WANDA J. KIRCHNER, .

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Grievant, .

.

v. . Docket No. 94-DOE-569

.

WEST VIRGINIA DEPARTMENT OF .

EDUCATION, .

.

Respondent. .

D E C I S I O N

Wanda J. Kirchner (Grievant) grieves her termination as Distance Learning Coordinator in the Office of Technology of the West Virginia Department of Education (DOE). Grievant contends that the employer's decision to eliminate her position and deny her the opportunity to transfer to another position resulted from unlawful religious discrimination. This grievance was initiated on August 25, 1994. After the grievance was denied at Levels I and II, the parties agreed to waive Level III because the Level II decision was rendered by the State Superintendent of Schools, the same individual who would be responsible for issuing a decision at Level III. Accordingly, the matter was advanced to Level IV on September 20, 1994. Following a series of continuances, each granted for good cause, extensive evidentiary hearings were conducted in this Board's office in Charleston on February 24 andMarch 17, 1995. As agreed at the conclusion of the hearing, the Respondent submitted a timely post-hearing submission on April 17, 1995. Thereafter, this matter became mature for decision on April 30, 1995, upon expiration of the time limit for Grievant to submit an optional reply brief.

Grievant obtained a Bachelor of Arts degree from Nichols State College in 1969, and completed a Master's program in vocational education at Marshall University in 1985. In addition, Grievant has obtained at least 45 hours of college credit above her master's degree from the West Virginia College

of Graduate Studies. She taught art and physical education in Louisiana's Head Start program for approximately two and one-half years. After moving to the Charleston area, Grievant obtained employment with the Kanawha County Board of Education as Community Education Coordinator. In that capacity, Grievant administered the county's adult education and night school program for three years. Grievant then taught art at Nitro Junior High School for approximately six years. She also taught computer education at the junior high level, authoring the computer literacy book for the county, and lesson plans in computer education for county-wide use.

Thereafter, Grievant spent four years as Kanawha County's "art supervisor," also administering the county's business education program during her last year and one-half in that position. During that time, she was on the "team" which developed the fine arts and business education programs for a new consolidated facility, Capitol High School. In the course of that project, Grievantreceived additional training in telecommunications. Grievant worked at a "troubled" school, Chandler Elementary, for approximately six months before being hired by DOE as Distance Learning Coordinator in January 1991. In that capacity, Grievant's duties were focused upon "distance learning," where geographically separated teachers and students communicate through satellite television or similar technologies. Grievant also worked with school librarians, primarily involving media issues.

Gail Looney, Executive Director of the Governor's Center for Professional Development (CPD) requested that Grievant be loaned to that office to work on a special project. Accordingly, Grievant worked in CPD for six months between April and October 1993. This arrangement had been agreed to by Grievant, as she noted that she had been "having problems" with her immediate supervisor, Brenda Williams, prior to that point in time. While at CPD Grievant worked with various "teach the teacher" programs, administering the program that trains teachers to teach advanced placement courses to high school students.

Prior to her departure for CPD, Grievant became upset with a memo dated March 24, 1993, describing who would be performing her duties during her absence. R Ex 1. The original version, drafted by Ms. Williams, indicated Grievant was leaving DOE and her position would be filled by another individual. Grievant complained to Dr. McClure and Mr. Luff, who corrected this erroneous "impression" through a revised memo.

While at CPD, Grievant had some difficulty working with Dr. Looney. Grievant acknowledged that

Dr. Looney specifically admonished her for talking to a board member. She further described disagreements with Dr. Looney regarding leaving work for a speaking engagement and taking leave for a family commitment.

Upon returning from CPD, Grievant was informed by Ms. Williams that, due to a change in funding, she would be working with the Basic Skills Project. This program places computers in the elementary schools in an effort to promote early computer literacy. In addition, Dr. John McClure became Grievant's immediate supervisor. In any event, Grievant was tasked with compiling the hours that contract personnel worked in the schools. Grievant subsequently learned, and the Respondent confirmed, that Grievant's position was still being funded with federal "Chapter Two" funds, money allocated for specific purposes, not including the Basic Skills Project.

Grievant testified that she began having "problems" with Ms. Williams about two years prior to her September 1994 termination. Grievant stated that she "never could seem to please" Ms. Williams. Eventually, she began writing daily notes to Ms. Williams noting that "[Ms. Williams] kept thinking that I was doing something behind her back."

