PATRICIA L. HENDERSHOT

v. Docket No. 93-BOT-207

BOARD OF DIRECTORS/

WEST LIBERTY STATE COLLEGE

D E C I S I O N

From approximately 1988 until mid-October 1991, Grievant Patricia L. Hendershot was regularly employed by Respondent West Liberty State College (WLSC) as a classified worker. On or about October 15, 1991, Grievant, then a Secretary III, signed a document signifying her intention and agreement to transfer from her then-current work department to a ninety-day (twelve working weeks) job in another area in the college and to resign from her full-time employment with the college when the temporary job ended. In mid-January 1992, several days before the job was scheduled to end, Grievant filed a complaint because she was not hired for a posted vacancy for which she had applied.

The primary issue in this case is whether WLSC was legally obligated to hire Grievant for the job she sought, pursuant to any laws or regulations in effect at the time, or under any theory of law. Grievant claims she is entitled to the job and seeks instatement and back wages and related benefits.

This case has a protracted procedural history and overlaps, time-wise and substantively, with a previous grievance filed by Grievant in September 1991, Hendershot v. Bd. of Directors/W. Liberty St. Coll. Docket No. 91-BOD-515 (May 29, 1992) (Hendershot I). In that action, as in the instant case, Grievant sought redress because she was not hired for a particu lar job within WLSC. Grievant did not prevail on that claim.

While the record indicates this grievance was initiated at

level one in January 1992, the matter was held in abeyance at the lower level for nearly one and one-half years, presumably by agreement of the parties, and perhaps pending the decision in Hendershot I, heard at level four on March 24, 1992.1 However, for whatever reason, an evidentiary level two hearing in this case did not occur until March 2nt retained an attorney to represent her interests, and WLSC was represented by the Respondent Board of Directors' (BOD) in-house counsel. By letter dated June 3, 1993, Grievant's attorney filed a level four appeal and requested a hearing. According to Grievant's counsel, the appeal was based on the April 15, 1993 adverse level two decision which he received on April 19, 1993. The grievance was docketed and assigned to the undersigned. By letter dated June 10, 1993, the parties were asked to send information about the nature of the grievance and any pertinent lower level data, including the lower-level decisions.

1Hendershot I had been initially filed at the lower grievance level in September 1991.

In response, WLSC transmitted the level two hearing exhib its. On June 17, the undersigned wrote the parties again and noted that Grievant had not yet responded and also questioned whether Grievant, not presently a WLSC employee, was eligible to file a complaint when she did. On June 22, 1993, Grievant transmitted by facsimile a completed level four filing form and an undated document, a copy of her original January 15, 1991 level one grievance statement:

On December 6, 1991 I informed . . . [WLSC officials] of my desire to transfer to the Secretary III position

that is open in the College [Student] Union. . . .
The amended starting date for the above mentioned
position is January 16, 1992. As of this date, I have
not been afforded the opportunity to transfer or for
an opportunity to interview for that same position. I
am currently a Secretary III in the Education Depart
ment and according to the Employee Policy Bulletin
should be able to transfer to another Secretary III
position that is vacant.
I would like a full explanation as to why I am not
permitted to transfer and I, in turn, ask that I be
awarded the transfer.

By letter dated June 21, 1993 (received June 24, 1993), Grievant's counsel declared that Grievant had full-time employment at WLSC when she filed this grievance on January 15, 1992. He also enclosed copies of ten additional grievances that Grievant had initiated at WLSC on June 12, 1993, and requested that they be consolidated with, and heard at the same time as the instant matter. These grievances, denied by WLSC President Clyde Campbell on the basis of untimeliness, each pinpointed some job at WLSC for which Grievant had applied, but had not been selected, from 1988 through 1993. Clearly, the grievances were not timely filed at the lower grievance levels. Finally, in conjunction with a reference to the ten "additional grievances against the college," Grievant's counsel suggested that Grievant had been "wrongfully terminated on January 21, 1992." It must be noted that Grievant never formally raised the issue of "wrongful termination," either in her initial filing or at any later time.

A level four hearing was scheduled for July 22, 1993 on the

original complaint. Additionally, the parties were informed a pre-hearing conference would be conducted that day to discuss the status of the ten grievances filed in June 1993 and, hope fully, to refine the issues in the instant matter. On the day of the hearing, BOD's counsel failed to appear. A telephone call was placed to his office, and he apologized because he had not remembered the date of the hearing. Thereafter, a confer ence ensued among the undersigned and the attorneys representing BOD and Grievant.

As a result of that conference, BOD's counsel agreed to find the ways and means to reimburse Grievant's counsel for his time for that day. In addition, the parties concurred that the ten grievances filed in June 1993 were indeed time-barred. Finally, the parties agreed to enter into settlement negotia tions with respect to the instant matter. Thereafter, no further word was heard from the parties for approximately ten months.

Accordingly, on May 17, 1994, the undersigned issued a notice of pendirievant immediately responded with a written objection to the dismissal and requested a hearing.2 After several dates were established and subsequently cancelled for cause by the parties, a hearing commenced on July 6, 1994, at which time the parties agreed to augment the lower level record with further testimony from Grievant and from one witness appearing for WLSC.

Following that hearing, a transcript was prepared and distributed to the parties. Approximately one month later, on August 19, 1994, BOD's counsel filed fact/law proposals. Due to some misunderstanding about when the parties' briefs were due, Grievant's attorney was given a cut-off date of December 2, 1994

to file a response and to supplement the proposals he had filed at level two. Thereafter, he was granted leave to extend that time, and his submission was received at the agreed-upon time of December 15, 1994.

Background

Grievant began employment at WLSC in 1987 as a clerk and, over four years' time, had been promoted to Secretary I and then Secretary III in WLSC's Registrar's Office. Although Grievant never took the initiative to discuss her working situation with relevant administrators, she apparently experienced some inter personal difficulties with peers within the Registrar's Office and sought alternative employment at WLSC. Over a period of

---

2The Grievance Board's Procedural Rules, Section 4.12, "Failure to Prosecute," permits the Board to dismiss a grievance when a case has been held in abeyance for longer than six months without word from the parties, but only upon furnishing adequate notice and giving the parties thirty calendar days to file a written objection.

time from 1988 through mid-1991, Grievant applied for various openings. Grievant was not selected for any of these jobs, and in September 1991, she grieved over a specific position posted in mid-1991 for which she had applied but had not been selected. See Henderimately, in October 1991, Grievant applied for a tempo rary, ninety-day secretarial position (Secretary I) for Dr. Leslie Jones within WLSC's Education Department. The posting clearly indicated that the position in that department was of limited duration. According to then-Human Resources Administra tor Mike Maloy, he advised Grievant that the job was temporary

and that, if she did not secure another job at the end of the employment period, she would no longer have a full-time job at the school. Despite this counseling, Grievant insisted that she wanted to transfer from the Registrar's Office for personal reasons.

At that point, Grievant told Mr. Maloy that she would apply for other positions before the temporary job in the Education Department ended. However, according to Mr. Maloy, because he could not assure Grievant that she would succeed in her efforts to secure another position, he asked her to sign a memorandum pertaining to the reassignment. This document, dated October 12, 1991, is reproduced here in pertinent part:

Dr. Jones [advised] that he has discussed with you, his need for . . . secretarial support. It[']s my further understanding that you maintain an interest in performing those duties for Dr. Jones for his 12 week period of need, after which it is your intention to resign your position at [WLSC].

[The administration] decided that . . . you [could] retain your current job title, rate of compensation, and benefits, and simply transfer supervision of your present job title to Dr. Jones for your last months of work. This is the only way to insure maintenance of your benefits and your classified employee status for the period.

In accepting this temporary reassignment, it must be understood that your employment status with [WLSC] will terminate when the temporary need expires. In the interim, [Registrar] Cain will identify his future staffing needs for the Registrar's Office I

must emphasize, however, your new assignment with Dr.
Jonng with it an automatic ability to
return to your present duties in the Registrar's
Office. . . . .
Please indicate in the space provided below if you are
in accord with the terms and conditions of this
reassignment stated above. Your signature will
certify that you agree unequivocally.

WLSC Ex. 1. Grievant signed and returned the memorandum to Mr. Maloy on October 15, 1991 and eventually assumed the temporary position with Dr. Jones in the Education Department.
On November 26, 1991, WLSC posted a position for a full-time Secretary III position in WLSC's College (Student) Union (Union). Grievant made application immediately. Thereafter, on December 6, 1991 the posting was corrected and revised, adding the requirement of experience and/or skill as a bookkeeper or cashier. On December 17, 1991, Grievant augmented her applica tion with detailed information about her experience as cashier and bookkeeper in previous jobs. See Joint Exs. 1 and 2.
In all, WLSC received fifty-one applications for the Union position, including three internal "transfer" applications, from Grievant and two other WLSC employees, according to Union manager Don Jones (no relation to Dr. Jones). Mr. Jones testi fied that he reviewed the application materials and initially selected twenty-seven candidates, including Grievant, for further consideration. However, Grievant was not included among the nine applicants that Mr. Jones selected for interview. Of the six who agreed to interview, Mr. Jones ultimately recalled two of them for a second interview. T2.7-9.
Mr. Jones' first choice for the position declined the job

offer. He stated that he then offered the position to Amy Jo Stift, primarily based upon Ms. Stift's educational qualifica tions, which included a bachelors degree in business administra tion from WLSC the previous year. Besides Ms. Stift's college training in accounting and bookkeeping, she had some experience in bookkeeping and cashiering. T2.10, 12. Ms. Stift,usly worked in WLSC's admissions office in a full-time,
ninety-day (temporary) capacity, accepted the job offer.
In the meantime, on or about January 3, 1992, WLSC's business office prepared the necessary papers effecting Grievant's termination from the temporary position she held.2 According to Mr. Maloy, the paperwork began in advance of Grievant's last scheduled working day for payroll purposes and to transmit necessary information about Grievant's health insurance options when the employment ended.

2For several years, Grievant had also held a contract to "coach" WLSC's cheerleading team, a non-classified position. That coaching contract was again offered to Grievant after her full-time job ended at WLSC, and she agreed to retain the position. Apparently Grievant was not employed anywhere in a full-time capacity at the time Hendershot I was heard; however, she did not reveal her employment status at the time of the level four hearing in the present matter.

The Parties' Positions

Grievant's initial stand in this matter was set forth in her level two brief. In it she alleged, among other things, that she had been harassed while working in the Registrar's Office, that she had been retaliated against because she had

previously filed a grievance upon not receiving a job or even a job interview for a vacant position at WLSC, and that she had never intended to resign her Secretary III employment at WLSC when she signed the memorandum in October 1991, but merely meant to resign from the Secretary III job in the Registrar's Office only.

Grievant also claimed that WLSC's hiring policy required in-house applicants be given jobs before external applicants, regardless of whether or not the in-house applicant is more qualified. According to Grievant, she does not need to prove her qualifications exceeded those of the successful applicant, merely that her qualifications were equal. In Grievant's view, becauses agree she was qualified for the posi tion of Secretary III, she was entitled to the vacant position at issue and should have been hired.

