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SUSIE CUNNINGHAM

v.

DOCKET No. 89-DPS-124

DEPARTMENT OF PUBLIC SAFETY

DECISION

Grievant, Susie Cunningham, was employed by the Department of Public Safety (Department) as a drivers examiner prior to her termination effective April 4, 1989. Ms. Cunningham filed a grievance appeal directly to level four on March 29 and an evidentiary hearing was held on June 6.

The facts of this matter are not in dispute. The grievant was hired by the Department in January 1989 to fill a vacancy created on the five-member drivers examiner team based at Shinnston after another examiner had been terminated. On or about March 21 the grievant was advised that the individual whom she had replaced was to be reinstated as the result of a negotiated settlement of a grievance. As only five driver examiners are assigned to the Shinnston

office the grievant was offered a similar position vacancy on the Moundsville team. When she declined to accept the transfer her employment was terminated.

The grievant argues that she was never advised that her employment would be temporary or could be contingent upon the outcome of a grievance and what she accepted was a permanent, full-time position as drivers examiner. She requests to be reinstated to the position of drivers examiner at Shinnston. The Department asserts that the grievant has not been terminated for any misconduct or inadequate performance but because she had been employed for a position which no longer exists and as the last person hired for the team she was the first to be fired.

While the decision to permanently fill a position subject to litigation was less than prudent, the Department has no written rules, regulation or policies upon which to base personnel decisions or to protect employees in situations such as this. The position is not classified by the Civil Service System and therefore its rules and regulations are not applicable. Although the grievant has been at best treated unfairly, she appears to have no legal rights to the position. With one more employee than assigned positions, the Department necessarily and properly implemented a reduction in force with the release of the grievant, the employee with the least seniority.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. The grievant was hired by the Department of Public Safety as a drivers examiner in January 1989.

2. The vacancy filled by the grievant had been created when another examiner was terminated. That employee had filed a grievance which was pending at the time this grievant was hired.

3. The grievant was never advised that the position was temporary or that the former employee was seeking reinstatement through the grievance process.

4. As a result of a negotiated settlement the former employee was reinstated to the position of drivers examiner resulting in overstaffing of the Shinnston team.

5. The grievant was offered, but declined, a vacancy on the Moundsville team.

6. The grievant's employment was terminated effective April 4, 1989.

7. The grievant is not covered by the Civil Service System and the Department has no personnel rules or regulations under which she may assert any claim to the position.

Conclusions of Law

1. In a situation which requires a reduction in force within a classification, the termination of that employee with the least amount of seniority is permissible.

2. The Department has shown a lack of need for one employee justifying the grievant's termination.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Harrison County or 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 §18-29-7) 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.

DATED:

July 31, 1989

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER