of the Code and its own statements of policy that internal candidates must be given preference in hiring. By failing to give internal candidates a chance to apply for a particular posting, Respondent denies those employees their right to preferential treatment in hiring (See footnote 4) .

However, even if Grievant had been in the applicant pool for the second job, his contention that he would have been awarded the position is mere conjecture, as he wouldalso have to prove no other employee would have applied under a second posting, or that he would have been the most qualified employee, or most senior of equally-qualified employees to apply. Had the second job been posted and had Grievant applied and been the only internal candidate, he would have been hired instead of Ms. Hamlin. Had there been other internal candidates for the second posting, Grievant would only have been awarded the position if he had been the most qualified internal candidate. Grievant seeks to be placed in the position, but such speculation does not justify instating grievant without giving other employees the same missed opportunity he seeks.

The second Code section Grievant cites in his Statement of Grievance is W. Va. Code § 18-29-4(c). That section describes Level III of the Grievance Procedure, (See footnote 5) but grievant made no specific allegations as to how this Section had been violated, and the undersigned can conceive of no possible way it could have been violated prior to the grievance having been filed at Level I. There is no evidence that Grievant had filed any other grievance on this issue. Grievant likewise provided no enlightenment as to how any equal employment opportunity (EEO) guidelines had been violated.

The Statement of Grievance also charges Respondent's failure to post the second job was “blatantly discriminatory.” “W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.A grievant alleging discrimination must establish a prima facie case by

> demonstrating:
>
> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his 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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989)." Holley*, supra.* Grievant presented no evidence to prove any of the elements of a *prima facie* discrimination claim, and so failed to sustain his burden of proof.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving his allegations by a preponderance of the evidence. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. The Marshall University Classified Employee Handbook is not an employment contract or a promise of specific treatment, but may be relied on to accurately explain its policies.

3. Under W. Va. Code § 18B-7-1(d), a qualified employee *who applies for the job* is entitled to hiring preference over an external candidate, but not over a better qualified or equally-qualified but more senior employee who also applies. 4. Respondent must develop a policy for posting of classified positions both internally and externally in order to provide employees adequate time to make application for positions. *See* 133 C.S.R. 39 § 8.1 .

5. Respondent may not rely on an unwritten practice that denies employees their right to preferential consideration, especially when it is required to have a written policy on the posting of positions.

6. "W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

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

(b) that he has, to his detriment, been treated by his 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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989)." Holley v. Higher Education Policy Comm'n/Marshall University, Docket No. 02-HEPC-128 (Aug. 30, 2002).

7. Grievant did not establish a *prima facie* discrimination claim. For the foregoing reasons, this grievance is hereby **GRANTED IN PART.** Respondent is ordered to develop a policy on posting of positions and to repost the Campus Service Worker II position sought by Grievant. The grievance is **DENIED** as to Grievant's request to be promoted to Campus Service Worker II.

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 § 29-6A-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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: October 22, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant did not submit a brief.

Footnote: 2

A later version of the handbook containing a slightly reworded version of this statement was issued in March, 2002, after the events with which this grievance is concerned.

Footnote: 3

Grievant cites two Grievance Board Decisions that found MU violated its own policies by not posting vacancies. However, those cases, Weece v. Bd. of Trustees, Univ. of W. Va./ Marshall Univ., Docket No. 91-BOT-503 (Oct. 30, 1992) and Standifur & Weece v. Univ. of W. Va./ Marshall Univ., Docket No. 92-BOT-017 (Oct. 30. 1992), were decided under a "Position Reassignment Policy" and a particular set of facts inapposite to the current case as well as a different "Classified Employees' Handbook" developed for the disbanded W. Va. Board of Regents.

Footnote: 4

As there appears to be no requirement that every position be posted, a written enforceable policy that provides for posting applicant pools to be used for like positions that become open within a given time period would likely be permissible.

Footnote: 5

As of July 1, 2001, the grievance procedure contained in Chapter 18, Article 29 is no longer applicable to employees of MU. Instead, the procedure for state employees, W. Va. Code § 29-6A-1 et seq. should be used. The analog to the section cited by Grievant is § 29-6A-4(c).