THEODORE NESBITT,

Grievant,

v. Docket No. 03-HEPC-072

HIGHER EDUCATION POLICY COMMISSION/

WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Theodore Nesbitt, (Grievant), employed by West Liberty State College (WLSC) as a Staff Librarian, filed a level one grievance on January 25, 2003, in which he alleged: "1) Demotion 2) Dismissal 3) Loss of Pay." For relief, Grievant requested reinstatement as a Staff Librarian (Bibliographic Instruction). Grievant's immediate supervisor lacked authority to grant the requested relief at level one, and Provost John McCullough filed the same response at level two. Dr. Richard H. Owens, President of WLSC denied the grievance at level three, after Grievant's request to amend the grievance was denied, and he elected not to participate in the hearing. Appeal was made to level four on March 12, 2003. A level four hearing was conducted in the Grievance Board's Wheeling office on May 5, 2003, at which time Grievant was represented by Daniel Tomassetti, Esq., and WLSC was represented by Assistant Attorney General Kristi McWhirter. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before June 18, 2003.

The following facts are derived from a preponderance of the evidence made part of the record at levels two and four.

Findings of Fact

1. Grievant has been employed by WLSC for three years and nearly five months, and was the employee with the least seniority classified as a full-time (1.0 FTE), Staff Librarian, pay grade 17, in January 2003.

2. During a reduction in force (RIF) implemented in January 2003, WLSC eliminated thirty-two positions, including one-half of a Librarian position. The most senior Librarian, J. Schramm, employed as a 0.54 FTE, was bumped into the position held by the least senior Librarian, Grievant. As a result, J. Schramm became a 1.0 FTE.

3. On or about January 9, 2003, Grievant was notified that his position was being eliminated and that his seniority of 39.5 months was sufficient to allow him to bump into another position at WLSC.

4. Grievant was subsequently reassigned as an Academic Program Associate, a 1.0 FTE position, in pay grade 13.

5. Grievant elected not to bump into another position based upon personal moral and ethical concerns, and his employment was terminated on February 1, 2003.

6. When implementing the reduction in force, WLSC bumped the least senior employee in the pay grade of the position being eliminated, if the displaced employee was qualified to hold that position. If there was no position in the same pay grade for which the displaced employee was qualified, WLSC looked at the next lower pay grade for a position for which the employee was qualified. Seniority and pay grade were the only criteria used during the bumping process.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 29-6A-6.

Grievant argues that WLSC violated W. Va. Code § 18B-7-1 when it failed to reassign him to a position held by a less senior employee in the same or equivalent job classification. WLSC asserts that Grievant was offered the position in the next highest classification for which he was qualified, and that the reassignment was not inconsistent with the relevant statutory provisions.

W. Va. Code § 18B-7-1(b) provides, in pertinent part:

All decisions by the appropriate governing board, the commission or its agents at state institutions of higher education concerning reductions in work force of full-time classified personnel, whether by temporary furlough or permanent termination, shall be made in accordance with this section. For layoffs by classification for reason of lack of funds or work, or abolition of position or material changes in duties or organization and for recall of employees laid off, consideration shall be given to an employee's seniority as measured by permanent employment in the service of the state system of higher education. In the event that the institution wishes to lay off a more senior employee, the institution shall demonstrate that the senior employee cannot perform any other job duties held by less senior employees of that institution in the same job class or any other equivalent or lower job class for which the senior employee is qualified: Provided, That if an employee refuses to accept a position in a lower job class, the employee shall retain all rights of recall provided in this section. If two or more employees accumulate identical seniority, the priorityshall be determined by a random selection system established by the employees and approved by the institution.

