DEBORAH WELLS, et al.,

Grievants,

v. **Docket No. 94-MBOD-334**

BOARD OF DIRECTORS, WEST VIRGINIA STATE COLLEGE, et al.,

Respondents.

D E C I S I O N

This is a grievance by 16 Librarians (See footnote 1) employed at various institutions by the Board of Directors of the State College System of West Virginia (BOD), contending they should have been granted faculty status and excluded from the reclassification conducted in 1993 under the Job Evaluation Plan for State College and University Systems of West Virginia developed jointly by the Respondent's Job Evaluation Committee (JEC) and William M. Mercer, Inc. (Mercer Plan). Their grievances were initiated in August of 1994 in accordance with specific procedures established in § 18 of the Legislative Rule for Personnel Administration promulgated by the BOD on March 28, 1994. 131 C.S.R. 62. In October 1994, BOD waived these grievances to Level IV. (See footnote 2) In accordance with W. Va. Code § 18-29-5(b), the grievances at issue here were consolidated by Orders of Consolidation dated November 3 and 17, 1994. A Level IV evidentiary hearing was conducted at West Virginia State College in Institute, West Virginia, on August 10 and 11, 1995. At the conclusion of that hearing, the parties agreed to make written post-hearing submissions, and this matter became mature for decision on November 7, 1995.

DISCUSSION

Because this grievance does not involve a disciplinary matter, Grievants have the burden of proving the contentions in their grievance by a preponderance of the evidence. 156 C.S.R. 1 § 4.17 (1996). See W. Va. Code § 18-29-6 ¶ 5; Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug.

8, 1995).

Grievants were assigned to their current job titles and pay grades by the JEC, effective January 1, 1994. The JEC consists of representatives from human resources and classified staff and is responsible for "review of classification decisions across the system." § 11.5, 131 C.S.R. 62 (1994). Grievants timely contested their classifications, alleging that the JEC should have taken their jobs out of the classified system, and placed them in the same status as librarians at West Virginia University and Marshall University, where librarians are part of the faculty. After careful analysis of the evidence presented, it is apparent that this grievance involves two distinct elements. Both elements are included in one grievance submitted to the JEC, seeking to obtain faculty status. The first element involves a claim that Grievants should not be reclassified under the Mercer Plan because they are entitled to faculty status. The JEC responded by explaining that it has no authority to grant the remedy requested. As will hereinafter be discussed, the undersigned administrative law judge is persuaded that the Respondent's position appears to be supported by the laws and regulations governing such matters.

The BOD has promulgated a legislative rule encompassing "Academic Freedom, Professional Responsibility, Promotion and Tenure." 131 C.S.R. 36 (1992). Section 3 of this rule deals with "Appointment of Faculty." Pertinent portions provide as follows:

> 3.1 The faculty at any institution in the State College System shall be those appointees of the institution's president as reported to the board. The faculty are those people so designated by the institution's president and may include, but are not limited to, such professional personnel as librarians and those involved in off-campus academic activities.
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> 3.5 Persons assigned full-time or part-time to administrative or staff duties at any institution may (if qualified) be appointed to, or may retain, one of the foregoing faculty ranks in addition to any administrative or staff title. Such person will be informed in writing at the time of the appointment whether the faculty rank is as a tenured member, probationary member, or temporary member of the faculty. Administrative or staff personnel who are not appointed to a faculty position are not faculty and therefore are not entitled to the protections afforded by this rule.
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> 3.8 The president of an institution shall make all tenured, probationary, and temporary faculty appointments at the institution after consultation with appropriate faculty and other collegiate units, and report those actions to the chancellor.

As explained by Margaret Robinson, Human Resources Administrator of the State College and

University Systems and JEC member, the foregoing rules give the president of each institution exclusive authority to determine which employees are granted faculty status. The Respondent further notes that W. Va. Code § 18B-9-4(a), required the governing boards, not later than January 1, 1994, to:

> establish by rule and implement an equitable system of job classifications, with the advice and assistance of staff councils and other groups repre senting classified employees, each classification to consist of related job titles and corresponding job descriptions for each position within a classification, together with the designation of an appropriate pay grade for each job title, which system shall be the same for corresponding positions in institutions under both boards: Provided, That before implementing the classification system, each classified employee is given an opportunity in a public hearing setting to address decisions affecting his or her classifica tion assignment and pay scale. The system of job classifications shall be submitted to the secretary of education and the arts for review and approval prior to implementation.
>
> By such date and with consideration to the recommendations of the institutions, the appropriate governing board shall furnish each classified employee written confirmation of the assignment to the appropriate classification, job title and pay grade and of the proper placement on a salary schedule. Such assignment may be appealed in accordance with Article twenty-nine [§ 18-29-1 et seq.], chapter eighteen of this code and all agencies are directed to expedite and give priority to grievances regarding the employee's initial assignment under the terms of this section. . . .

Pursuant to authority granted by W. Va. Code § 18B-9-4(c), the governing boards established the legislative rule under which Grievants were classified, 131 C.S.R. 62 (1994). That rule clearly states: "[f]aculty are not considered classified employees or subject to the classification program." § 2.1.6, 131 C.S.R. 62 (1994). Ms. Robinson testified that there was no provision in 131 C.S.R. 62 giving the JEC authority to move employees from classified to faculty status. Review of the two legislative rules cited byRespondent confirms that the JEC had neither actual or apparent authority to grant the relief Grievants are seeking through this grievance.