In January 1992, IBM Corporation presented a program in "transformational leadership." Part of this program involved exploring the personality traits of the participants. Grievant vocally objected to participating in this program as she "felt veryintimidated" and "I didn't feel safe showing myself." She also objected to DOE employees showing "a vendor all of our weak spots and all of our good spots." Grievant further testified that in the course of her conversation objecting to participation in the IBM seminar, she "opened up" to Ms. Williams regarding how she felt about a number of matters.

Sometime after this conversation, Ms. Williams returned from a vacation cruise to learn that Grievant was coordinating a "Mardi Gras Party" for DOE employees. Grievant testified that she was chastised by Ms. Williams for not requesting her permission before agreeing to coordinate this event. Ms. Williams was also upset because the Superintendent of Schools questioned her decision to schedule a meeting the same day as the party. Grievant stated that Ms. Williams was "in tears" because she had been "fussed at" by the Superintendent. It was at this point that Ms. Williams allegedly told Grievant that she had "spent most of her cruise praying for me" and that she "would forgive me." Grievant characterized the cruise as a "religious" cruise sponsored by a gospel music organization.

Grievant described a conversation with Dr. McClure about two months prior to her termination

when Dr. McClure told Grievant that working with her and Ms. Williams was "like fighting the holy wars." When Grievant asked Dr. McClure what he meant by that remark, he reportedly told her that Ms. Williams could not work with Grievant because Grievant "was not a Christian." According to Grievant, Dr. McClure further stated that he reached that conclusion after talking to Ms. Williams. Grievant asked Dr. McClure to "insulate" her from Ms. Williams. However, Grievant believed that she was only reporting to Dr. McClure because she had been placed on a "plan of improvement for six months" following her return from CPD. When that improvement period ended, Ms. Williams again became Grievant's immediate supervisor.

Dr. McClure, Director of DOE's Office of Technology and Information Systems (OTIS), explained that his organization is responsible for internal office automation in DOE, management information systems in the public schools, and application of new technologies in the education process. Distance learning is part of the technology role he oversees. Distance learning technology is an evolving area which requires continuing education to maintain pace with the latest developments.

Brenda Williams has served as Dr. McClure's Assistant Director since 1990. Since Grievant's termination, Ms. Williams has been primarily responsible for distance learning within OTIS. Dr. McClure opined that Ms. Williams presently spends no more than 25 per cent of her time performing the Distance Learning duties previously assigned to Grievant.

Dr. McClure participated in the selection of Grievant as Distance Learning Coordinator. At that time, the position was entitled "Coordinator, Instructional Technology." R Ex 4. When Grievant was hired, federal "Chapter Two" funds were available to cover her salary. Dr. McClure believes those funds have been reduced since Grievant was hired and believes such funding will befurther reduced in the future. Moreover, since Grievant's hiring, Dr. McClure has found that the Distance Learning Coordinator position does not require a full-time employee. This opinion was enhanced during Grievant's six-month loan to CPD.

Dr. McClure recalled having multiple discussions with Grievant regarding various problems she was having while working for Ms. Williams. These conversations began prior to Grievant's loan to CPD. Dr. McClure could not recall telling Grievant that she would not be able to get along with Ms. Williams since Grievant was not a Christian. Indeed, Dr. McClure did not recall any conversations with Grievant where religion was discussed. Instead, Dr. McClure recalled that his discussions with Grievant and Ms. Williams indicated that each of them believed that the other held a personal

animosity toward them. While he acknowledged using the term "holy wars" on occasion, he did not use that term in a religious context.

Grievant testified, in rebuttal, that Dr. McClure brought up the "holy wars" comment in a subsequent conversation. In the course of the second conversation, Dr. McClure indicated that one of Grievant's "friends" had told Dr. Marockie something about the conversation, and he made inquiry to Dr. McClure regarding the incident.

Dr. McClure characterized Ms. Williams as a "demanding" supervisor. He contradicted Grievant's testimony regarding the reason he became Grievant's supervisor when she returned from CPD. Dr. McClure indicated that this was based on a DOE-wide policy determination that Assistant Directors would not be responsible forevaluating professional staff. When that policy was subsequently rescinded, Ms. Williams again became responsible for rating Grievant's performance. See R Ex 10.