At level four, Grievant raised a new issue in this case, discrimination. At hearing, she alleged that WLSC had engaged in a "pattern" of discriminatory treatment of her from 1988 through 1992. According to Grievant, the discrimination oc curred when WLSC failed to act upon job applications in which she had sought either a transfer to alternate employment within WLSC while an internal applicant or full-time employment to a secretarial job while an external applicant, and instead hired others, transfer (internal) applicants in some cases and exter nal applicants in other cases. As proof of this, Grievant named the persons who had attained employment or transfers to jobs she had sought, the very jobs (and alleged discriminatory practices) cited in the ten time-barred grievances she had filed in June 1993.

WLSC denies all wrongdoing with respect to its treatment of

Grievant. At the onset of the level four hearing, WLSC raised the issue of timeliness. WLSC argues that Grievant should not prevail because she did not make her appeal to level four within the five allowable days set forth in W.Va. Code 18-29-4. Grievant counters that WLSC waited too long to raise the issue, and that it was not prejudiced in any way, in any event.

With respect to the merits of the case, WLSC agrees that, during the time in question, regulations called for in-house applicants to be given preferred treatment in filling vacancies. However, it urges that, contrary to Grievant's belief, the regulations did not require that internal candidates be hired for vacancies, rather, they required that the most qualified candidate be employed for the overall good of the college. According to WLSC, all of the proper hiring procedures were followed for the job at issue, and Ms. Stift was more qualified than Grievant for the position.

Discussion

The timeliness issue must be resolved first. Without doubt, the appeal of this grievance to level four was untimely. W.Va. Code 18-29-4(d)(1) states that if a grievant is not satisfied with the written response of the chief administrator at level two, the grievant may appeal to level four "within five days of the written decision." Grievant's attorney received President Campbell's written decision on April 19, 1993, but an appeal to level four was not filed until early June 1993. Added to this mix in a case with an initial filing date of January 1992, was WLSC's further delay in raising the level four timeli ness issue until the day the case finally came on for hearing in July 1994.

As WLSC's counsel pointed out, it is well known that, with

respect to a grievant's initial filing of a grievance, an employer must assert that the grievance had been untimely filed at the level two hearing or earlier. Code 18-29-3(a). Here, however, the untimeliness occurred upon appeal to level four, but the statute is silent about when the employer must act in that situation. Certainly, the issue should be raised promptly either before a level four hearing or at the onset of hearing. However, as noted above, this grievance has had a very protracted procedural history, both at the lower level and at level four. Shortly after the case was advanced to level four, a hearing day and time was scheduled. Moreover, time was reserved for a pre-hearing conference regarding the ten addi tional grievances filed by Grievant just shortly before she appealed the instant matter to level four. Despite the fact that WLSC's counsel failed to appear on the designated day, a pre-hearing conference ensued among the parties and the under signed via telephone. At that time, WLSC's counsel did not mention any intention to raise a timeliness defense regarding this case. Moreover, WLSC did not raise the issue at any subsequent time while the parties were purportedly engaged in settlement negotiations. In fact, WLSC did not raise the issue during the entire thirteen months the case was pending prior to the level four hearing.3

However, Grievant's response to WLSC's affirmative defense of untimeliness also falls short. Grievant cited no reason for waiting almost one and one-half months to file her level four appeal, and merely stated that WLSC had been "on notice" of her intention to appeal an adverse level two decision. In the final analysis, despite the fact that WLSC's counsel did not raise a (level four) timeliness issue until the level four hearing took

place in July 1994, WLSC was not required by statute to bring the matter up earlier while Grievant was required by statute to timely file her level four appeal. Grievant simply waited too long after she received the level two decision to perfect her level four appeal and, more importantly, offered no reasonable

---

l four proceeding began, WLSC's counsel
exhibited a letter bearing a date of June 3, 1993, in which he raised the timeliness issue and which he purportedly sent via first class mail to the undersigned. The undersigned never received such letter and Grievant's counsel avowed he never received such letter. This letter made no mention that Grievant's counsel had even been copied.
excuse for the delay. See Farmer/Smith v. Mercer County Bd. of Educ., Docket No. 94-27-185 (Aug. 3, 1994).
Even if Grievant had timely filed her level four appeal, her case would still fail. Unfortunately for Grievant, she has failed to demonstrate she was entitled to the job at issue or that WLSC engaged in any wrongdoing with respect to the awarding of the job to Ms. Stift. In addition, Grievant has failed to demonstrate any other basis for obtaining relief in this case.
During the year the job in question was posted and filled, 1991, WLSC had in place a "Personnel Policy and Procedure" which contained individual policy titles for various personnel ac tions, one in particular being its "Transfer and Promotion," policy, Bulletin No. 8 (August 1, 1973).4 This policy stated that the college intended to encourage transfers and promotion of staff members, "when they are to the mutual advantage of the staff member and the College." One purpose stated in the policy

was to "aid the departments in obtaining the best skills and experience available to the College."

4This policy also contained a highly detailed procedure to bring about the transfer of a worker within or between departments due to any perceived "difficulties" in the working relationship, including "personality problems." Transfers between departments, seemingly not directly related to position vacancies, were to be "negotiated" through the personnel department. Although Grievant applied for vacancies within WLSC, she never met with any administrator to detail her problems with the other woistrars Office or to institute negotiations pursuant to this policy with regard to a transfer to another department. Had Grievant begun this process, it is not entirely impossible that she or the personnel director could have found a worker in another department to exchange jobs with her.

WLSC also had a "Recruitment and Selection" policy, Bulle tin No. 4 (August 1, 1973). This regulation established an "obligation to the public, and to ensure that all persons who make application shall be given fair and proper consideration" via an active recruitment system. This policy also required that all open (vacant) positions be registered with the person nel office. Final employment selections were the responsibility "of the department head." Together, the two policies in ques tion required that information about open positions be provided to minorities and women, opened the door of employment opportu nity to both internal and external applicants, and encouraged the assessment of the applicants' qualifications in order to

obtain the best possible candidate for a particular vacancy. Notably, Grievant had no greater right to the job at issue in this grievance than she had for the job at issue in Hendershot I, and the essential holdings in that case must be applied here. In short, in 1991, the time both of those jobs were available, neither BOD's nor WLSC's hiring and/or transfer regulations required the employment of an internal candidate, even if minimally qualified, to any alternate job or vacancy within the institution.5 Grievant does not assert and the

_____

5It is noted that, effective April 21, 1993, W.Va. Code 18B-7-1 was amended so as to include employment rights not previously available to higher education's "nonexempt" classi fied employees. The statute provides that such an applicant "who meets the minimum qualifications for a job opening at the institution where the employee is currently employed . . . shall be transferred or promoted before a new person is hired . . . ." This new provision found in Code 18B-7-1(d) was discussed in a

(Footnote Continued)

undersigned is unaware of any other law which compelled the employment of Grievant over a non-employee or external applicant for a secretary's position in WLSC's College Union in December 1991.

Therefore, the burden in this case rests with Grievant to prove she was the most qualified applicant for the job at issue, see Hendershot I, and not upon WLSC to establish justification for hiring a college graduate applicant over an applicant without a college degree, as Grievant suggests WLSC must do in this case. Grievant did not even assert, let alone demonstrate,

that she was more qualified for the job than Ms. Stift.
However, Grievant raised issues in this grievance which she
did not raise in Hendershot I. Nevertheless, Grievant's allega
tions of discriminatory treatment and retaliation on the part of
WLSC are not supported by the record. Rather, the record
supports that, contrary to Grievant's suggestion that she had
not been given fair consideration in 1991 for the Secretary III
position in the College Union, WLSC treated Grievant in exactly
the same manner as it had treated all of the other applicants
for the job in question, including those other internal appli
cants who had essentially filed transfer requests.
Initially, Grievant's credentials for the vacancy were
considered equally along with those of the other applicants,
both internal and external, and Grievant survived a preliminary

---

(Footnote Continued)
recent Grievance Board decision, Booth v. Marshall University,
Docket No. 94-BOT-066 (July 25, 1994).
screening which rejected over half the field of prospective
candidates. Thus, no discrimination against Grievant is appar
ent in that regard. The record also reflects that two other
in-house candidates besides Grievant were not advanced to the
"finalist" or interview stage of the hiring process. Therefore,
no discrimination againvident on the basis of
her being an internal candidate.
Moreover, Grievant's allegation of reprisal on Mr. Jones'
part, as stated in her level two brief, is also not supported by
the record. An employer is not obligated to fulfill a past
grievant's every desire (or to abstain from any other properly-
motivated adverse actions) in order to avoid a charge of retali

ation. In this case, Grievant claimed in her level two brief that she earlier had filed a grievance "against" Mr. Jones for not interviewing her for a previous College Union opening for which she had applied. Details of this alleged incident were not made clear by Grievant. However, according to Grievant's level two testimony, Mr. Jones had requested on one occasion that the application materials she had submitted to the person nel office for another job within WLSC be forwarded to him for his consideration with regard to a separate opening in the College Union. T2.9. An inference can be drawn that Mr. Jones did not bear any ill-will toward Grievant, for any reason.

Finally, Grievant's insistence that she never intended to resign her full-time secretarial position at WLSC upon her accepting a temporary job and signing a memorandum to that effect is refuted by her own testimony at level two. Under cross-examination, Grievant acknowledged that she read and understood the content of the agreement/memorandum, and never theless signed it. Her only response at that point was, "We don't always do what we intend doing." T2.7. In any event, the meaning and intent of the language in the memorandum is so clear on its face that it necessarily belies Grievant's claim alleging a contrary understanding.

In addition to the foregoing, the following determinations are made.

Findings of Fact

1. In October 1991, Grievant signed a document in which she agreed to laterally transfer to a temporary secretarial job and to resign from her full-time employment with the college, effecmporary job ended in January 1992.

2. Prior to the time the temporary job ended, Grievant

applied, but was not selected for a full-time secretary's job in WLSC's Union.

3. The successful candidate, Amy Stift, had a bachelors degree in business, previous work experience at WLSC in a temporary job and some experience as a cashier.

4. During the time in question, existing personnel policies and regulations in effect at WLSC, Bulletin Nos. 4 and 8, encouraged the transfer and promotion of internal applicants but also promoted the recruitment and employment of qualified external applicants in order to hire the most qualified person for the job in question.

Conclusions of Law

1. "It is incumbent upon an employee to timely pursue his rights through the grievance process or demonstrate a valid reason for the delay. Butta v. Ritchie County Bd. of Educ., Docket No. 43-86-315-3 (Sept. 11, 1987)." Farmer/Smith v. Mercer County Bd. of Educ., Docket No. 94-27-185 (Aug. 3, 1994).

2. Grievant failed to timely perfect her level four appeal and offered no reason for her delay; therefore, the grievance is untimely under the provisions of W.Va. Code 18-29-4. See Id.

3. An employee who challenges the selection of another candidate for a classified position at a college in 1991 must demonstrate that she was more qualified than the successful applicant. See Hendershot v. Bd. of Directors/W. Liberty St. Coll., Docket No. 91-BOD-515 (May 29, 1992).

4. Grievant has failed to demonstrate that she was more qualified than the successful applicant for the Secretary III position at WLSC's College Union in December 1991.

5. Grievant has not established entitlement to the job by

operation of law, in that she has not shown that her employment status, her existing qualifications as a Secretary III or any other factor at the time of the posting created a situation which legally obligated WLSC to award the job to her.

6. Grievant has not shown that WLSC's selection of Ms. Stift was based on retaliation, discrimination or any other impermissible motivation.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

_____

NEDRA KOVAL

Administrative Law Judge

Date: December 30, 1994