The second element of this grievance involves Grievants' complaint that the BOD, through its various college presidents, has failed to comply with law (See footnote 3) by granting faculty status to some librarians employed by the State College and University Systems of West Virginia, but not to Grievants. However, unlike the first element of this grievance, the various college presidents and Board of Directors were never given an opportunity to respond to this complaint as a grievance. (See footnote 4) This is a critical consideration because grievances arising out of the Mercer reclassification

project follow an expedited path, specifically authorized by W. Va. Code § 18B-9-4(a) and 131 C.S.R. 62.

Having heard all the evidence in this matter and reviewed the arguments of the parties, it is clear that this second element of the grievance is beyond the scope of a grievance which could properly be addressed under W. Va. Code § 18B-9-4 and § 18, 131 C.S.R. 62. Moreover, Respondent has not consented to expanding the scope of this grievance at Level IV. Under these circumstances, the undersigned administrative lawjudge is constrained by W. Va. Code § 18-29-3(j) to conclude that this second element is a separate grievance which the Respondent never addressed on its merits, and which should not be heard for the first time at Level IV of the grievance procedure. (See footnote 5) See W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993); Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995); Anderson v. Wyoming County Bd. of Educ., Docket No. 93-55-183 (Sept. 30, 1993).

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. At all times pertinent to this grievance, Procedural Rule, Series 36, entitled "Academic Freedom, Professional Responsibility, Promotion, and Tenure," dated May 4, 1992, and promulgated by the State College System of West Virginia Board of Directors, was in effect. 131 C.S.R. 36 (1992).

2. As of March 28, 1994, Legislative Rule, Series 62, entitled "Personnel Administration," dated March 28, 1994, and promulgated by the State College System of West Virginia Board of Directors, was in effect. 131 C.S.R. 62 (1994).

3. As of January 1, 1994, when Grievants' positions were reclassified by the Respondent's Job Evaluation Committee (JEC) pursuant to the legislative mandate expressed in W. Va. Code § 18B-9-4, no individual Grievant then held faculty status inaccordance with an appointment by the president of his or her institution as authorized under § 3, 131 C.S.R. 36.

4. Effective January 1, 1994, the JEC assigned Grievants to specific job titles, including Staff Librarian, Manager/Library Services, and Library Director II, established under the Job Evaluation Plan for State College and University Systems of West Virginia developed jointly by the JEC and

William M. Mercer, Inc. (Mercer Plan).

5. Grievants timely appealed their initial classifications to the JEC, seeking faculty status. Grievants did not allege that they were otherwise misclassified under the Point Factor Methodology set forth in the Mercer Plan.

CONCLUSIONS OF LAW

1. The governing boards are required by W. Va. Code § 18B-9-4 to establish and maintain an equitable system of job classifications for all classified employees in higher education. Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995).

2. In a grievance contesting whether employees have been properly reclassified as classified staff rather than faculty, Grievants are required to prove the contentions in their grievance by a preponderance of the evidence. See W. Va. Code § 18-29-6 ¶ 5; 156 C.S.R. 1 § 4.17; Burke, supra.

3. Discretion to grant faculty status to an employee of the State College System of West Virginia rests with the president of the institution employing such employee. See § 3, 131 C.S.R. 36 (1992). 4. The JEC had no authority to grant Grievants faculty status or exclude them from the reclassification process. See W. Va. Code § 18B-9-4; § 2.1.6, 131 C.S.R. 62 (1994).

5. Grievances arising out of the Mercer reclassification project are to be submitted in accordance with W. Va. Code §§ 18-29-1, et seq., and processed under an expedited procedure which begins at Level III of the grievance procedure. See W. Va. Code 18B-9- 4(a); §§ 18.1 & 18.8, 131 C.S.R. 62 (1994); Burke v. Bd. of Directors, Docket No. 94- MBOD-349 (Aug. 8, 1995). An administrative law judge at Level IV will not rule upon a legal claim in a grievance which does not arise out of the Mercer reclassification project and, thus, was not properly presented for consideration at the lower levels of the grievance procedure. See W. Va. Code § 18-29-3(j); W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993); Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995); Anderson v. Wyoming County Bd. of Educ., Docket No. 93-55-183 (Sept. 30, 1993).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or 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 § 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. 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: August 22, 1996

Footnote: 1

Deborah Wells, Ronald Wiley, Joy Humphries, Rita Young, Jane Wu, Joseph Barnes, Jean Elliott, Ann Henriksson, Barbara Maxwell, Laura Neal, Joanna Thompson, Claibourne Williams, Ofelia Alexander, Virginia Rubinstein, Thomas Brown, and Robert Turnbull.

Footnote: 2

These grievances were among over 540 grievances waived to Level IV at the same time by the BOD and the Board of Trustees for the University System of West Virginia. For a more detailed recitation of the procedural history involving these grievances, see the "background" section of this Board's decision in Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995).

Footnote: 3

Grievants contend that Respondent has violated W. Va. Code §§ 18B-1-8(e) and 18B-9-4 by failing to grant faculty status to librarians in a uniform manner. They also allege that Respondent's continued denial of faculty status deprives them of due process of law, inasmuch as such denial represents arbitrary and capricious conduct in the circumstances presented.

Footnote: 4

It is noted that Grievants have historically presented their pleas for relief to the college administration at different levels in various forms, but have only filed the instant grievance under W. Va. Code §§ 18-29-1, et seq., challenging the JEC's authority to classify them. For this reason, Respondent has never addressed the specific contentions raised by Grievants on their merits.

Footnote: 5

According to W. Va. Code § 18-29-3(j), the time limitations set forth in W. Va. Code § 18-29-4(a)(1) for filing a grievance over an issue excluded at Level IV begin to run from the date of this ruling.