DELPHIA RODEHEAVER, et al.,

Grievants,

v. **Docket No. 98-HHR-209**

WV DEPARTMENT OF HEALTH &
HUMAN RESOURCES/HOPEMONT
STATE HOSPITAL and
WV DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievants, (See footnote 1) maintenance workers for Hopemont State Hospital (Hopemont), allege that their layoff in March of 1997 was retaliatory in nature and contrary to regulations of the West Virginia Division of Personnel (DOP). They seek the opportunity to “bump” employees in other departments with less seniority. The parties agreed to waive consideration of the grievance at levels one and two. After numerous continuances, a level three hearing was held on November 5 and 6, 1997, and on March 6, 1998. The grievance was denied at level three on June 11, 1998. This matter was appealed to level four on June 16, 1998, and was held in abeyance at the request of the parties for several months. Subsequently, one continuance was granted for good cause shown, and a level four hearing was ultimately held on March 17, 1999. Grievants were represented by Marguerite Kyer, District 1199 representative; the Department of Health & Human Resources (DHHR) was represented by counsel, Sarah Brack; and DOP was represented by Perry Dotson. This matter became mature for consideration on April 22, 1999, upon receipt of Respondents' joint proposed findings and conclusions. Grievants did not file a written proposal.

The following findings of fact are made from a preponderance of the credible testimonial and documentary evidence submitted at levels three and four.

Findings of Fact

1. Prior to their layoff, Grievants were employed in various classifications in the maintenance department at Hopemont.

2. Effective March 21, 1997, Hopemont implemented a layoff in its maintenance department, eliminating all positions except for one electrician and one building maintenance mechanic position. This resulted in the elimination of eleven maintenance positions.

3. According to seniority, Grievants were offered the opportunity to “bump” into the remaining building maintenance mechanic position, pursuant to the provisions of DOP's Administrative Rule, Section12.04(g) (1995). (See footnote 2)

4. Since 1993, Hopemont has experienced a steady decline in its original patient population of 300, having only 98 beds by 1997.

5. As early as 1993, due to state government budget cuts and reductions inpatient population, the maintenance department had been identified as a potential area for layoffs. Level IV testimony of Keith Stouffer.

6. In 1994, then DHHR Commissioner Garrett Moran directed all administrators of long-term care facilities to identify cost-reducing measures. Pursuant to that request, several departments at Hopemont were targeted for severe personnel cuts, including maintenance. Level IV, Respondent's Exhibit 1.

7. Rather than implementing layoffs, between 1994 and 1997, Hopemont officials allowed reductions in staff to result from attrition. Maintenance has experienced less attrition than many other departments.

8. The 1997 layoffs in the maintenance department have enabled Hopemont to realize significant cost savings, including savings from reduced salaries and benefits, reduced maintenance inventory, and recovery of the significant costs associated with several vehicles, which the department was able to dispose of after the reduction in maintenance department staff. Level III, Joint Exhibit 3.

9. Hopemont's expenses were reduced by over $500,000 after the 1997 layoffs.

10. Between April 1, 1996, and December 31, 1996, a study was conducted by Hopemont officials to determine whether there was enough work in the maintenance department to justify the number of staff. As a result of that study, it was discovered that employees were not completing the

portion of work orders indicating how long a project took, which could involve several days or weeks. Therefore, beginning in October of 1996, maintenance employees were directed to complete this portion of the work order forms.

11. The Hopemont maintenance department was the “organizational unit”identified for layoff. Level III, Agency Exhibit 5.

Discussion

In a non-disciplinary matter, Grievants must prove the allegations in their 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). Grievants have raised two contentions. First, they allege that their layoffs have resulted from retaliation for filing prior grievances. Second, Grievants contend that DOP's Administrative Rule requires that they be allowed to “bump” employees in other departments at Hopemont, instead of limiting their bumping rights to the maintenance department. Respondents contend that no retaliation has occurred and that the layoffs were accomplished in accordance with DOP regulations.

There is very little evidence in the voluminous level three record regarding Grievants' alleged prior grievances, and no additional evidence to support these allegations was offered at level four. The only references to prior grievances at level three were made by Grievant George Haskiell and Grievant Delphia Rodeheaver. Mr. Haskiell testified that he asked Benny Westfall, Director of Support Services at Hopemont, “what's been done about these guys that's filed all these grievances” and that Mr. Westfall responded to the effect that “they might think they're getting by with this but they're not.” Level III Tr. at 29. However, Mr. Haskiell did not specify when this conversation occurred or how he believed it was related to the Grievants' layoff. He also stated that he had not been involved in any of the grievances to which he referred. Mr. Rodeheaver testified that maintenance employees began requesting work orders for all work they did “especiallyafter we filed those grievances.” Level III Tr. at 37. He further stated that, when the maintenance employees were ordered in October of 1996 to begin marking the time that each job took on the work order, “[w]e filed a grievance against that.” Level III Tr. at 38. Again, there was no explanation of who was involved in the grievances, when they were filed, or what their outcomes may have been.

W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In general, a grievant alleging unlawful retaliation, in order to establish a prima facie case, must prove:

> (1) that the employee engaged in activity protected by the statute;
>
> (2) that the employee's employer was aware of the protected activity;
>
> (3) that, thereafter, an adverse employment action was taken by the employer; and
>
> (4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Wiley v. W. Va. Div. of Natural Resources, Docket No. 97-DNR-397 (Mar. 26, 1998); Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va.53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). Grievants' limited evidence falls far short of establishing a prima facie case of retaliation. The only grievance which has been specifically identified involved the marking of time on work orders. Extensive testimony given at level three establishes that maintenance employees were directed to begin marking the time it took to complete projects because, without this information, there was the appearance that employees were without anything to do for days and weeks at a time. The department's practice of not filling in the time it took to complete a project gave an erroneous impression of the amount of work and the time spent on large projects by maintenance employees. Accordingly, Hopemont's directive to employees to begin marking the total time on work orders was to the benefit of the employees, allowing them to receive credit for lengthy projects. Therefore, there is no evidence of a retaliatory motivation, nor any

evidence of a connection between this alleged grievance and the maintenance department layoffs.

Moreover, as noted by Respondents, the above-described incident occurred in late 1996, and the record contains evidence of the discussion of maintenance department layoffs as early as two years prior to that time. Accordingly, no retaliatory motive can be inferred. Since the record is devoid of any evidence regarding the alleged “other grievances” filed by maintenance employees, Grievants have again failed to establish reprisal by a preponderance of the evidence with regard to their grievance activities.

Grievants' second contention involves their interpretation of DOP's regulations regarding layoffs and bumping rights. They argue that they should have been allowed to bump into positions in other departments, rather than just the remaining maintenance positions. DOP's Administrative Rule, Section 12.04 (1995) provides, in pertinent part: (a)

> When it becomes necessary by reason of shortage of work or funds, . . . the appointing authority may initiate a layoff in accordance with the provisions of this rule.

(b)

> Organizational Unit. The appointing authority shall submit to the State Personnel Board for approval a description of the unit or units to which a layoff will apply. The organization unit may be an entire agency, division, bureau, or other organization unit.

* * * * *

(g)

> Bumping Rights. A permanent employee who is laid off may request an involuntary demotion to any class in the occupational group in the same organizational unit unless the results thereof would be to cause the layoff of another permanent employee who possesses greater seniority than the employee who is exercising the request for involuntary demotion.

Grievants' arguments in this regard is somewhat difficult to understand, due to the absence of any briefs filed on their behalf at any level of the grievance process. However, it may be inferred from their testimony at levels three and four that Grievants believe their bumping rights should not have been limited to the maintenance department as the “organizational unit” for layoff. Their testimony

indicates that they believe they were entitled to the opportunity to be placed in lower classified positions in departments such as housekeeping and food services. Grievants have not identified what law, regulation, policy, or other documentation would entitle them to these bumping rights, nor have they explained how the procedure they propose would comply with the provisions of Section 12.04(g).

