JOE BRUMFIELD,

Grievant,

v. DOCKET NO. 03-HEPC-140

HIGHER EDUCATION POLICY COMMISSION/

MARSHALL UNIVERSITY,

Respondent.

DECISION

This grievance was filed by Grievant, Joe Brumfield, against his employer, Respondent, Higher Education Policy Commission/Marshall University ("Marshall"). The statement of grievance reads:

> Policies of the Higher Education Commission (BOT); EEO guidelines and the Marshall University Employee Handbook. I feel that I was not given an equal opportunity to receive a position that another employee received because I was not given any instruction in operation of a golf cart that has been treated as on-the-job training before. I also feel that the numerous questions by one of the interviewers on my “attitude” and getting along with supervisors proves that they were “prepped” on what questions to ask and how to ask them as a way to irritate me and possibly try to make me lose my temper in the interview. I was also asked to operate a large Gravely tractor/mower that I was not asked about in the last interview for the same position. This is an entry level position. It would be expected to have a certain amount of on-the- job training. No one would know everything about all of the various types of equipment, keys, policies and procedures and ordinary routine of working in the grounds dept at Marshall University.
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> This same large Gravely tractor/mower is routinely operated by intermediate level employees - not entry level employees. The “low man on the pole” at Physical Plant in the Grounds Dept typically starts off on trash pick-up, weed- eating, trimming, operating small lawn mowers, operating small Gravely tractor/mowers and emptying garbage cans around campus. This type of interview process was not typical and gave the successful candidate an unfair edge in the time that he had worked in the grounds dept before.
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> The position he received was posted, but he was left in this same position and was still on the payroll using sick leave because of a tragic car accident which broke both of his ankles. Is this a re-posting? It seems as if it was already decided that he would retain this position. Can an employee both currently occupy and interview for the same

> job title with the same position number? How can this be a “fair” process? What would happen if the current employee had not gotten the position a second time? Would he be fired? Would he be off the payroll? How could the interviewers, knowing that the incumbent was on sick leave and might lose his job if they didn't say that he was the most qualified employee, make a fair decision? If this was a fair interview process, why didn't more employees bid on the job? It would have been a 20% raise for any Building Service Worker. The main reason that no one else applied was that they KNEW that the position would go to the incumbent. Human Resources stated in the job posting that it was to satisfy a grievance. This made sure that most other employees would not apply for the job. If the decision is pre-ordained then the process is tainted. By definition it could only have one outcome. To be unfair to me.

As relief, Grievant sought “an overturning of Marshall's decision on the position. I would like Marshall to award me the position of Campus Service Worker II that was unfairly given to Mr. Ronnie Hoover. I would also like a list of the interview committee, as I may need to call them as witnesses in my grievance.” (See footnote 1)

It is useful to understand the events which led to this grievance. On April 5, 2002, Grievant filed a grievance when Marshall did not post a Campus Service Worker II vacancy in the Roads and Grounds Department. Marshall had filled that vacancy in accordance with its usual practice, utilizing the pool of applicants from the previous posting for a Campus Service Worker II vacancy. The position which Grievant alleged should have been posted was filled by Regina Hamlin. The grievance advanced to Level IV of thegrievance procedure, where the Administrative Law Judge found, in a decision issued on October 22, 2002, that Marshall could not rely on the unwritten practice of utilizing a pool of applicants from a prior posting. Brumfield v. Higher Educ. Policy Comm'n, Docket No. 02-HEPC-180. However, Grievant was not awarded the position, as he could not demonstrate that, had the position been posted, there would not have been other applicants more qualified than he. Marshall was ordered to post “the Campus Service Worker II position sought by Grievant.”

It is clear from the decision that the position to be posted was the one for which Ms. Hamlin had been selected. However, Ms. Hamlin had already vacated this position by the time the Level IV decision was issued, and the vacancy had already been posted. Grievant had applied for the position, as did two other Marshall employees. Cecilia Scarberry was selected to fill the position. Grievant filed a grievance, which he advanced to Level IV, challenging the selection of Ms. Scarberry. That grievance was denied at Level IV as untimely filed. Brumfield v. Higher Educ. Policy Comm'n, Docket No. 02-HEPC-339 (Jan. 3, 2003).

Marshall then decided that, since Ms. Hamlin's position had already been posted, the only way to

satisfy the requirement of the October 22, 2002 order to post Ms. Hamlin's position was to post another Campus Service Worker II position which had been filled April 1, 2002, from the applicant pool and had not been posted. That position had been filled by Ronnie Hoover, who was not employed by Marshall at the time. Grievant and Mr. Hoover were the only applicants when the position was posted, and the position was awarded to Mr. Hoover.

The following findings of fact are made based upon the evidence presented at the Level III and IV hearings.

