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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**  
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CHARLES D. CARPENTER, et al.

v.

Docket No. 89-H-264

W.VA. DIVISION OF HEALTH

DECISION

The grievants in this proceeding are twenty-two former state employees whose employment was terminated when Spencer State Hospital was closed on June 30, 1989. Grievant Charles D. Carpenter, who served as the group's representative, filed a grievance alleging that the Division of Health (Health)<sup>1</sup> violated State law by withholding payment of their annual increment for the period from July 1, 1988, through June 30, 1989, and by denying them an option to receive accrued vacation benefits in regular paycheck form rather

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<sup>1</sup> The grievance originally named the W. Va. Department of Health as the respondent employer. This style has been changed to the Division of Health to reflect the changes brought about by the passage of Senate Bill No. 2 which reorganized the executive branch of State government. See, W. Va. Code §5F-1-1 et seq.

than in a lump sum.<sup>2</sup> It was also alleged that Health violated a civil service regulation governing reductions in force and a federal law which in certain instances requires employers to give employees sixty days notice before a plant closing.<sup>3</sup>

Before turning to the merits two preliminary matters must be briefly addressed. First, Health has filed a motion to dismiss the grievance on the basis that Mr. Carpenter has acted in bad faith and never properly requested a level II or III hearing. Health offered an affidavit from the former administrator of the hospital and documentary evidence in support of its motion. Mr. Carpenter testified at a level IV hearing held on September 13, 1989, and denied all the

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<sup>2</sup> Grievant stated at the level IV hearing that Health had agreed to pay accrued vacation benefits in regular paycheck form rather than in a lump sum after the grievance was filed. Health confirmed that it had paid accrued vacation benefits in such a manner and explained that this was beneficial to employees, because employees receive three months of health insurance coverage after their last paycheck. It thus appears that grievants have obtained the relief sought on this issue. It should also be noted that since W. Va. Code §29-6A-2(i) provides that "Any ... issue relating to public employees insurance in accordance with article sixteen [§ 5-16-1 et seq.], chapter five of this code ... shall not be the subject of of any grievance filed in accordance with the provisions of this article," there is a question whether the Grievance Board has jurisdiction over this matter.

<sup>3</sup> The grievance was filed at level IV on June 15, 1989, and an immediate hearing was requested. This request was denied because grievants were terminated due to the hospital closure rather than for disciplinary reasons, See Williamson v. W. Va. Dept. of Human Serv., Docket No. 89-DHS-33 (Feb. 27, 1989), and, accordingly, the case was remanded to level I and dismissed from our docket.

allegations. After careful consideration of all evidence concerning procedural irregularities at the lower levels, Mr. Carpenter's testimony is found to be credible and it is concluded that the grievant did not act in bad faith and did not attempt to subvert the requirements of the grievance procedure statute as contended by Health. To the contrary the evidence shows that he acted in good faith and substantially complied with the procedural requirements of the grievance procedure. In any event, dismissal of the case as to all grievants would be an unduly extreme and unjustified sanction under all the circumstances. Accordingly, the motion to dismiss is denied.

The second preliminary matter concerns what issues will be addressed in this proceeding. Prior to the final level IV hearing, the West Virginia Supreme Court of Appeals issued a rule to show cause in a mandamus proceeding for the purpose of deciding whether all former employees of the hospital are entitled to the annual pay increment.<sup>4</sup> In the same proceeding the Court agreed to rule on a second issue closely related to grievants' claim involving the payment of accrued annual leave and the continuation of their health insurance coverage. Since the Supreme Court will probably

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<sup>4</sup> State ex rel. Courtney v. State Dept. of Health, Docket No. 19196 (Sept. 13, 1989).

resolve these issues, they will not be addressed in this decision.<sup>5</sup>

The merits will now be addressed. Grievants' reliance on the federal plant closing law, formally titled the Worker Adjustment and Retraining Notification Act (WARN)<sup>6</sup>, is plainly misplaced for at least two reasons. First, Congress authorized actions to enforce the liability provisions of WARN to be brought only in the federal district court where the alleged violation of law occurred or where the employer transacts business. For that reason alone, it is extremely doubtful the Grievance Board has any jurisdiction to entertain a claim based upon a violation of the federal plant closing law. Second, and more importantly, there is nothing in the language of the WARN suggesting that it was intended to extend any protection to state government employees whose employment is to be terminated upon the closing of a government facility. This conclusion is buttressed by 20 C.F.R. §693.3 which, in pertinent part, states that "Regular Federal, State, and local government public services are not covered." It is therefore concluded that the protections of

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<sup>5</sup> Accordingly, these claims are hereby dismissed without prejudice, and in the unlikely event that either issue is not resolved by the Supreme Court, grievants may reinstitute these proceedings by filing a grievance at level IV within fifteen days of the Court's decision.

<sup>6</sup> See 29 U.S.C. §§2101 et seq. (1988); 20 C.F.R. §639 (1989).

the federal plant closing law do not extend to employees of State government.

Grievants next contend that Health violated the layoff and recall amendments of W.Va. §29-6-10(5),(6). These amendments, however, did not become effective until July 1, 1989, with the passage of House Bill 2665. Statutes are generally presumed, in the absence of language to the contrary, to apply prospectively only. W.Va. Code §2-2-10(bb). The statute does not contain any language calling for retroactive application, and it is thus not applicable to the termination of grievants on June 30, 1989.

Grievants also allege that Health violated civil service system (CSS) reduction-in-force regulations. Section 13.4, codified at 143 CSR §13.4, provides certain limited "bumping"<sup>6</sup> rights within the agency based upon an employee's service ratings and seniority in a particular job classification.<sup>7</sup> Health argues that Senate Bill No. 2,

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<sup>6</sup> Generally, the term "bump" means to fill a position with an employee having greater seniority at the expense of an employee with less seniority in order that the senior employee can avoid layoff. Smith v. Sorensen, 748 F.2d 427, 430 n. 1 (8th Cir. 1984).

<sup>7</sup> Section 13.04 effective from July 1, 1987, until June 30, 1989, provides:

Reduction-in-force.--

The appointing authority may release any employee without prejudice, because of lack of funds or curtailment of work, or in order to permit reinstatement of employees upon their release from periods of military service in the

(Footnote Continued)

passed on February 1, 1989, and made effective from passage,<sup>8</sup> substantially limited the bumping rights of civil service employees in a reduction in force and, in effect, superseded the civil service regulations.

The language of this bill, codified in W.Va. Code §5F-2-2(d), supports Health's contention that grievants had no right under section 13.4 to bump junior employees in the

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(Footnote Continued)

Armed Forces of the United States. No permanent employee, however, shall be released while there are emergency, intermittent, temporary, provisional, or probationary employees serving in the same class of positions in the agency. The order of separation due to reduction-in-force shall be based upon service ratings and seniority, under a formula to be formally established by the Director of Personnel and approved by the Commission, and all such separations shall be reported to the Director. For reemployment purposes, the Director shall establish a list of employees laid off in accordance with the above provisions, giving due consideration to performance records and seniority in service in compiling said list.

Appendix A of the 1987 regulations contains the Director's reduction-in-force rating formula. Under this formula employee's receive a numerical average service rating, to which is added one-sixth point per month of service in the classified system, to arrive at a separation rating which determines the order of separation from employment.

<sup>8</sup> The engrossed bill states that Senate Bill No. 2 was enacted on Feduary (sic) 31, 1989. Despite this obvious error concerning the February date when the bill was passed, it is clear that the bill was enacted and became effective prior to the termination of grievants' employment.

same job class<sup>9</sup> in other state hospitals operated by Health.

The pertinent amendatory language provides:

The layoff and recall rights of employees within the classified service of the state as provided in subsections five and six, section ten[§ 29-6-10(5) and (6)], article six chapter twenty-nine of this code shall be limited to the organizational unit within the agency or board. . .in which the employee was employed prior to the agency of board's transfer or incorporation into the department: Provided, That the employee shall possess the qualifications established for the job class. . . . Except as provided in this subsection, nothing contained in this section shall be construed to abridge the rights of employees within the classified service of the state as provided in sections ten and ten-a [§§ 29-6-10 and 29-6-10a], article six, chapter twenty-nine of this code or the right of classified employees of the board of regents to the procedures and protections set forth in article twenty-six [§ 18-26B-1 et seq.], chapter eighteen of this code. (Emphasis added).

Based upon this statutory language, the undersigned concludes that Health was not required to follow the bumping and recall provisions of the civil service regulation with respect to positions in other facilities, i.e., organizational units operated by Health. It is a basic principle of administrative law that a regulation that conflicts with a statute is invalid. See Ney v. State Workman's Compensation Comm'r, \_\_ W. Va. \_\_, 297 S.E.2d 212 (1982); Rowe v. W.Va. Department of Corr., \_\_ W.Va. \_\_, 292 S.E.2d 650 (1982).

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<sup>9</sup> Section 3 of CSS's regulations defines a "Class or Class of Positions" as follows: "One or more positions sufficiently similar in duties, training, and responsibilities so that the same titles, the same qualifications and the same schedule of compensation and benefits may be equitably applied to each position."

Section 13.4 is in direct conflict with the statute to the extent that it permits bumping on an agency-wide basis and, hence, cannot be given the force and effect of law.

Grievants make the further argument, however, that Health retained certain employees at the hospital and not only would not reveal the names or duties being performed by these employees, but also refused to permit senior employees to perform these jobs or bid on these positions in violation of section 13.4. Grievants also claim jobs were contracted out in violation of State law.

Jeanne L. Roberts performs personnel functions for Health and participated in one of the two meetings held with hospital employees to explain their rights prior to the termination of their employment. She testified that Health terminated all hospital employees and then rehired approximately five or six of them in temporary, ninety-day exempt positions, all with the approval of the Division of Personnel<sup>10</sup> and that posting is not necessary for such

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<sup>10</sup> A second and final hearing was held on October 30, 1989. Mr. Carpenter had previously submitted various documents in support of the grievance but declined to participate further and did not appear at the final hearing. Despite notice to all grievants for whom an address was available, no one appeared on grievants' behalf at this hearing. Health's motion to dismiss for failure to prosecute was not ruled on at the hearing. This motion is hereby denied. Seven grievants did appear at the initial hearing, and Mr. Carpenter testified and offered several documents in evidence to prove the claims. Considering these circumstances, the failure to appear at the second hearing is not, in and of itself, grounds for dismissal.

appointments. Health, nonetheless, selected the former employees it rehired on the basis on seniority within the pertinent civil service job classification out of a sense of fairness. These positions included personnel to complete medical records on patients, to complete payroll, retirement, and insurance matters, and to maintain the storeroom. No evidence was introduced to contradict any of this testimony. While Health apparently contends it had no duty to allow grievants to exercise bumping rights under §13.4 after their termination, the testimony indicates it adhered to the spirit of the regulation's requirements by hiring the most senior employee in the relevant job classification.

The critical question in this case is whether section 13.4 applies when a state facility or organizational unit is closed and all employees are terminated. If it does not, Health cannot be found in violation of its requirements. Upon review of the regulations, the undersigned concludes the regulation does not apply in instances where an entire facility is closed and all employees are terminated. The regulation applies when for various reasons the number of employees must be reduced, not when a facility is closed eliminating any need for permanent employees. This conclusion is supported by the language of the regulation which speaks in terms of layoff and release rather than termination of employment. Layoff is defined in Section 3 of the CSS's regulations as "A reduction in the number of employees caused by a reduced work load or curtailment of funds."

Ms. Roberts testified that Health did hire a private contractor to maintain the hospital grounds as alleged by grievants. Here too, however, no showing has been made that contracting out these services is contrary to State law or civil service regulation. Certainly nothing contained in Section 13.4 expressly forbids contracting out these limited services upon the closure of state facility, and it is doubtful that the regulation was ever intended to prohibit such personnel actions.

Although grievants argue Health's personnel actions in connection with the hospital closure were unlawful, no evidence was introduced that would substantiate this claim. No statutory provision or civil service regulation, other than Section 13.4, was specified as having been violated. It is therefore concluded that grievants have not met their burden of proving a violation, misapplication or misinterpretation of the statutes, policies or rules and regulations under which they work in the contracting out of limited maintenance services. This final claim must also be denied.

The following findings of fact and conclusions of law are in addition to the findings and conclusions contained in the foregoing discussion and analysis.

### Findings of Fact

1. All employees of Spencer State Hospital were terminated from employment when it was closed effective on June 30, 1989.

2. Five or six of these former employees were rehired in temporary, ninety-day exempt positions and limited maintenances services were contracted out.

### Conclusions of Law

1. The protections of the federal plant closing law do not extend to employees of State government.

2. Since this is not a disciplinary matter, grievants bear the burden of proving the allegations of their grievance by a preponderance of the evidence.

3. The layoff and recall amendments to W.Va. Code §29-6-10(5),(6) did not become effective until July 1, 1989, and do not apply to the termination of grievants' employment on June 30, 1989.

4. Section 13.4 of the Rules and Regulations of the Civil Service System is not applicable where an entire facility is closed and all employees are terminated.

5. Grievants have failed to prove Health violated Section 13.4 of the Rules and Regulations of the Civil Service System, or that any violation, misapplication or misinterpretation of the statutes, policies or rules and regulations under which they worked was committed.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Department of Personnel may appeal this decision to the Circuit Court of Roane 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 Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

  
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C. RONALD WRIGHT  
DIRECTOR

Dated: December 8, 1989