AMANDA A. FRYMIER,

Grievant,

v. Docket No. 03-HEPC-217

HIGHER EDUCATION POLICY COMMISSION/

GLENVILLE STATE COLLEGE,

Respondent.

D E C I S I O N

Amanda A. Frymier ("Grievant"), employed by Glenville State College ("Respondent") as an Accounting Assistant I, filed a level one grievance on June 3, 2003, after her employment was reduced. For relief, Grievant requests that she be allowed to bump a less senior employee in the same pay grade, and to provide her with back pay and benefits. (See footnote 1) **The grievance was denied at all lower levels, and appeal to level four was made on July 24, 2003. An evidentiary hearing was conducted on September 16, 2003, in the Grievance Board's Westover office, at which time Grievant was represented by Loren B. Howley, Esq., and Respondent was represented by Assistant Attorney General Elaine L. Skorich. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before October 10, 2003.**

The following facts are undisputed and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant has been consistently employed by Respondent since May 19, 1980, and has been classified as an Accounting Assistant I, pay grade 12, since July 2000. Until July 2003, Grievant's assignment was for 37 ½ hours per week, or 1.0 FTE (full-timeemployee).

2. In response to state-mandated budget cuts, Respondent reduced the assignments of thirty-six employees, including Grievant, from 1.0 FTE (full-time equivalent), to less than 37.5 hours per week. Positions were identified for reduction based on an assessment of those job duties which were most essential to Respondent's operation. Neither seniority nor job performance were considered when the reductions were made.

3. Effective July 1, 2003, Grievant's position was reduced to .87 FTE, with her salary and

benefits prorated accordingly. Grievant's salary was reduced from approximately $30,000 to $26,000 per annum.

4. Mawhana Gifford, also classified as an Accounting Assistant I, with eight years of seniority, retains a 1.0 FTE position based upon a determination that her responsibilities are more time consuming than those of the other Accounting Assistants. There is no question that Grievant is qualified for the position held by Ms. Gifford, since she had been offered the job a few months earlier when Ms. Gifford left Respondent's employ. When Ms. Gifford asked to return to work, Grievant agreed to resume her position in the Business Office as she was unaware of the impending reductions.

5. Other employees in pay grade twelve holding positions of Administrative Secretary-Senior, and Program Assistant I, have less seniority than Grievant.

6. Respondent employed three individuals on a temporary basis as Secretaries in 2003. Two of the positions were approximately one month in duration, and the third continued for three months. Grievant was not given the option of assuming any of these positions.

Discussion

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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Grievant argues that Respondent acted outside its statutory authority and in an arbitrary and capricious manner by reducing the hours of full-time employees rather than terminating employees under the provisions of W. Va. Code § 18B-7-1(b). Grievant asserts that while the statute refers to the temporary furlough and permanent termination of employees to deal with budget cuts, it does not provide for the reduction of employees' hours to less than 1.0 FTE.

Alternatively, Grievant argues that if Respondent does have the authority to reduce the hours worked by full-time employees, the action constitutes a material change in duties or organization, requiring it to follow the "bumping" procedure used when laying off employees. Grievant further argues a violation of W. Va. Code § 18B-7-6 occurred when Respondent employed summer workers in 2003 without first offering full-time employment to current employees

Respondent denies any violation of W. Va. Code § 18B-7-1, because there was no reduction in the number of employees through the elimination of positions. Respondentfurther denies that the reduction of Grievant's hours triggers the application of bumping rights, because the Legislature never intended for the bumping statute to apply to employees with reduced working hours. Respondent argues that the decision to reduce employee hours was not arbitrary and capricious because it is not prohibited by any rule, regulation, statute or policy, and was reasonably implemented to save as many positions as possible while complying with budgetary restraints. Finally, Respondent denies that it violated W. Va. Code § 18B-7-6, when it hired temporary summer employees, rather than allowing Grievant to assume those duties. Respondent first notes that the statute specifically refers to nine and ten-month employees, thereby excluding Grievant, a twelve month employee. Second, the duties of the summer positions were necessarily performed during the same hours that Grievant works, making it unfeasible, if not impossible to schedule for her.

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.

Clearly, this provision addresses reductions in the work force resulting in thetemporary furlough or permanent termination of employees, and does not mention a reduction in employee hours. To stretch the provisions of the statute to hold that reducing hours is prohibited, or to extend the bumping rights established therein to employees who have had their positions reduced, would be an improper application of the law. Although Grievant correctly notes that there is no authorization in the statute or any policy for Respondent to reduce employee hours to cope with the budget reduction, guidance is provided by the West Virginia Supreme Court of Appeals.

In Lucion v. McDowell County Board of Education, 191 W. Va. 399, 446 S.E.2d 487 (1994), the Court held that when a board of education seeks to reduce employment closts, the board may decide that the schools' best interests require either the elimination of some service personnel jobs or the retention of all service personnel jobs, but with reduced employment terms. The Court also noted that "[f]rom the humanitarian prospective, the firing of people in economic hard times, rather than reducing everyone's hours defeats government's implied goal of helping to provide counter cyclical employment." That reasoning would apply to the present case which involves the same factual scenario albeit on a different educational level. **(See footnote 2)**

Neither is Grievant entitled to work assigned to temporary employees. W. Va. Code § 18B-7-6 states, in part:

(b)Each governing board, with the advice and assistance of the staff council shall establish a policy regarding the role of part-time classified employees. Such policy shall discouragethe hiring of part-time employees solely to avoid the payment of benefits or in lieu of full-time employees and shall provide all qualified classified employees with nine-month or ten-month contracts with the opportunity to accept part-time or full-time summer employment before new persons are hired for the part-time or full-time employment.

Nine or ten-month employees would be free to accept temporary, summer employment. Grievant continues to work approximately seven hours a day, and is not eligible to assume an additional position.

Respondent's actions in this matter were not arbitrary and capricious. The arbitrary and capricious standard of review of decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Additionally, the reviewer's role is limited to determining whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison at 283. Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286. Generally, an action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

Robert Hardman, Respondent's Vice President for Business and Finance, testifiedthat the decision to reduce employee hourss was intended to be a humane measure to keep as many people employed as possible. This approach is meritorious; however, some individuals may find a reduction in salary to be devastating, and would prefer a reduction in force preferable to an across the board loss of salary and benefits. In any event, Respondent considered relevant factors, and there was no clear error in judgment.

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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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).

2. Respondent acted within its discretion when it determined that it was in the school's

best interests to curtail employee costs by reducing employment terms rather than eliminating positions. See Lucion v. McDowell County Board of Education, 191 W. Va. 399, 446 S.E.2d 487 (1994).

3. Grievant failed to prove that she was entitled to bumping rights granted under W. Va. Code § 18B-7-1, after her hours were reduced to less than 1.0 FTE.

4. As a twelve-month employee, Grievant was not eligible for a summerassignment under the provisions of W. Va. Code § 18B-7-6.

5. The arbitrary and capricious standard of review of decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Additionally, the reviewer's role is limited to determining whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison at 283. Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, at 286. Generally, an action is arbitrary and capricious if the employer did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

6. Grievant failed to prove that Respondent acted in an arbitrary and capricious manner.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County, and 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 Boardnor 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: NOVEMBER 5, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Grievant also requested attorney fees and costs; however, the Grievance Board lacks authority to grant attorney fees, and may not award costs in the absence of bad faith, which Grievant does not allege.***

Footnote: 2

[2]Grievant erroneously relies upon Hendershot v. HEPC/West Liberty State College, Docket No. 03-HEPC-061 (June 18, 2003) in which a reduction in force had been implemented. This issue in that matter was whether Respondent had properly transferred Ms. Hendershot while exercising her bumping rights.