Findings of Fact

1. Grievant has been employed at Marshall for 10 years, and is a Campus Service Worker, pay grade 7.

2. On February 7, 2003, Marshall posted a Campus Service Worker II position. The position was not posted because it was vacant. It was posted because Marshall had been ordered in a Level IV decision dated October 22, 2002, to post a particular Campus Service Worker II position, which had been filled by Marshall from an existing pool of applicants. By the time the Level IV decision was issued, however, the position at issue had become vacant, it had been posted, Grievant had applied, was not selected, and had filed another grievance. Marshall posted the position at issue here in an effort to comply with the order to post, as this position had also been filled from an existing pool of applicants in April 2002, and was not posted at that time.

3. Grievant was not considered for the position in April 2002, and did not grieve the failure of Marshall to post the position.

4. The position posted in February 2003, was held by Ronnie Hoover. He had been selected for the position from the existing pool of applicants in April 2002, and had been in the position since that time.

5. Mr. Hoover and Grievant were the only applicants for the position posted in February 2003.

6. Mr. Hoover was employed by Marshall for 11 years, working in the Roads and Grounds Department. He resigned his employment sometime in the 1980's to accept other employment. He was re-employed by Marshall in April 2002, in the Roads and Grounds Department.

7. David Harris, Director of Equity Programs and Associate Director of Human Resource Services, chose four people to serve on the interview panel, Charles Young, supervisor of the Roads and Grounds Department, Carol Skaggs, Receiving supervisor,Maurice Cooley, and a Mr. Holbrook.

Other than Mr. Young, the panel members did not know Grievant or Mr. Hoover.

8. Mr. Young wrote the questions and correct answers to be used in the interview, but he did not ask any of the questions. The questions were designed to determine whether the applicants were knowledgeable of grounds keeping. (See footnote 2) Mr. Hoover answered all the questions correctly. Grievant did not know the answers to several of the questions, and did not attempt to answer them.

9. Mr. Young then tested the applicants on four pieces of equipment used by the Roads and Grounds Department, a club car, push mower, walk behind Gravely with multiple attachments, and a Gravely ProMaster. When testing applicants on equipment, Mr. Young does not always use the same equipment, and he does not instruct applicants on how to operate the equipment. Grievant had previously tested on some of this equipment. Mr. Hoover was able to operate all four pieces of equipment properly. Grievant was not able to operate all four pieces of equipment properly.

10. The Campus Service Worker II position is not treated by Mr. Young as an entry-level position. The employees under his supervision are expected to be able to operate all the equipment used by the Roads and Grounds Department, and all his employees do so.

11. The qualifications for the position are a high school diploma or GED, and six months of related experience.

12. Grievant told the interview panel that his prior experience in grounds keeping consisted of helping out in grounds during the year he was employed at Mildred Mitchell-Bateman Hospital in Huntington on an as needed basis, which amounted to about 20% of his time over a 12 month period. This would not have given Grievant the required six months of experience, and he was not qualified for the posted position.

13. The interview panel recommended Mr. Hoover for the position, and Mr. Hoover retained the position.

14. Mr. Hoover was off work from August 26, 2002, until March 10, 2003. He was released by his doctor to return to work with no restrictions.

15. Mr. Harris did not participate in the selection of Mr. Hoover for the position, nor did he tell the interview panel anything about the applicants or what to ask them.

Discussion

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). Grievant did not attempt to demonstrate that he was in any way qualified for the position, other than to present evidence that he had done some grounds work when he worked for Mildred Mitchell-Bateman Hospital. Rather, Grievant argued that the process was not fair to him for several reasons, and he was discriminated against. He argued it was unfair for him to have to compete against Mr. Hoover, who was already in the position, and that Marshall had posted the wrong position. Marshall argued Grievant was provided the same interview opportunities as the other applicant. Although Marshall's representative insisted at the Level III hearing that the correct position had been posted, Marshall finally acknowledged that the Level IV decision of October 22, 2002, had required the position held by Ms. Hamlin to be posted, and argued that since that position had already been posted, Mr. Hoover's position was posted in a good faith effort to comply with the order to post since his position had also been filled from the applicant pool.

Grievant is correct that Marshall posted the wrong position. The position Marshall was ordered to post was the position Regina Hamlin had held. The decision requiring theposting of Ms. Hamlin's position did not require Marshall to post all positions which had been filled in the past from a pool of applicants, nor did it indicate that the ruling was retroactive. No grievance was filed complaining of Mr. Hoover's placement in his position. Although Marshall was attempting to comply with the order to post, there was no reason for Marshall to post Mr. Hoover's position at all, and it was improper for Marshall to do so unless it was going to post all positions filled from an applicant pool from the time the grievance was filed, which there is no indication that it did. If anyone was treated unfairly here, it was Mr. Hoover. The undersigned concludes that it was improper for Marshall to post Mr. Hoover's position.