Prior to the filing of this grievance, Dr. McClure had no knowledge of Grievant's religious affiliation. In the ten years Dr. McClure has known Ms. Williams, he has heard her discuss "religion" at times, but not to any greater extent than any other employee describing their religious activities. Dr. McClure stated that, to his knowledge, Duane Maxey, another Coordinator working directly for Ms. Williams was a "Christian fundamentalist."

Shortly after Grievant's return from CPD, Grievant was assigned to work with a backlog of paperwork involving a contractor. Dr. McClure acknowledged that this work was tedious but did not believe it could be entrusted to clerical personnel. Although Grievant indicated that she would prefer some other assignment, Dr. McClure credited her with performing the work "diligently" so that the backlog was cleared up. Thereafter, these duties were assumed on a routine basis by other professional staff members, Ms. Smith and Mr. McBride.

Dr. McClure testified that Mr. Luff initially suggested to him that Grievant's position be eliminated. DOE needed a staff member to take responsibility for overseeing the Bell Atlantic-sponsored World School Project. (See footnote 1) Bell Atlantic suggested that DOE providean in-house staff member to oversee this program, taking over work that was essentially being "donated" by their personnel. Dr. McClure estimated the value of Bell Atlantic's offer at $10 million. Bell Atlantic's proposal did not include funding for additional DOE personnel and DOE's budget would not permit hiring another Coordinator in OTIS. Therefore, Dr. McClure concluded that Grievant's position could be eliminated. He further estimated that it would take a minimum of six months and up to one year for Grievant to

obtain the necessary training to perform the required duties of the new position.

Dr. McClure and Mr. Luff concluded that the need for someone to work with the World School Project was too immediate to allow Grievant to be retrained. Accordingly, a new position of Telecommunications/Telecomputing Specialist was eventually established and posted. R Ex 3. Grievant was notified of her termination for lack of need in a letter from State Superintendent Henry Marockie dated August 10, 1994. R Ex 5. Grievant's termination became effective on September 9, 1994, while the application period for the newly-created position closed on September 12, 1994. R Exs 3 & 5. DOE received approximately 15 applications for the new position and Phyllis Justice, then employed by the Cabell County Board of Education, was selected to fill the vacancy. Ms. Williams was one member of a three-person committee who interviewed the applicants and recommended hiring Ms. Justice. Grievant did not apply for the position.

William Luff, Associate State Superintendent of Schools, testified that he solicited recommendations from both Ms. Williams and Dr. McClure regarding the best way to provide support to the Bell Atlantic World School Project. Because there were no additional funds readily available to support an additional position, Mr. Luff decided that Grievant's position could be eliminated, based largely on the fact that her work had been accomplished by others during her six-month absence at CPD.

Mr. Luff explained that the new Telecommunications/Tele-computing Specialist was expected to develop a statewide training program for the World School Project, but not to personally conduct the training. He agreed that time did not permit retraining Grievant so that she could perform the duties relating to the World School Project. Bell Atlantic never conditioned their contribution on DOE creating or eliminating any particular position. Elimination of Grievant's position and establishment of the new position ultimately filled by Ms. Justice was simply their best solution for meeting DOE's requirement to support and coordinate the World School Project.

Grievant testified that a co-worker, Pamela Smith, told her that Ms. Williams thought Grievant was "the devil incarnate." However, Ms. Williams never spoke directly to Grievant about not being a Christian. Grievant never told anyone she was not a Christian, but did mention to some co-workers about going to "psychics," and she had an imitation "voodoo doll" decorating her office.

Grievant's co-worker, Pamela Smith, was called as a witness by DOE. Ms. Smith is employed by DOE as a Courseware Coordinator for the Basic Skills Project. She characterized her immediate

supervisor, Brenda Williams, as a "very exacting person." Ms. Williams likes to know what is going on, and she does not hesitate to let people know when employees are not meeting her expectations. However, she corrects or criticizes positively, instructing employees in the way she wants things done.

Ms. Smith considers Grievant to be a "friend." She recalled various conversations with Grievant wherein Grievant indicated that she was "unhappy" in regard to her working relationship with Ms. Williams. However, she did not remember Grievant's religion arising in the course of any of those conversations. Indeed, she could not recall religion being discussed as a factor in any of the problems Grievant discussed with her.

Ms. Smith acknowledged that religion was discussed in the office on occasion. However, she specifically denied telling Grievant that Ms. Williams considered her to be "the devil incarnate." Ms. Smith stated that Grievant's religious affiliation is Catholic. She was not sure of Ms. Williams' religious affiliation, but believed her to be a Nazarene.

Brenda Williams, Assistant Director of OTIS since 1990, also testified for DOE. Ms. Williams participated in the decision to hire Grievant as a Coordinator. She explained that much of the work involving Distance Learning previously done in DOE is nowaccomplished directly between the schools and the various vendors or providers.

Ms. Williams stated that when Grievant went to CPD, she understood there was a proposal pending to fund a full-time arts position there. Had that position been established, Grievant would have been a strong candidate to fill it. Ms. Williams explained that her reference to "filling" Grievant's position in the memo announcing her departure for CPD (R Ex 1) was based on her expectation that a temporary employee would be hired to fill in for Grievant. At the time she prepared the memo, Ms. Williams thought that funding would be available to hire a temporary, noting that CPD was paying Grievant's salary for six months. However, the temporary position never materialized and Grievant's duties were absorbed by other staff without hiring a temporary.

After first learning of the World School Project in February or March of 1994, Ms. Williams recognized that Bell Atlantic's ambitious time lines for statewide implementation would require a full-time DOE employee to support that initiative. Ms. Williams discussed this requirement on several occasions with Dr. McClure and Mr. Luff. In Ms. Williams' judgment, neither Grievant nor any other employee in OTIS had the technical background to "hit the ground running" and perform the essential

duties of the position immediately upon being hired.

Ultimately, Grievant's position was identified as the most expendable to provide funding for a new Coordinator to handle the World School Project. Ms. Williams remembered that this conclusionwas reached by consensus among herself, Dr. McClure and Mr. Luff. However, Mr. Luff made the final decision to recommend elimination of Grievant's position to the State Board of Education.

Ms. Williams identified her religious affiliation as Baptist. However, she usually attends Nazarene and Methodist services in Dunbar and South Charleston, respectively. She testified that employees might discuss various religious activities at work, but she did not recall discussions relating to religious beliefs or dogma. She recalled discussing the activities available on her "religious" cruise with Grievant but denied telling Grievant that she had been praying for her. She also denied "forgiving" Grievant in a religious context.

Ms. Williams recalled Grievant's participation in the IBM "transformational leadership" seminar as being positive and constructive. She did not remember Grievant having any concerns about participating in the seminar. Although Ms. Williams admitted having difficulties in her dealings with Grievant, she could not identify any cause for their problem, other than the possibility of simple miscommunication.

Approximately one month after successfully completing her improvement period, Grievant was terminated. Grievant noted that another position, the "Basic Skills Field Project," was posted sometime following her termination. Although Grievant opined that she could perform that job, she did not make application for the position and the posting was not introduced into evidence. Ms.Williams testified that additional funding for this position was not requested until January or February of 1995.

DISCUSSION

A Grievant alleging an improper termination as the result of a reduction-in-force action has the burden of proving his or her allegations by a preponderance of the evidence. Finley v. W. Va. Div. of Veterans Affairs, Docket Nos. 91-VA-435/449/455 (Aug. 28, 1992); Asaad v. W. Va. Div. of Health, Docket No. 90-H-358 (Oct. 9, 1991). In the instant matter, Grievant contends that her termination resulted from unlawful religious discrimination. In Vest v. Board of Education, 455 S.E.2d 781 (W. Va. 1995), the West Virginia Supreme Court of Appeals determined that this Grievance Board does not have jurisdiction to determine liability under the West Virginia Human Rights Act, W. Va. Code §§ 5-

11-1 et seq. See Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994); Norton v. W. Va. Northern Community College, Docket No. 89-BOR-503 (Apr. 28, 1993). By implication, this Board likewise does not have jurisdiction to determine liability under Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. See Coddington v. W. Va. Dept. of Health & Human Resources, Docket Nos. 93-HHR-265/266/267 (May 19, 1994). However, as noted in Vest, this Grievance Board's authority to decide allegations of "discrimination" under W. Va. Code § 18-29-2(m) effectively overlaps with claims under the Human Rights Act (and, by implication, Title VII) and may "provide alternative remedies to aggrieved persons." Vest, supra, at 783-84.

"Discrimination" is defined by W. Va. Code § 18-29-2(m) 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." This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), must demonstrate the following:

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

Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (Nov. 22, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Applying this prima facie analysis to the facts presented here, Grievant has demonstrated that she is similarly situated to one or more other employees who are employed by DOE as Coordinators in OTIS and that she was treated differently to her detriment in that her position was eliminated. Moreover, Grievant presented evidence that her religious affiliation is different from other employees

in OTIS whose positions were not eliminated. Thus, Grievant established a prima facie case of discrimination. See Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182, 39 FairEmpl. Prac. Cas. (BNA) 53 (11th Cir. 1985); Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995).

Once a grievant establishes a prima facie case of discrimination under § 18-29-2(m), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Hickman, supra.

DOE established a requirement within the Office of Technology for a Telecommunications/Telecomputing Specialist to provide training and coordination for the Bell Atlantic World School Project which will provide Internet access for most West Virginia schools. See R Exs 3 & 11. Grievant conceded that she was not qualified to fill the newly-created telecommunications position awarded to Phyllis Justice. Grievant argued that DOE could have provided additional training that would allow her to perform the duties of the Telecommunications Coordinator. However, Grievant could not say how much training would have been necessary to qualify her to perform the essential duties of the new position. Although DOE agreed that Grievant could have been trained to perform the duties of the new position, Mr. Luff and Dr. McClure estimated it would take six months to one year of training before Grievant could fully perform the duties of the new position. This estimate was not refuted. Likewise, their determination that time was not available to permit Grievant to be retrained without jeopardizing the World School Project was not effectively challenged.

Grievant agreed with characterizing Ms. Williams as a "demanding boss" who expects "high levels of performance" from her subordinates. Likewise, Grievant acknowledged that Ms. Williams had problems with another employee's performance, even though that person appeared to share Ms. Williams' Christian views.

Clearly, the fact that DOE was able to operate effectively during Grievant's six-month "loan" to CPD, when her duties were shared between Ms. Williams and Dr. McClure, provides support for DOE's claim that Grievant's position was eliminated as the most expendable. Further, Grievant's complaint that, upon returning from CPD, she was assigned non-essential clerical duties, compiling statistical information on the performance of a contractor, tends to confirm DOE's claim that the

distance learning work she had been hired to perform was no longer their highest priority.

In summary, much like a corporation, DOE identified a requirement to restructure its management team to keep pace with changes in its industry. This restructuring required DOE to displace an otherwise satisfactory and competent employee, in order to meet a specific requirement that she could not meet without significant retraining. While different people might have made a different decision, faced with the same facts available to Dr. McClure, Mr. Luff and the State Board of Education, their actions in this matter were not arbitrary and capricious or otherwise in violation of any law, rule or regulation.

Accordingly, DOE has articulated legitimate, nondiscriminatory reasons for its decision to eliminate Grievant's position andcreate a new position which Grievant was not qualified to fill. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). See also Colesante v. W. Va. Bureau of Employment Programs, Docket No. 93-BEP-004 (Apr. 27, 1993); Loomis v. W. Va. Div. of Human Serv., Docket No. 91-DHS-172 (Feb. 27, 1992). Grievant failed to demonstrate that these reasons were merely a pretext to mask motivations that were not job-related. Indeed, except for Dr. McClure's comment regarding "holy wars," which was, at most, generically religious, none of Grievant's anecdotal claims regarding religion-motivated statements were established by a preponderance of the credible evidence. While reasonable persons could differ with Mr. Luff and Dr. McClure on their decision to revise priorities in their areas of responsibility, there is no persuasive evidence that Grievant's religion played a causal role in any of their deliberations. Likewise, despite the fact that Ms. Williams drafted the position description for the new position which supplanted Grievant, there was no credible evidence that the requirements for this job were misrepresented so as to preclude Grievant from qualifying for the newly-created position. Accordingly, assuming for the sake of argument that Ms. Williams' actions were somehow tainted by her religious preferences, the weight of the evidence demonstrates that the same ultimate decision to eliminate Grievant's position would have been inevitably reached by Dr. McClure and Mr. Luff, based upon their determination of priorities within OTIS.

The remainder of this decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant was employed by the West Virginia Department of Education (DOE) as a Coordinator

of Instructional Technology in DOE's Office of Technology and Information Systems (OTIS) in January 1991.

2. Grievant's primary duties involved Distance Learning, whereby students and teachers receive instruction by means of satellite television, or similar technologies.

3. Grievant's immediate supervisor during most of her tenure in DOE was Brenda Williams, OTIS Assistant Director.

4. As early as September 1992, Grievant and Ms. Williams began having difficulties in their working relationship. Both Grievant and Ms. Williams brought their concerns to Dr. John McClure, OTIS Director.

5. At one point, Dr. McClure told Grievant that trying to resolve the differences between her and Ms. Williams was "like fighting the holy wars."

6. Grievant's religious affiliation is Catholic. Ms. Williams' religious affiliation is Baptist. At least one other professional employee in OTIS whose position was not eliminated was characterized as a "Christian fundamentalist."

7. At the request of Dr. Gail Looney, Director of the Governor's Center for Professional Development (CPD), Grievant wasgiven a six-month leave of absence to work on a special project at CPD.

8. While at CPD, Grievant also had some difficulty in her working relationship with Dr. Looney.

9. During Grievant's absence at CPD, her duties in distance learning and other areas were absorbed by Ms. Williams, Dr. McClure, and other professional staff members in OTIS.

10. When Grievant returned from CPD, her duties were revised to assist in the Basic Skills Project, in particular, resolving a backlog of documentation required to monitor a contractor's performance. Due to a policy change, Dr. McClure became Grievant's supervisor for purposes of rendering annual evaluations.

11. Sometime in early 1994 or before, DOE was approached by officials from Bell Atlantic regarding implementation of their initiative to connect all West Virginia schools in their service area to the Internet. This effort, involving up to $10 million of Bell Atlantic support, was designated the "World School Project." See R Ex 11.

12. William Luff, Associate State Superintendent of Schools, determined that a full-time OTIS employee was required to work with Bell Atlantic in implementing the World Schools Project.

13. Without at least six months of additional training, Grievant was not qualified to perform the essential duties of the position created to support the World School Project.

14. DOE did not have sufficient funding available in mid-1994 to create an additional position to support the World School Project.

15. Based upon a consensus recommendation from Ms. Williams and Dr. McClure, Mr. Luff determined that Grievant's position was the most expendable and recommended elimination of her position to the State Board of Education. The Board approved this recommendation on August 12, 1994, and Grievant was terminated for lack of need, effective September 9, 1994. R Ex 6 & 7.

CONCLUSIONS OF LAW

1. In order to prevail, Grievant must prove the allegations in her complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. In order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

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

Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (No. 22, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. Grievant established a prima facie case of discrimination under W. Va. Code § 18-29-2(m) by demonstrating that she was similarly situated to other employees working as Coordinators in DOE's

OTIS, that her position was singled out for elimination, and that Grievant's religious affiliation was different from other employees whose positions were not eliminated. See Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182, 39 Fair Empl. Prac. Cas. (BNA) 53 (11th Cir. 1985).

4. Although Grievant established a prima facie case of discrimination under W. Va. Code § 18-29-2(m), DOE, by demonstrating the need for a new position to coordinate implementation of the Bell Atlantic World School Project, the fiscal limitations then in existence, and that the duties of Grievant's position could most readily be assumed by existing staff members, presented legitimate, non-discriminatory reasons for its actions sufficient to refute Grievant's prima facie case. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). See also, Gibson v. W. Va. Dept. of Health & Human Resources, 452 S.E.2d 463 (W. Va. 1994).

5. Grievant failed to show that the reasons given by the Respondent for its actions were a pretext to mask prohibited discrimination. See Tex. Dept. of Community Affairs v. Burdine,450 U.S. 248 (1981); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). See also Callaghan v. W. Va. Civil Serv. Comm'n, 273 S.E.2d 72 (W. Va. 1980); Smith v. W. Va. Div. of Corrections, Docket No. 94-CORR-624 (Feb. 27, 1995); Miller v. W. Va. Div. of Highways, Docket No. 93-DOH-011 (June 30, 1993), aff'd, Civil Action No. 93-AA-201 (Kanawha County Cir. Ct. Feb. 7, 1994).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred and 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. 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.

LEWIS G. BREWER

Administrative Law Judge

Dated: September 26, 1995

Footnote: 1 The World School Project is projected to provide all K-12 schools in those portions of West Virginia served by Bell Atlantic with direct, high-speed access to the Internet by 1996. See R Ex 11. Mr. Luff testified that 760 of West Virginia's 890 public schools are within the area served by Bell Atlantic.