BONNIE J. CARR,

Grievant,

v. Docket No. 03-HEPC-201

HIGHER EDUCATION POLICY COMMISSION/

WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Bonnie J. Carr ("Grievant"), employed by West Liberty State College ("WLSC") as an Office Assistant, filed a level one grievance on May 13, 2003, in which she alleged:
Grievant asserts a claim against WLSC for unfair treatment as demonstrated by preferential treatment of another whereby Grievant had substantially more seniority and equally qualified for a position, but was unfairly denied the full-time position and was instead assigned to a part-time position in violation of § 29-6A-2(h).

For relief, Grievant requested instatement to the unidentified, full-time position, and back pay. Hearing evaluators at levels one and two lacked authority to grant the requested relief, but noted that the grievance was not timely filed. Following an evidentiary hearing at level three, the grievance was denied on the basis that it was not timely filed, and on the merits. Appeal was made to level four on July 11, 2003, and a level four hearing was conducted in the Grievance Board's Wheeling office on October 14, 2003. Grievant was represented by Daniel Tomassetti, Esq., and WLSC was represented by Assistant Attorney General Kristi McWhirter. The matter became mature for decision on December 8, 2003, upon receipt of Grievant's proposed findings of fact and conclusions of law.

The essential facts of this matter are undisputed, and may be set forth as the following findings of fact.

Findings of Fact

1. Grievant has been employed by WLSC for approximately eight years, and has held the positions of Building Service Worker, Switchboard Operator, and Postal Worker. Grievant is

presently classified as an Office Assistant.

2. During the 2001-2002 school year, Grievant was employed as a Postal Worker, pay grade 8. In April 2002, Grievant was notified that her position would be reduced from 1.0 FTE (full-time employee, working 7 ½ hours per day) to.53 FTE, effective July 1, 2002. Grievant did not file a grievance at that time.

3. In Spring 2003, WLSC eliminated 32 classified positions due to budgetary constraints. By letter dated January 9, 2003, Grievant was notified that her position of Postal Worker was being eliminated as part of the reduction in force. Grievant was also advised that she had accrued 189 months of seniority, and was eligible to bump into a .53 FTE position of Office Assistant, pay grade 7, in the Registrar's Office. Grievant accepted the transfer which became effective February 1, 2003, and did not file a grievance at that time.

4. At the same time, a 1.0 Secretary position held by Donna Howard was eliminated. At that time Ms. Howard had 59.5 months of seniority. Ms. Howard was subsequently transferred into a 1.0 FTE Records Assistant I position in the Admissions Office. Ms. Howard was experienced in computer skills, had received training, and used Banner, the school software.

5. Grievant was determined not to be qualified for the Records Assistant I position because it requires substantial knowledge and use of computers, particularly the Banner system used by WLSC. This decision was based upon skills required in her prior positions and information included in her personnel file. WLSC was not aware thatGrievant was familiar with the Word and Excel programs which she used in her private business. In January 2003, the Office Assistant was not required to use computers; however, some computer work is now being performed by Grievant.

6. Grievant did not file a grievance until May 17, 2003.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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); 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 her to

the Records Assistant I position. WLSC asserts that the grievance was not timely filed, that no favoritism was shown as Grievant was offered the position in the next highest classification for which she was qualified, and that the reassignment was not inconsistent with the relevant statutory provisions.

When the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources,Docket No. 96-HHR-501 (Sept. 30, 1997). Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See* Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). *See* Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). This grievance was not filed within the ten day time frame.

Grievant argues that the discovery rule exception discussed in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990) should apply because she filed a grievance shortly after receiving a document in the inter-campus mail system which revealed that Ms. Howard had less seniority. Spahr determined an employee may file a grievance within

ten days after discovering the facts which give rise to his or her grievance. *See*, *e.g.*, Butler v. W. Va. Dep't of Transp., Docket No. 99-DOH-084 (May 13, 1999); Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-092 (July27, 1998). Respondent argues that Grievant's explanation lacks credibility since she had been assigned duties of a postal worker and switchboard operator for many years. Given that both positions would have made Grievant aware of new staff members, Respondent asserts that it is likely Grievant knew that Ms. Howard had less seniority. Although Respondent's argument is reasonable, it is possible that Grievant did not learn of Ms. Howard's reassignment until May. Therefore, the matter was timely filed.

Addressing the merits of the grievance, Grievant has failed to prove that Respondent engaged in favoritism. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Initially, a grievant must establish a *prima faci*e case of favoritism by establishing:

(a) that she is similarly situated in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once a grievant establishes a *prima facie* case of favoritism, the burden shifts to Respondent to demonstrate a legitimate, nondiscriminatory reason for the employment decision. Thereafter, the grievant may show the offered reasons are pretextual. *See* Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). While Grievant demonstrated that shewas similarly situated to Ms. Howard in that both their positions were eliminated, Ms. Howard was not treated favorably in her reassignment because she had previously held a 1.0 FTE position while Grievant did not, and she had experience using the school's computer system, which Grievant did not.

WLSC did not act in violation of 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 priority shall be determined by a random selection system established by the employees and approved by the institution.

WLSC properly determined that Grievant was qualified to perform the duties of Office Assistant I position. It was only one pay grade lower than Grievant's previous assignment, and was for the same number of hours. The Grievance Board has 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 StateCollege, Docket No. 03-HEPC-061 (June 18, 2003). To have bumped Grievant up to a 1.0 FTE position, and Ms. Howard down to a .53 FTE position, would have been improper.

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

Conclusions of Law

___1. When the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484

(Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997). Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See* Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

2. A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified ofthe decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). *See* Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

3. WLSC established that this grievance was not filed within the ten day time frame required by W. Va. Code § 29-6A-4(a).

4. Grievant has proven that this matter falls under the discovery rule exception discussed in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), since she filed the grievance upon learning that Ms. Howard had less seniority but was reassigned to a full-time position.

5. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

6. Initially, a grievant must establish a *prima faci*e case of favoritism by establishing:

(a) that she is similarly situated in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once a grievant establishes a *prima facie* case of favoritism, the burden shifts to Respondent to demonstrate a legitimate, nondiscriminatory reason for the employment decision. Thereafter, the grievant may show the offered reasons are pretextual. *See* Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

7. Grievant established that she and Ms. Howard were similarly situated; however, WLSC demonstrated a legitimate basis for the employment decision, successfully rebutting the *prima facie* case of discrimination. Grievant did not prove the stated reason was pretextual.

8. W. Va. Code § 18B-7-1(b) requires that consideration be given to an employee's seniority during reductions in the work force, and that the senior employee be permitted to assume the duties of less senior employees in the same job class or any other equivalent or lower job class for which the senior employee is qualified.

9. WLSC did not act in violation of W. Va. Code § 18B-7-1(b), or in an arbitrary and capricious manner when it reassigned Grievant to the position of Office Assistant I.

Accordingly, the grievance is DENIED.

Either party 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: DECEMBER 17, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE