CAROLANN COOK,

Grievant,

v. **DOCKET NO. 96-BOT-421**

BOARD OF TRUSTEES/

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Carolann Cook, Grievant, appealed this grievance against Respondent, Board of Trustees/West Virginia University, to Level IV on September 30, 1996, following termination of her employment on or about November 1, 1995. The parties agreed to submit this grievance on the record developed at Level II. Grievant waived the Level III of the grievance procedure by appealing her grievance directly to Level IV. The case was mature for decision when it was transferred to the undersigned on November 11, 1997, for administrative reasons.

Grievant's grievance statement is unusually long, and differed from the testimony she gave at Level II. Moreover, apparent allegations contained in her grievance statement were not addressed by her counsel in her proposed findings of fact and conclusions of law. However, Grievant, in the presence of her counsel, stated twice during the Level II hearing that her grievance consisted of the following four allegations (See footnote 1):

(1) that she should not have to accept an entry level position to remain employed with Respondent;

(2) that she was not considered and appointed to one of the following positions: (a) Extension Specialist, Division of Family and Youth Programs, (b) Extension Specialist, Recruitment and Training, and (c) Administrative Intern, Division of Family and Youth Programs; (See footnote 2)

(3) that she was never informed why she was not considered for the three positions listed above; and

(4) that it was never explained to her that the three month contract she received on July 1, 1995, was not going to be extended beyond the life of the contract. (See footnote 3)

Although Grievant failed to list any relief on her Level IV grievance form, she is seeking preference in selection, or the
right of first refusal for vacant positions in her area, or appointment to an Extension position equivalent to the position she held while employed at West Virginia University. (See footnote 4)

The following Findings of Fact were derived from the record, and proved by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant worked for over nineteen years in various Extension Service positions. From October, 1976 to 1978, she worked in the Water Research Institute. In 1978, Grievant received a Master's degree, and transferred to the Extension Service's Office of Research and Development.

2. In 1980, she accepted an Extension Specialist position with the Division of Family and Youth Programs. Her duties included Home Energy Management Programs for adults, youth and community groups, and responsibilities in the areas of household equipment, housing and program evaluation.

3. In 1989, Grievant transferred to the Agriculture, Forestry and Community Development Division, where her responsibilities were expanded to include environmental areas, e.g., household hazardous waste. She also continued to do programming for the Division of Family and Youth Programs.

4. In 1992, the Division of Agriculture, Forestry and Community Development was divided into three units, and Grievant
was placed in the Environmental Management unit. Grievant continued working on various programs with the Division of Family and Youth Programs, and also had responsibility for energy programs, environmental programs (solid waste management), household equipment programs, and housing programs.

5. In 1994, the above Energy Management position was eliminated, and Grievant began working in a position with Water Quality Programs, which was eliminated in 1995.

6. Grievant's position as an Extension Specialist, Water Quality, extended from July 1, 1994

through September 30, 1995. For the first three months of that period, salary resources were 50% from energy resources and 50% from water quality resources. For the period October 1, 1994, through March 31, 1995, the resources were 100% from water quality funding. The balance of the appointment (June 1, 1995, through September 30, 1995) was funded by “residual” resources.

7. Grievant's last contract with Respondent was for an Extension Specialist position in “Water Quality” for the term of July 1, 1995, to September 30, 1995.

8. Grievant's employment was extended beyond the end of September, 1995. A letter, dated October 20, 1995, to Grievant from Robert Maxwell, Interim Associate Provost, in pertinent part, provides:

> Because we have no other positions vacant for which you qualify we must proceed with the termination of your employment with WVU Extension.
>
> Since we are already committed to the month of October as a transition period for you we will honor that
>
> commitment. You will have the option on November 1, 1995 of either having a lump sum payment for your accumulated annual leave, or you will be able to take your annual leave by remaining on the regular payroll. You should work with Jessie Momen, Program Leader Management Service Offices to complete the documents necessary to implement your decisions. You should also contact the Human Resource Benefits Office to discuss benefits options.

9. Grievant's employment for the last several years, if not entirely, was funded by monies secured by grants, commonly called soft money.

10. In 1993, Grievant filed a grievance. (See footnote 5) She rested on the relief granted at Level II, which provided:

> A. That [Grievant's] current contract or letter of appointment be modified so that it is not identified as a terminal appointment.
>
> B. That her assignment remain in her current unit until the expiration of the external funding allocated and internal funding allocated and internal funding budgeted for her current position and that, unless otherwise prohibited by law, she then be reassigned to any similar vacant position in her unit for which she meets the employment requirements.
>
> C. That she be kept apprised, in timely fashion, of any plans that would

restructure or eliminate her position as well as the availability of Extension Specialist positions for which she might apply or to which she is eligible to transfer.

