BEFORE THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANIEL FROST,
Grievant,

v. **Docket No. 2010-0636-BSC**

BLUEFIELD STATE COLLEGE,
Respondent.

Decision

Grievant, Daniel Frost, is employed by Respondent, Bluefield State College, as a Counselor II. On November 3, 2009, Grievant filed a grievance at level one asserting the following:

> The West Virginia State Legislature, the Higher Education Policy Commission and/or the Bluefield State College Board of Governors has yet to fully fund the Classified Salary Schedule as is found in W.Va. State Code § 18B-9-3 and was promised by the Board of Governors of Bluefield State College through Policy No. 33. Additionally, it is my contention this salary schedule was and still is antiquated before it was ever implemented it is now 10 years old.
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> The relief sought is:
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> Immediate full funding of the salary schedule as was agreed upon by Board of Governors of Bluefield State College through Policy No. 33 and that classified receive the back pay from 01 July 2009 (FY 2010) as that was when Classified was promised the salary schedule would be funded by.

A level one conference was held on November 16, 2009. A level one decision was issued on December 7, 2009, denying the grievance. A level two mediation was held on January 20, 2010. Grievant appealed to level three and a level three hearing was held on January 18, 2011, in Beckley, WV. Grievant was represented by Ben Barkey, Organizational Development Specialist for the West Virginia Education Association

("WVEA"). Respondent was represented by Kristi A. McWhirter, Esq., Assistant Attorney General. This matter became mature for decision on February 7, 2011, after the submission of both parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant asserts that Respondent has violated W.VA. CODE § 18B-9-3 and Bluefield State College Policy No. 33 by not fully funding classified employees' statutory salary schedule. Respondent avers that Grievant did not demonstrate that Respondent violated any rule, regulation or policy by not fully funding the salary schedule in fiscal year 2010.

Grievant did not meet his burden of proof and establish that Respondent violated any rule, regulation, statute or policy. For the reasons stated below, this grievance must be DENIED.

Findings of Fact

1. Respondent has three categories of employees, classified, non-classified and faculty.

2. Grievant is a classified employee for Respondent.

3. In 2001, the Legislature enacted W.VA. CODE § 18B-9-3 which established a personnel classification system and salary schedule for classified employees.

4. Respondent's Board of Governors ("BOG") enacted Policy 33, Classified Staff Salary Policy[1] ("Policy 33") and Policy 41, Salary Policy[2] ("Policy 41").

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[1]Respondent's Exhibit No. 1

[2]Respondent's Exhibit No. 20

5. Policy 33 states in part:

> With funds allocated by the Board for general salary increases for classified employees, the goal for fully funding of the statutory salary schedule is fiscal year 2010 or earlier, as funds are available...

6. Policy 41 states that no one category of employee group should receive a salary increase unless all three categories of employees receive a salary increase.

7. The last salary increase for classified, non-classified and faculty became effective during the 2009 fiscal year.[3]

8. The 2009 salary increase placed Respondent at 98% funding of the salary schedule for classified personnel.

9. During the 2009 and 2010 fiscal years, Respondent separated from New River Community and Technical College ("NRCTC"). NRCTC became a free standing educational institution separate from Bluefield State College. As a result, Respondent lost some of its student enrollment revenue.

10. BOG minutes[4] from the June 18, 2009 meeting reflect that Shelia Johnson, Vice President of Financial and Administrative Affairs, presented a Finance Committee Report. The minutes reflect the following:

> Ms. Johnson reported on the challenges faced by the institution due to the reduction in state funding for the coming year and stressed the need to be very conservative with spending. She stated that the Classified Salary Schedule is 98% funded and will be reviewed in the fall after looking at the state and the economy and the institution's enrollment figures to get a better idea of the finances of the

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[3]Respondent's Exhibit No. 10

[4]Respondent's Exhibit No. 16A

> institution. Ms. Johnson reminded the group of the loss of revenue from the NRCTC separation.

11. BOG minutes[5] from the Oct. 15, 2009 meeting reflect that Finance Committee Member, Larry Morhouse, presented a Finance Committee Report. The minutes reflect the following:

> Mr. Morhouse stated that the institution is in good financial shape but due to the state of the economy the college must be very frugal in spending decisions. He informed the group that the committee and the college continue looking for ways to economize and continue to look at various alternatives in regard to funding of salaries, etc. He commented on the great asset the college is to the community. This Committee will continue to monitor and make reports to the Board on a regular basis.

12. During the 2010 and 2011 fiscal years, the West Virginia Higher Education Policy Commission ("WVHEPC") advised all institutions to spend money conservatively and fully examine funding before implementing salary increases.[6]

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. "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 Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

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[5]Respondent's Exhibit No. 22

[6]Respondent's Exhibits No. 24 and 25

Grievant asserts that Respondent has violated W.VA. CODE § 18B-9-3 and Bluefield State College Policy No. 33 by not fully funding classified employees' statutory salary schedule by fiscal year 2010. W.VA. CODE § 18B-9-3 discusses the annual salary schedule of higher education classified employees and states:

> (a) There is hereby established a state annual salary schedule for classified employees consisting of a minimum annual salary for each pay grade in accordance with years of experience: Provided, That payment of the minimum salary shall be subject to the availability of funds, and nothing in this article, shall be construed to guarantee payment to any classified employee of the salary indicated on the schedule at the actual years of experience absent specific legislative appropriation therefor. The minimum salary herein indicated shall be prorated for classified employees working less than thirty-seven and one-half hours per week...

(Emphasis added).

Policy 33 sets a "goal" for fully funding the statutory salary schedule by fiscal year 2010 "as funds are available". The policy does not guarantee full funding by fiscal year 2010, but merely sets full funding as a goal and clearly states that the goal is contingent upon the availability of funds. Salary increases are long-term commitments, not a one time expense. There must be funds available for all three employee categories to receive salary increases before any employee category receives an increase. Respondent asserted that the overall financial condition of the college is not feasible for fully funding the salary schedule, at this time. Respondent demonstrated that it had been advised by WVHEPC to be conservative with spending and to "fully examine funding before implementing salary increases". Likewise, Respondent demonstrated that it has lost revenue due to the separation from NRCTC.

No violation of Policy 33 has occurred by Respondent not meeting the goal set for full funding. W.Va. Code § 18B-9-3 is clear - "absent specific legislative appropriation"

there is no statutory “guarantee” to classified employees as to when the salary schedule will be fully funded. *Dunn et al. v. Marshall*, 2009-0983-CONS (February 16, 2010). Accordingly, Grievant has not demonstrated a violation of any rule, regulation, statute or policy.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. “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 Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. W.VA. CODE § 18B-9-3 states:

> (a) There is hereby established a state annual salary schedule for classified employees consisting of a minimum annual salary for each pay grade in accordance with years of experience: Provided, That payment of the minimum salary shall be subject to the availability of funds, and nothing in this article, shall be construed to guarantee payment to any classified employee of the salary indicated on the schedule at the actual years of experience absent specific legislative appropriation therefor. The minimum salary herein indicated shall be prorated for classified employees working less than thirty-seven and one-half hours per week...

(Emphasis added).

3. W.Va. Code § 18B-9-3 is clear - “absent specific legislative appropriation” there is no statutory “guarantee” to classified employees as to when the salary schedule

will be fully funded. *Dunn et al. v. Marshall*, 2009-0983-CONS (February 16, 2010).

4. Policy 33 does not guarantee full funding by fiscal year 2010, but merely sets full funding as a goal and clearly states that the goal is contingent upon the availability of funds.

5. Grievant has not demonstrated a violation of any rule, regulation, statute or policy.

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Jennifer Lea Stollings-Parr
Administrative Law Judge

Date: February 24, 2011