The Grievance Board has previously discussed the propriety of layoffs in state agencies on a number of occasions. These cases have involved a variety of differenttypes of “organizational units” subject to layoff, including a state liquor store [Rice v. W. Va. Dept. of Tax and Revenue, Docket No. 90-ABCC-452 (Jan. 23, 1992)]; numerous job classifications throughout a health care facility [Asaad v. W. Va. Div. of Health/Colin Anderson Center, Docket No. 90-H-358 (Oct. 9, 1991)]; and a single job classification [Cunningham v. W. Va. Farm Management Comm'n, Docket No. 93-FMC-312 (Feb. 28, 1994)]. As evidenced by these decisions and the broad language defining “organizational unit” in Section 12.04, there was nothing improper in the identification of the maintenance department as the unit to be subject to layoffs. The clear language of Section 12.04(g) allows employees only to bump into positions “in the same organizational unit”. Therefore, Grievants were not entitled to the opportunity to be placed in positions in other departments at Hopemont.

Several Grievants testified regarding the bumping rights they were afforded within the maintenance department. The limited evidence in the record regarding this subject indicates that employees with sufficient seniority were allowed the option of bumping into the remaining maintenance mechanic position. In fact, Grievant Robert Haskiell testified at level three that he was offered that position, but declined to accept it. However, Grievants have offered no evidence as to which employee was ultimately placed in that position or what seniority he possessed. Accordingly, there is insufficient evidence in the record to support any findings of impropriety with regard to Grievants' bumping rights within the maintenance department.

Finally, Grievants' evidence in this grievance also indicates that they may have some belief that the layoffs in Hopemont's maintenance department were unnecessary. However, the record contains extensive evidence regarding Hopemont's declining patient population and budgetary restrictions, which occurred over a period of several years. These factors quite clearly justified an adjustment in the size of the maintenance staff. Moreover, Respondents have provided evidence of the considerable reduction in costs realized since the 1997 layoffs. Accordingly, the undersigned finds

that the layoffs were justified and comported with the requirements of Section 12.04.

In accordance with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, Grievants must prove the allegations in their 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. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

3. In order to establish a prima facie case of reprisal, a grievant must prove:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of timethat retaliatory motive can be inferred.

Wiley v. W. Va. Div. of Natural Resources, Docket No. 97-DNR-397 (Mar. 26, 1998); Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va.53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

4. Grievants failed to establish a prima facie case of retaliation with regard to their layoffs in 1997.

5. A state agency may initiate a layoff due to shortage of work or funds, and such a layoff may be implemented within an entire agency, division, or other organization unit. West Virginia Division of Personnel Administrative Rule, Section 12.04 (1995).

6. When a layoff is implemented, employees are only afforded "bumping rights" within the organizational unit subject to layoff, according to seniority. See West Virginia Division of Personnel Administrative Rule, Section 12.04(g) (1995).

7. Grievants have failed to establish by a preponderance of the evidence that their layoffs were contrary to the provisions of Section 12.04 or any other law, policy, regulation, or written agreement applicable to their employment.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel 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 § 29-6A-7 (1998). 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 21, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The named grievants in this matter are Delphia Rodeheaver, Claude Rodeheaver, David Knotts, Robert Haskiell, William Luckel, George Haskiell, Ron Host, James Kelly, Dale Funk and Floyd Teter, Jr.

Footnote: 2

Some Grievants have been rehired in different classifications and departments since their layoffs. Because he raised allegations regarding his pay and seniority since being rehired in the housekeeping department, Grievant George Haskiell

was given 10 days from the day of the level four hearing to file a new grievance regarding those matters, which are unrelated to the instant grievance.