D. That the unit administrators be advised of their obligation to include their employees in the discussions associated with program change and the implementation of policy changes within the unit.

11. Grievant was not excluded from consideration for positions requiring a doctorate degree. This requirement was waived.

12. The following positions were either not vacant, not funded, or otherwise not available to Grievant: Consumer Management/Family Resources Management Position, Housing Specialist, Recruitment and Training Specialist, Administrative Intern, Family Resource Management Specialist, and Financial Management Specialist.

13. Grievant was not qualified for the position referred to as the “Robert Anderson” position, or the 4-H Specialist position, Family and Youth Development.

14. Grievant did not apply for County Extension Agent positions in the following counties: Berkeley, Clay, Monongalia, Pocahontas, and Randolph.

15. The Extension Service has offices and staff throughout the state.

16. Grievant knew, as early as August 24, 1994, that funding for the Water Quality Extension Specialist position would cease (and that her employment may terminate). See Level II, March 13, 1996, Tr. at 43-44, and 94-95.

DISCUSSION

Grievant's allegations lack merit unless she has acquired a property interest (See footnote 6) in continued employment with Respondent orRespondent has a duty to treat her preferentially. Assuming arguendo that Grievant has a property interest in her employment with the Extension Service, and Respondent had a responsibility to take steps to maintain the employment relationship with Grievant, she failed to prove by a preponderance of the evidence that Respondent did not satisfy that requirement.

The Extension Service Department worked, for almost two years, with Grievant to help her find another position. Grievant was notified of several positions for which she could apply, and of course,

she could apply for positions she discovered or she felt matched her qualifications. Mr. Charles G. Morris, Interim Associate Provost and Interim Director, kept Grievant informed of vacant positions, and supported her when appropriate.

Grievant applied for a Brooke/Hancock County Extension Agent position. Grievant did not dispute that to be selected for a County Extension Agent position, the successful applicant had to be selected by the County Selection Committee. The Committee was informed that the Extension Service supported Grievant for theposition. Although the Extension Service supported Grievant, the Committee did not select her to fill the position.

Although Grievant was informed of four County Extension Agent positions (Berkeley, Clay, Pocahontas, and Randolph counties), and that she would be supported by the Extension Service for the positions, she failed to apply for any of the positions. Instead Grievant responded by memorandum to Mr. Morris, dated August 31, 1994, which, in pertinent part, provided, ”As previously discussed, reassignment is focused on positions located in Morgantown. Responsibilities in the Morgantown area prevent relocation at this time.”

Later, Grievant was informed that the Monongalia County Extension Agent position was vacant, and that she would be supported by the Extension Service for the position. Again, Grievant elected not to apply for the position, and responded with a memorandum to Mr. Morris, dated October 11, 1994, which provides:

> Thank you for your recent memo concerning the Monongalia County 4-H and youth position. My response is overdue because I was out of state until October 10.
>
> As you probably know from review of my personnel file, my experience and training background do not quite fit the requirements of this position.
>
> After carefully considering my qualifications, I find that this would not be a position that would capitalize on my strengths and abilities. Simply, I am not the person who would do the best job for the West Virginia University Extension Service in this position.
>
> Let's keep looking for a position that would capitalize on the strengths of my experience and training. Perhaps you could furnish me with information on extension specialist positions that will be available in the near future.
>
> Your effort to secure an appropriate reassignment for me is appreciated.

Grievant applied for only one of six positions, one of which was in Morgantown, Monongalia County. Grievant failed to apply for the Monongalia County Extension Agent position, but applied for a 4-H Specialist position, Family and Youth Development. Although, Grievant's credentials were reviewed by the search committee, she was not given preferential treatment for this position because of the reasons she cited in failing to apply for the Monongalia County Extension Agent position.

In a letter to Grievant, dated March 7, 1995, Ms. Ora A. Drake, Interim Assistant Director, Extension Service, informed her that the 4-H Specialist position, Family and Youth Development, “is one that provides leadership statewide for programs such as the one in Monongalia County.” Mr. Morris testified, “if you aren't qualified or you take yourself out of consideration on your qualifications to be an Agent responsible for 4-H then you would take yourself out automatically of being the --- the lead of those who lead 4-H Agents in their program development.” Level II, May 8, 1996, Tr. at 68. Grievant was not included on the interview list for the 4-H Specialist position, Family and Youth Development Division, and was not offered the position.

Grievant's counsel, in her Level IV proposed findings of fact and conclusions of law, page 8, asserts that even if Respondent was not obligated by law to grant Grievant preferential consideration, once it agreed “to offer Grievant preferred consideration, it was bound to comply with its agreement.” She also asserts thatGrievant “was denied the preferred consideration relief she achieved in the 1993 [g]rievance.” Id.

However, the record is clear that Grievant was granted preferential consideration. She was notified of vacancies which occurred within the Extension Service for which she was qualified, the Extension Service waived the doctorate requirement for Grievant, and the Extension Service supported her in positions for which it thought she was qualified. In summary, Grievant failed to prove by a preponderance of the evidence that Respondent did not comply with any relief granted in her 1993 grievance.

Grievant's first allegation that she should not have to accept an entry level position to remain employed with Respondent fails. Although Grievant and her counsel failed to define “entry level position”, Grievant's position was a grant funded, non-tenure track position. Some of the positions, for which Grievant would have been supported by the Extension Service had she applied, were tenure track positions. Mr. Morris testified that her salary would have remained the same salary for some of these positions.

Mr. Morris testified that if Grievant had received the Brooke/Hancock County Extension Agent position, her salary would have remained the same. The salary level listed in the Position Announcement for the above position was $19,200 to $24,000. The Monongalia County Extension Agent position which Grievant declined, was also a tenure track position, and provided "[s]alary will be commensurate with professional qualifications." Grievant's second allegation that she was not considered and appointed to one of the following positions: (a) Extension Specialist, Division of Family and Youth Programs, (b) Extension Specialist, Recruitment and Training, and (c) Administrative Intern, Division of Family and Youth Programs, will be discussed next. The Extension Service did not feel that Grievant was qualified for the Extension Specialist, Recruitment and Training position because it involved duties in an area in which Grievant had no training or experience (labor relations). Her application was sent to the Search Committee and reviewed by the University's Affirmative Action Office. Both found Grievant not qualified for the position. Level II, March 13, 1996, Tr. at 49.

The Extension Specialist, Division of Family and Youth Programs, position was a reclassification of a position, and not a vacancy. Level II, August 14, 1996, Tr. at 76. The Administrative Intern announcement was for a work assignment (not a position), and required the applicant have a regular appointment. See Level II, Ex. 5.

Grievant's third allegation that she was never informed why she was not considered for the above three positions fails. Again, Grievant failed to identify any policy, rule, regulation, or Code provision compelling such a duty or responsibility of Respondent. Although Grievant might not have been informed why she did not receive one of the above positions, her qualifications were considered for the vacant Extension Specialist positions, and shewas ineligible for the Administrative Intern assignment because she did not have a regular appointment.

Grievant's fourth allegation that it was never explained to her that the three month contract she received on July 1, 1995, was not going to be extended beyond the life of the contract also fails. It is hard for the undersigned to find this allegation credible. It is obvious that a three month contract is for a period of three months. During the Level II hearing, Mr. Morris testified that the Extension Service started the process of formally offering opportunities to Grievant, for which she was qualified, as early as August 24, 1994, when there was evidence that the grant funding for her employment was "going to go." Level II, March 13, 1996, Tr. at 43-44.

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

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). 2. Grievant failed to prove by a preponderance of the evidence the allegations she asserted in this grievance.

Accordingly, this grievance is **DENIED**.

Any party may appeal this **DECISION** to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County, andsuch 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.

Dated: January 30, 1998. _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

Level II, March 13, 1996, Tr. at 81 and 83, and May 8, 1996, Tr. at 103.

Footnote: 2

See Level II, Ex. 5.

Footnote: 3

All other theories including, but not limited to, coercion, discrimination, and retaliation were not considered by the undersigned and were considered abandoned because counsel failed to address these theories in her opening and closing arguments, and in her Level IV proposed findings of fact and conclusions of law.

Footnote: 4

Respondent did not object at the Level II to the Level II Grievance Evaluator considering such relief which, in practical effect, was an “amendment” to her grievance statement.

Footnote: 5

The exact nature of this grievance is not contained in the record.

Footnote: 6

"For a protected 'property interest' to arise, there must berules, understandings, or relationships between the employee and the institution which give rise to a legitimate claim of entitlement." W. Va. Univ. v. Sauvageot, 185 W. Va. 534, 537, 408 S.E.2d 286, 289 (1991). "A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." Syllabus point 3, Waite v. Civil Service Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1977). "[T]here must be some undertaking, or position by the employer which gives rise to an objective expectation on the part of the employee[,]" this "undertaking, however, does not have to be in writing; it may evolve in a de facto fashion." Sauvageot, supra.