As to Grievant's arguments that it was unfair for him to have to compete against Mr. Hoover, and that there was some policy violation in “re-interviewing” Mr. Hoover, if Ms. Hamlin's position had been posted, the person filling that position certainly could have applied for it, and Grievant would have had to have competed with that person for the position, and that person would likewise have been “re-interviewed.” Grievant did not produce any evidence that there were other positions filled from the applicant pool which should have been posted rather than Mr. Hoover's , and, indeed, that is not what he wants.

Grievant insisted that Marshall should have posted the position which had been filled by Ms.

Hamlin. However, as stated above, by the time the Level IV decision had been issued, Ms. Hamlin had resigned, and that position was then posted. Grievant applied, was not selected, grieved, and the grievance was denied at Level IV. When asked why Ms. Hamlin's position should be posted again, Grievant stated Marshall should have posted it because it was ordered to do so. This would not be reasonable. Marshall had already fulfilled its obligation to post the position, and did not need to post any position to comply with the Level IV ruling. Grievant had the opportunity to compete for that position, and has already utilized the grievance procedure once to contest his non-selection. He is not entitled to a second bite of the apple. As to Grievant's argument that he was discriminated against, 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).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant has not demonstrated he was discriminated against. He and Mr. Hoover were the only applicants for the posted position. He and Mr. Hoover were asked the same questions in the interview, and were tested on the same equipment. Mr. Hoover was able to operate the equipment, and was able to answer the interview questions, while Grievant was not able to answer the questions, nor was he capable of operating the equipment. Mr. Hoover met the qualifications for the

position while Grievant did not. Grievant asserted that he should have received some instruction on operation of the equipment, however, Mr. Young testified he does not provide instruction to applicants who are being tested. To do so would have been to treat Grievant more favorably than other applicants are treated. While Grievant asserted that he should not have been tested on some of the equipment because employees are taught how to operate the equipment as part of their on-the-jobtraining, no evidence of this was placed into the record. Grievant also asserted that Mr. Harris had played some role in his failure to obtain the position. The record does not reflect this to be true. Regardless of Mr. Harris' opinion of Grievant, he played no role in the selection, and that is what this grievance is about.

Were it appropriate to post Mr. Hoover's position, under the facts of this case, W. Va. Code §18B-7-1(d) required Marshall to hire the best qualified employee applicant to fill the posted position of Roads and Grounds Worker. If the applicants were equally qualified, Marshall was required to hire the most senior of the equally qualified employee applicants. Grievant was not as qualified as Mr. Hoover.

Finally, Grievant asserted that Mr. Hoover was not physically able to perform the job, and sought to question Mr. Hoover regarding the details of his medical condition. The record reflects that Mr. Hoover was released by his doctor to return to work, with no restrictions, and Mr. Hoover did, in fact, return to work. Certainly Mr. Hoover's doctor is better qualified to make such a determination than either Grievant or the undersigned.

As Grievant points out, he has been trying to get a Campus Service Worker II position for quite some time, and it is clear that he is frustrated that he has not been found to be qualified for the position. Perhaps if Grievant made some effort to educate himself in lawn care, gardening, equipment operation, and any other relevant areas, so that he could answer the interview questions and safely operate the equipment, it would improve his chances for advancement.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In order to prevail, a grievant must prove the allegations in his complaint 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 Level IV decision issued October 22, 2002, in Brumfield v. Higher Education

Policy Commission, Docket No. 02-HEPC-180, ordered Marshall to post "the Campus Service Worker position sought by Grievant." The position Marshall was to post was the position which had been held by Regina Hamlin.

3. As Ms. Hamlin had already resigned her position and that position had been posted by the time the Level IV decision referred to in Conclusion of Law Number 2 was issued, Marshall was not required to post the position again.

4. It was improper for Marshall to post the position being filled by Ronnie Hoover.

5. 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).

6. Grievant has not demonstrated he has been discriminated against.

Accordingly, this grievance is **DENIED**.

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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 26, 2003

Footnote: 1

The grievance was filed on or about April 4, 2003, and was denied at Level I on April 10, 2003. Grievant appealed to Level II on April 16, 2003, and a decision denying the grievance at Level II was issued on April 22, 2003. Grievant appealed to Level III, where a hearing was held on May 3, 2003. A Level III decision denying the grievance was issued on May 5, 2003. Appeal was made to Level IV on May 14, 2003. A Level IV hearing was held on July 7, 2003. Grievant was represented by Thomas Bergquist, and Respondent was represented by Jendonnae L. Houdyschell, Esquire. This case became mature for decision upon receipt of Respondent's reply brief on August 11, 2003.

Footnote: 2

Although Grievant made assertions in his statement of grievance that one of the interviewers asked numerous questions on his attitude and getting along with supervisors, which he felt demonstrated that the panel members were prepped on how to irritate him, no supportive evidence was introduced. Mr. Young testified the questions were designed to determine whether the applicants were knowledgeable of grounds keeping, and he did not discuss the applicants with the panel members.