SALLY KESSELL,

Grievant,

v.

DOCKET NO. 02-LC-404

WEST VIRGINIA LIBRARY COMMISSION,

Respondent.

D E C I S I O N

Grievant, Sally Kessell, filed this grievance against her employer, the West Virginia Library Commission ("Commission"), on October 24, 2002:

> The event would be J. D. Waggoner's reorganization and the [e]nsuing appropriation of prime parking spots. Historically, prime spaces were given to managers and the rest were allocated according to seniority. It was understood that if you didn't want a parking space and later changed your mind, your name was put on the bottom of the list.
>
> I want to reacquire a parking space at the back of the building and a written set policy on how people acquire parking spaces.

The grievance was waived at levels one and two, and a level three hearing was held on December 2, 2002, with J. D. Waggoner, Secretary of the Commission, presiding. A level three decision was rendered by Mr. Waggoner on December 6, 2002, in which he granted the portion of the grievance requesting a written parking policy, but denied the request for a prime parking space in the rear of the building. Grievant appealed to level four on December 16, 2002, and a level four hearing was held in the Grievance Board's Charleston, West Virginia, office on February 27, 2003. This matter became mature fordecision on March 27, 2003, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by Larry Lefevre, and the Commission was

represented by Karen O'Sullivan Thornton, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Level Three Exhibits

Ex. A -

W. Va. Library Commission Parking Policy, effective November 15, 2002.

Ex. B -

November 12, 2002 letter from J. D. Waggoner to Sally Kessell.

Ex. C -

April 30, 2002 memorandum from Jan Iman to Janice Bickham, Sally Kessell, Vanesse Jyers, Gwen Sizemore, Lori Fitzgerald and Suzy McGinley.

Level Four Exhibit

Ex. 1 -

Roster of Commission employees with hire dates.

Testimony

Grievant testified in her own behalf, and presented the testimony of Jonnie Blackburn, Terry Matheney, Donna Calvert, James Vance, Emily Neff, Harlan White, and Jan Iman. The Commission presented the testimony of J. D. Waggoner.

The underlying facts of this grievance are not in dispute, and are set forth in the following findings.

FINDINGS OF FACT

1. Grievant is employed as an Office Assistant II by the Commission.

2. Jan Iman is the Building Supervisor for the Commission, and in charge of assigning parking spaces to Commission employees.

3. It had been the Commission's practice to assign parking spaces first to managers, and then by seniority. If an employee turned down a parking spot, his or her name stayed on the roster, but would just be passed over. If that employee later decidedhe or she wanted a parking spot, he or she would receive the next available parking space, but would not “bump” someone out of an already assigned spot.

4. At some point following the change in the State Administration in 2001, several manager-level employees left the Commission, leaving empty prime parking spaces.

5. Ms. Iman decided to fill those parking spaces temporarily to prevent the Commission losing the spaces altogether.

6. Grievant and other employees of the Commission were given temporary parking assignments in “prime” parking spaces behind the Library Commission offices pending the appointment of a new Secretary. (See footnote 1)

7. On April 4, 2002, Ms. Iman sent Grievant and the other employees with temporary parking spaces a memorandum reminding them that when the new administration came on board, they would be returned to their former parking locations. LIII Ex. C.

8. J. D. Waggoner was appointed Secretary by the Commission's Board on August 9, 2002.

9. Mr. Waggoner held a meeting with the staff announcing there would be a reorganization and several people would have title changes, but no promotion or raises were being given, because of the Governor's directive to all agencies to cut 10% of their budgets. He said the reorganization would not affect parking. 10. Ms. Iman came to Mr. Waggoner and told him he needed to formalize the parking situation, because she had people temporarily assigned to prime spaces. He decided since he could not offer his new managers under the reorganization a promotion or pay raise, he would give them the prime parking spaces.

11. Emily Neff, a Library Assistant with the Commission for 16 years, had once been offered a prime parking space, but declined it and parked in the parking garage. In Fall 2002, Ms. Neff asked to be put back on the list for a prime parking spot. Ms. Iman noted on the seniority rotation list that Ms. Neff now wished to have a prime spot when one became available. Even if she had greater seniority than someone holding a prime spot, she would not bump that person out; she simply would get the next available spot. 12. Grievant filed this grievance after she was informed she had to give up the temporary prime parking place and return to her former parking place.

13. As a result of the grievance, Mr. Waggoner, with the help of Ms. Iman, developed a written parking policy, effective November 15, 2002. LIII Ex. A.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

Grievant claims the parking policy as it existed before and after it was put in writing is not fair. She claims employees who in the past did not want a prime parking space but change their mind should have their name put at the bottom of the seniority list, rather thanremaining in their appropriate place on the list. She further alleges the individuals who received title changes under Mr. Waggoner's organization are not really “managers”, should not be assigned prime parking spaces, and should not have been able to “bump” her out of a prime spot. If all of these things happened to Grievant's liking, she would be in line on the seniority list for a prime parking space.

The Commission replies that it followed the unwritten parking policy, that Grievant was only assigned a prime spot on a temporary basis, and had knowledge that she would be returned to her former place once a new Secretary was appointed, that it had no obligation to create a written parking policy, but did in an effort to resolve her grievance, and the assignment of prime parking spaces was done in accordance with that policy.

Grievant finds fault with the assignment of prime parking spaces in two specific instances. First, she claims Ms. Neff should not be eligible for a prime parking spot before Grievant, because she had once declined a prime spot. Grievant contends that once an employee, like Ms. Neff, decides she wants a prime spot, her name should go on the bottom of the seniority list, regardless of her years of experience. That is not the way the policy has been applied under Ms. Iman, though. Once Ms. Neff told her she wanted a prime spot, Ms. Iman simply would not pass over her name the next time a spot became available. That is also the way the assignments occur under the new written policy.

Grievant also contends the individuals given the prime spaces under Secretary Waggoner are not really “managers,” and should not have those spaces. Under the old unwritten policy, “department heads” got prime spaces, and then the rest were awarded by seniority. Under the new written policy,

"managers" get prime spaces, and then seniority comes into play. Mr. Waggoner testified that to comply with the Governor's 10% cut directive, he lost four vacancies, including the Deputy Director position. He reorganized existing staff to assume some of the duties of those positions, and those employees were designated as managers. Initially, those employees agreed to take on the additional duties without any compensation or benefits. Later, when Ms. Iman told him he needed to formalize the parking situation, he decided to give those managers the prime spots which would have gone to the department head positions.

The above findings and discussion are supplemented by the following conclusions of law.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. Grievant has failed to prove the Commission has any requirement, statutorily or otherwise, to formulate a parking policy, much less a written one. Nevertheless, the Commission, in an effort to resolve this grievance, did formulate a written parking policy.

3. Grievant has failed to prove she is entitled to a prime parking space under either the old, unwritten policy, or under the new written policy.

4. Grievant has failed to prove the assignment of prime parking spaces to the new managers under the reorganization violates the written parking policy.

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. Any 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: April 14, 2003

Footnote: 1

A "prime" parking space for purposes of this grievance is a parking space located at the rear of the building in which the Library Commission is located. Commission employees also park in the State parking garage and at Laidley Field.