WLSC did not provide a detailed explanation of how the reduction in force was implemented; however, it is known that the classification of “Staff Librarian” was reduced by one-half position. J. Schramm, a .54 FTE determined to be the most senior Staff Librarian with 378 months of seniority, was bumped into Grievant's 1.0 FTE position. (See footnote 1) The Grievance Board recently held that the failure to consider whether the positions effected by the reduction were full or part-time was arbitrary and capricious. Hendershot v. Higher Ed. Policy Comm'n/West Liberty State College, Docket No. 03-HEPC-061 (June 18, 2003). Therefore, since the classification of Staff Librarian was reduced by one-half, Grievant's position should have been reduced by one-half.

Grievant would then be eligible to bump into another position to complete his employment as a 1.0 FTE. Grievant argues that he is qualified for two positions in pay grade 16, Admissions Counselor and Residence Hall Director. WLSC Director of Human Resources, Brian Warmuth, testified that when determining the qualifications of an employee he considered the data line from his Personnel Inventory Questionnaire (PIQ), and information included in the individual's personnel file, including his resume and job applications. Mr. Warmuth determined that Grievant was not qualified for the Residence Hall or Admissions

Counselor positions, because there was no evidence he had any related job experience.

The procedure outlined by WLSC for implementation of the reduction in force defines qualifications as follows:In general, a person's ability to perform another positions job may be determined by an examination of employment history (positions previously held) both within Higher Education and without; their level of education attained, including special courses or certificates; the relevancy and recency of such course work and certificates/ degrees; and the Mercer Classification System "dataline" for the position being examined, insofar as what the dataline states about the minimum requirements as to education and experience. Lastly, if a PIQ exists for the position it may be examined to determine duties and responsibilities. Any special knowledge, skills or abilities necessary for an individual to possess may also be considered.

Likewise, it is realized that there are positions for which up-to- date PIQ's are not available on this campus, and where there may have been significant changes as to the use of technology and/or special computer programs, for example, the "Banner System." In such cases as mentioned above, it is important to consider in determining qualifications such things as ability to keyboard/type, familiarity with computer-based programs, etc., but in every case reasonable and diligent efforts will be applied to give the displaced employee the "benefit-of-the- doubt" if a particular bumping opportunity looks to be available to the displaced employee.

Grievant's resume indicates that from 1964 to 1971 he was employed by the Perkiomen School where he taught English and music appreciation and was a dormitory Housemaster. This would appear, at least initially, to be relevant for consideration as a Residence Hall Director. Furthermore, Grievant has significant experience as a librarian, and has acquired computer skills as part of that work. While Grievant may have no direct experience as an Admissions Counselor, he may very well have the skills and ability to quickly learn the particulars of the position. He certainly has a great deal of experience working with students which would serve him well. In any event, this appears to be a case in which a discussion with the employee would have been most useful. A displaced employee does not have the right to pick and choose the position he wants; however, ifqualified, he is entitled to placement in the

next highest classification from which he was bumped. Therefore, it is appropriate to remand this matter for further consideration by WLSC on this issue.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 29-6A-6.

2. During a reduction in force by a board of directors at a state college, W. Va. Code § 18B-7-1(b) requires that consideration be given to the employees' seniority and "shall demonstrate that the senior employee cannot perform any other job duties held by less senior employees of that institution in the same job class or any other equivalent or lower job class for which the senior employee is qualified ."

3. WLSC acted in an arbitrary and capricious manner when it chose not to implement a reduction in force without consideration of whether positions were full-time or part-time.

4. Grievant has proven by a preponderance of the evidence that he should have been bumped only from one-half his position as Staff Librarian.

5. Grievant has proven that he did not receive appropriate consideration of his qualifications for the positions of Residence Hall Director and Admissions Counselor. Accordingly, the grievance is GRANTED, and WLSC Ordered to reinstate Grievant to the position of Staff Librarian on a half-time basis, and to award him all back pay and benefits to which he is entitled. WLSC is further Ordered to review Grievant's credentials, with Grievant, to determine whether he has the skills and ability to qualify him for half-time positions as Residence Hall Director or Admissions Counselor.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-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. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

DATE: JUNE 30, 2003

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***The record does not reveal whether this calculation was adjusted to reflect the 0.54 FTE status.***