CARRIE DODSON

v. Docket No. 96-BOT-229

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY

D E C I S I O N

Grievant, Carrie Dodson, employed by West Virginia University (Respondent) as a Trades Worker, filed a level one grievance on June 6, 1996, in which she alleged that

[d]ue to internal reorganization, past practice, departmental internal promotion, departmental seniority accumulation and the blatant disregard for the posting of jobs, I have been stripped of any opportunity to move up the seniority roster. There is no equal opportunity at W.V.U. for outside hires and or minorities. Last hires from outside of the institution maybe minorities or veterans or both . . . are locked out of any future opportunity due to WVU Human Resources interpretation of State or Federal law.

For relief, Grievant requested that Respondent post all positions to all qualified applicants, use seniority as it applies to a particular job classification, and follow federal affirmative action guidelines as they apply to equal opportunity employment.

Following denials at levels one and two, the grievance was advanced to level four on June 10, 1996. The matter became mature for decision at the conclusion of the level four hearing on October 30, 1996, when both parties waived the opportunity to file proposed findings and conclusions.

At hearing, Grievant stated that when she was hired in January 1995, as a Trades Worker assigned to the Department of Housing and Residence Life, she was advised that twenty-four hour coverage was required, and that as the employee with the least seniority, she would be required to cover some weekend shifts. As she earned more seniority, her shift duties would lessen. At that time, seniority within the unit, or classification, was used to allocate the shift work. Subsequent toher hiring, Respondent amended its policy and allowed other Departmental employees who transferred into the Trades Worker classification, to keep their total seniority. This placed at least one employee much higher on the seniority list than he had been under the previous system. A recently hired employee

was specifically employed to cover the shift work, therefore, Grievant remains “low man on the totem pole” subject to shift assignments.

Grievant argues that under the current system, if other employees transfer into Trades Worker positions and retain their Departmental seniority, she will never be allowed to advance to the point where she may avoid shift work. She asserts that the current system is a violation of W.Va. Code §18B-7-9, which requires that the governing boards of higher education “establish a policy . . . that discourages temporary, non-emergency, institutionally-imposed changes in an employee's work schedule; that maintains reasonable continuity in working schedules and conditions for employees . . . ”, and results in discrimination and favoritism.

Respondent asserts that the action does not violate Code §18B-7-9, nor has the change in calculating seniority subjected Grievant to discrimination or favoritism, in that all employees have been treated exactly the same.

The following findings of fact are derived from the record.

Findings of Fact

1. Grievant was initially employed by West Virginia University on January 3, 1995, as a Trades Worker assigned to the Department of Housing and Residence Life.

2. Because twenty-four hour coverage is required in the residence building, some shift work is assigned to some of the Trades Workers on the weekends. Grievant works a schedule of three “regular” days and two “shift” days per week.

3. Grievant was advised at the time she was hired that as her seniority within the classification increased, the shift work assigned to her would decrease.

4. Sometime later in 1995, Gerald Harris, employed by Respondent as a Trades Worker since July 1, 1994, requested a recalculation of his seniority to include years worked in another unit of Housing and Residence Life.

5. Consistent with a decision regarding calculation of seniority in another matter, Respondent changed its calculation to include all work within the department.

6. As a result of the change Mr. Harris, who was hired in 1988, advanced significantly on the Trades Worker seniority roster, thereby giving him the opportunity to avoid shift work.

7. A Trades Worker position posted and filled effective October 1995, specifically stated that the employee would be assigned shift work.

8. Grievant remains the employee with least seniority subject to assignment of shift work.

9. Grievant has applied and been interviewed for a lateral Trades Worker position in the Physical Plant Department.

10. Grievant failed to identify any specific Trades Worker position in the Department of Housing and Residence Life which had been filled without posting, or to assert that she had been deprived of the opportunity to apply for any specific position. Although Grievant's concern in this matter is understandable, the change in calculation of seniority was not a violation of Code §18B-7-9, nor did it constitute discrimination or favoritism. The cited statutory provision merely directs that a policy be developed to discourage, not prohibit, changes in an employee's work schedule and conditions. In fact, there have been no changes in Grievant's schedule or conditions. No other employee has been advanced over her as a result of the change in calculation and no employee has transferred into the Department's Trades Worker classification who is above her in seniority. Of course, her concern is the possibility that might occur. While the possibility exists, Assistant Director of Housing Facilities Jeff Miller testified that the most recent employee was hired specifically for the shift work, and he anticipated that future employees would be hired under the same circumstances. Grievant must also consider that her own seniority continues to accrue, making it less likely that another employee could transfer into the Department with more seniority. It is also noted that Grievant could benefit from the change in calculation if she would transfer to another unit in the Department, as she would carry her seniority rather than starting with no seniority in that unit. Because she has failed to establish that she has been, to her detriment, treated differently than similarly situated employees, in a significant manner, Grievant has failed to establish a prima facie case of discrimination. See Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25, 1995).

W.Va. Code §18-29-3(o) defines favoritism as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” Although Grievant perceives that other employees have been given preferential treatment to her detriment, in fact the decision as to how seniority would be calculated applies to all employees evenly. While some employees have benefitted from the change already, other employees, includingGrievant, may not reap the advantages unless and until such time as they transfer into another unit within the department. Nonetheless, all employees are treated exactly the same and no favoritism has been shown by Respondent.

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

Conclusions of Law

1. In a non-disciplinary matter, the grievant has the burden of proving each element of her complaint by a preponderance of the evidence. W.Va. Educ. & State Employees Grievance Bd. Procedural Rule 4.19, 156 C.S.R. 1 (1996); Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994).

2. Respondent's determination that seniority would be carried from one departmental unit to another was not violative of the W.Va. Code §18B-7-9 provision that continuity in employees' work schedules and working conditions be maintained.

3. Grievant has failed to prove that the revised policy on seniority resulted in discrimination as defined by W.Va. Code §18-29-2(d).

4. Grievant has failed to prove that the revised policy on seniority resulted in favoritism as defined by W.Va. Code §18-29-2(h).

5. Grievant has failed to prove that she has suffered any harm from the revised policy.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of thisdecision. 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.

Date: February 6, 1997 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE