SHEILA RIDDLE

v. **Docket No. 93-BOD-275**

BOARD OF DIRECTORS/SOUTHERN

WEST VIRGINIA COMMUNITY COLLEGE

D E C I S I O N

Sheila Riddle, Grievant, has been employed by Southern West Virginia Community College ("SWVCC") since October, 1981 and was the Director of Educational Media (Pay Grade 14) from July, 1990 until June 30, 1993. On February 11, 1993 Dr. Harold Boyer, President of SWVCC, notified Grievant by certified mail that due to continuing financial difficulties it would be necessary to close her department, Graphics, on June 30, 1993. Two staff positions would be eliminated as a result of the closure including the Grievant's. Effective July 1, 1993 Grievant was to be transferred to the vacant position of Admissions/Record Officer III ("ARO III") (Pay Grade 8) with no decrease in salary.

In March, 1993 Ms. Riddle grieved this decision (See footnote 1). Her statement of grievance and suggested remedies is fairly lengthy and complex, but the major points are outlined below.

Areas of Grievance:

1) The Respondents violated W. Va. Code §18B-7-1 by not following the reduction in force or layoff requirements in this code section and by not allowing the Grievant to "bump" into multiple other positions for which she is qualified.

2) Although her new job assignment was called a transfer it was "in fact a layoff and rehire situation."

3) Because of the difference between her current salary and pay grade her new position will be "red-lined" and she will not receive any pay increases.

4) She was discriminated and/or retaliated against because she "challenge[d] [her]

supervisor's lack of commitment to the [Graphics] department."

5) Her supervisor and Dr. Boyer are "guilty of favoritism in this situation."

Suggested Remedies:

1) Reopen the Graphics Department, recombine it with the TV Department, make Grievant Director of the total area, and hire one new employee to facilitate getting the work done.

2) Create a position of Director of Public Relations and place Grievant in it. The Grievant would continue to do some Graphics work. This position should be at a Pay Grade 14 or higher.

3) Implement the instructional program she has written on communication technology and make Grievant the instructor.

4) Allow the Grievant to "bump" the Director of Personnel, Director of Financial Affairs, Career Development Director, or any other employee with less seniority than Grievant who has a position for which she is qualified.

5) Purge her personnel file of all matter put in by her supervisor since January, 1990.

6) Cut funding in other areas, i.e., fax machines, travel expenses, freeze other positions, etc.

The Respondent contends that the Grievant was transferred, not demoted or laid off; thus she has no "bumping" privileges. Further, the Respondent argued President Boyer had the right, and indeed the duty, to close the Graphics Department because it was not cost effective. Further Respondent avers this Grievance Board has no jurisdiction to order SWVCC to reopen the Graphics Department.

Background

The Grievant has an Associate Degree in Secretarial Science, a Bachelor's Degree in Speech and Broadcasting, and a Master's in Communication Art. Although she occasionally teaches a course at SWVCC, her official position has always been that of support staff.

Grievant was first employed at SWVCC from 1981 to 1983 as a Printer and from 1983 to 1990 as a Coordinator of GraphicsServices. In July, 1990 the Graphics and TV Departments were combined under her supervision and her new job title was Director of Educational Media. In January, 1992 the TV and Graphics Department were again divided, and the Grievant was only in charge of Graphics. At that time, Ms. Priscilla Hank directed the Grievant to update her Position Information Questionnaire ("PIQ") for possible reclassification. Grievant's response to this request was to turn in her old PIQ and reiterate her desire for the Departments to be recombined. Shortly thereafter all reclassification reviews were "frozen" because of the statewide classification program, sometimes called the Mercer Study.

Dr. Boyer became President of SWVCC in 1989, and his mission was to strengthen the academic program. He stated he was faced with decisions on where to spend limited funds, and he chose to improve instructional areas, specifically increasing the salaries of faculty. Along these lines he decreased administrative staff and returned administrators to the classroom. He also examined all support services in detail to see if they were efficient and cost-effective.

Administrative discussions about closing the Graphics Department and Printing Shop began as early as 1990-1991. The major concerns were that the Department was not cost-effective and did not meet deadlines. Other concerns were the need for new equipment and additional staff and the question of competing with other businesses for printing jobs. Grievant repeatedly requested additional staff and equipment because of the inability to do thework in a timely manner. In order to assist the Grievant, SWVCC ordered a Desktop Publishing system and provided training to the Grievant on its use. No change was realized in meeting deadlines nor was the Department more cost-effective as a result of this purchase.

Grievant's supervisor, Joanne Tomblin, investigated the possibility of contracting out the work and found it could be done more cheaply and on time. Dr. Boyer discussed this situation with Chancellor Marion and notified him verbally he was going to close the Department. After the first day of Level II hearings, on May 27, 1993, he notified the Chancellor in writing of this decision, as the issue of

written notification had been brought up at this hearing.

Dr. Boyer testified that once he had decided to close the Department, his concern was to find positions for the two employees whose positions were being eliminated. He testified he had no other Graphics positions, so his focus was to find the Grievant a comparable position and make sure there was no loss in pay. The ARO III position was vacant, as a long-term employee had retired.

Dr. Boyer was very clear in his testimony that he did not view the ARO III position as a demotion. He sees this position as very important as it deals with students and confidentiality. This view was supported by Ms. Hank, Director of Personnel, who is also a member of the new Classification System Committee. She testified at Level IV that although the new classifications are not written in stone yet, her belief is that the Grievant's abolished positionwould be reclassified to Supervisor of Printing, a Pay Grade 14, and the ARO III position would be a Pay Grade 12.

As to the issue of the right to "bump", both Dr. Boyer and Ms. Hank stated this was a transfer, not a layoff, thus the Grievant was not entitled to "bump." Additionally, there was some testimony advanced at Level II (See footnote 2) that the Grievant was not qualified for any of the positions she sought, even if she were allowed to "bump."

Dr. Boyer and Ms. Hank at Level IV and Ms. Tomblin at Level III all testified the decision to close the Graphics Department was based on the need to decrease financial expenses and meet the required deadlines. Ms. Tomblin testified her investigation had showed contracting out would result in savings and gave several examples of this. Ms. Barker, Director of Business Affairs, testified that the savings were approximately forty to fifty thousand dollars a year. These four people were consistent in their testimony that there was never any intent or desire to retaliate against Grievant, nor was the closure of the Graphics Department the result of any discrimination or favoritism.

Dr. Boyer also testified about the Grievant's academic proposal, a Communication Technology Program. He stated that curriculum proposals must go through a faculty approval process, and that he had given the Grievant explicit directions as to how this was to be done. (Gr. Exh. 5-Lower Level II.) Even if theproposal would be approved there would be no assurance the Grievant would be placed in the position because searches for faculty members are conducted by faculty committees and approved or disapproved by him.

The Grievant testified she objected to the closing of her Department. She stated she had checked for herself and found her work to cost less than contracting out. When questioned on cross

examination she clarified that her figures did not take into account the salaries and benefits of employees, materials, rent, or any overhead costs. (Trans. Level II at 189.) She also testified that once she got the Desktop Publishing program she was able to "catch-up" the art work but was still unable to meet deadlines because of insufficient help to print the materials. She affirmed she had made frequent requests for more help, including graphic artists and graphic assistants.

She stated her current job of ARO III was clearly a demotion because of the lower pay grade and because it was "an entry level job" in which she supervised no one and because it required little skill and ability. She viewed the ARO III position as one that could be filled by a work-study student except for the confidentiality. She also stated the ARO position required no creative ability as had the Director of Educational Media.

In terms of her claims of discrimination, favoritism, and retaliation the Grievant described only a few instances that "might be" applied to these areas. Grievant stated that in September, 1991 her supervisor threatened her. She stated Ms. Tomblin wantedto know if a certain job would be finished on time. Grievant refused to guarantee it would. Words were exchanged and Grievant reported Ms. Tomblin said, "Well, he will just close your Department." (Trans. Level II at 188.) Ms. Tomblin stated she did indicate to the Grievant that if she could not meet deadlines that possibly the Graphics Department would be closed. (Trans. Level II at 201.) Grievant also stated she received a reprimand for taking safety concerns to the Fire Marshall instead of to the Comptroller's Office. (Trans. Level II at 1994.) No date was given for this reprimand and it was not grieved.

Grievant also testified that administration would not fulfill her request for additional help and that the closing of the Department was not discussed with her. She also complained about her supervisor's request for her to provide Ms. Tomblin with cost and job reviews including information about quality, quantity and cost. Grievant stated she thought the Graphics Department was the only one "put through such." (Trans. Level II at 174.)

Grievant also testified that Ms. Hank told her on February 17, 1992 that the College could not eliminate positions, and she would have the right to "bump" another individual, if she did not like the position and pay grade offered. Grievant testified she has requested information from Ms. Hank about the seniority of others so she could "bump," and Ms. Hank has refused to give her this information. Ms. Hank confirmed she has not fulfilled Grievant's request, because since the Grievant was transferred instead of laid off she had no right to "bump." Ms. Hank also testified that ifthe outcome of

the grievance was to grant Ms. Riddle the right to "bump" she would provide all necessary information.

Issues

The crux of Grievant's legal argument appears to be that she was demoted, not transferred, and since she was demoted she was entitled to be laid off and given the right to "bump" into other positions. (See footnote 3) She also argues she was subjected to favoritism, retaliation, and discrimination, although little data to support these contentions was produced.

In addition to the findings of fact and issues contained in the foregoing discussion the following facts and conclusions are appropriate.

Findings of Fact

1) The Grievant was employed by SWVCC as Director of Educational Media from approximately July, 1990 until June, 1993 when the Graphics Department was closed and its two positions were eliminated.

2) Dr. Boyer closed the Department because of the budget cuts ordered by the Governor. The reasons for this action were multiple. A review of the Graphics Department revealed that it was not cost-effective and was often unable to meet deadlines. Both these problems could be resolved by contracting out the printing jobs. Additionally, since the focus of the College was academicsand Grievant performed activities largely unrelated to this focus, Dr. Boyer determined this was one area where support services could be cut.

3) The Grievant continued to hold the title of Director of Educational Media due to the Mercer Study freeze and her lack of cooperation in completing her PIQ even though the scope of her duties had been curtailed in January, 1992 when the Graphics and TV Departments were divided. After January, 1992 she only supervised one person instead of four or five and had responsibility only for the Design and Printing Division.

4) There were no other Graphic positions available within SWVCC.

5) The Grievant was placed in the position of ARO III at a Pay Grade 8 with no reduction in salary. Her salary would be red-lined until it came in line with her new classification and years of service, but this action would not preclude other types of raises. Additionally, the Grievant could now

earn overtime.

6) The position of the ARO III requires less "skill effort and responsibility" than the position of Director of Educational Media.

7) In the new classification system the most likely pay grade for Grievant's last position in Graphics, Supervisor of Printing is a Pay Grade 14, and the most likely pay grade for the ARO III is a 12.

8) After discussions with administration, Dr. Boyer notified Chancellor Marion verbally in 1992-1993 of his discussions andeventual decision to close the Graphics Department. On May 27, 1993 after the first day of the lower level hearings, Dr. Boyer notified the Chancellor in writing of his decision to close the Department.

9) Do to Grievant's actions, the Graphics Department was closed on June 4, 1993, and the Grievant was transferred effective June 8, 1993. See, Riddle v. Bd. of Directors/Southern W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994).

Conclusions of Law

1) "It is incumbent upon the grievant to prove all allegations constituting the grievance by a preponderance of evidence." Bole v. W. Va. Northern Community College, Docket No. 91-BOD-194 (Oct. 30, 1992).

2) Demotion as discussed in Policy Bulletin No. 62, §13 states:

> 13.1 Movement from a position requiring a certain level of skill, effort and responsibility to another position requiring a significantly lesser degree of skill, effort and responsibility.
>
> 13.2 Determine the entry rate for the grade of the position which an employee now holds regardless of that employee's present salary. Determine the entry rate for the grade of the classification to which the employee is moving. If the latter entry rate is lower than the former entry rate a demotion exists.
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> 13.3 The employee moves from entry rate to entry rate or percentage above an entry rate to that same percentage above the entry rate of the demoted-to position.

Transfer as discussed in Policy Bulletin No. 62, §15 states:

> 15.1 Movement from a position requiring a certain level of skill, effort and responsibility to another position requiring the same degree of skill, effort and responsibility. Both positions are in the same pay grade.
>
> 15.2 No change of salary as a function of a transfer may occur. In cases where shift differentials exist, salary changes may occur in transfer situations only when they result from those shift differentials.

Thus, the Grievant's placement into her new position as an ARO III contained components of both demotion and transfer since she was placed in a lower pay grade requiring less skill, effort, and responsibility, but retained her salary. Additionally, this placement was not done for disciplinary reasons.

3) Even if this Board were to determine the Grievant was demoted when she was placed in the ARO III position, this would not entitle her to be laid off.

4) W. Va. Code §18B-7-1(b) and (c) state in pertinent part:

> (b) All decisions by the appropriate governing board or their 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 so 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 layoff a more senior employee, the institution must 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, such employee shall retain all rights of recall hereinafter provided. . . .
>
> (c) Any employee laid off during a furlough or reduction in work force shall be placed upon a preferredrecall list and shall be recalled to employment by the institution on the basis of seniority . . . . An employee placed upon the preferred list shall be recalled to any position opening by the institution within the classification(s) in which the employee had previously been employed or to any lateral position for which the employee is qualified.

The Grievant's position, Director of Educational Media, was abolished when the Graphics

Department was closed. This abolishment of a position typically results in a reduction-in-force ("RIF"), thus setting off all the requirements and rights in W. Va. Code §18B-7-1(b) and (c), because employees are usually permanently terminated or laid off. Here the Grievant's position was RIF'd, but the college chose not to terminate her. SWVCC moved Grievant to a comparable, vacant position, for which she was qualified, with the same salary. cf., Lockhart v. Univ. of W. Va. Bd. of Trustees/W. Va. Univ., Charleston Div., Docket No. 91-BOT-443 (Apr. 30, 1992).

5) Although the statute provides a form of job protection for a classified higher education employee whose position has been eliminated in a reduction in force, it does not give such an employee an absolute right to "bump" or displace a less senior employee holding a position for which the employee is qualified. It is apparent that the Legislature did not intend to eliminate all management discretion in implementing a reduction in force, given its use of the language "in the event the employer wishes to lay off a more senior employee." In view of this language, the undersigned concludes the statute cannot be read to forbid an employer from assigning an employee whose position has beeneliminated to a vacant position. Consequently, a higher education employer must be held to retain the option of transferring an employee to a vacant position for which the employee is qualified. See Brinser v. Cumberland-Perry Area Vocational-Technical School, __ Pa. Cmwlth. __, 405 A.2d 964, 966 (1979).

Here, the Grievant was transferred to a position in a lower pay grade without a salary reduction and she remains eligible for certain types of pay increases. In these circumstances it simply cannot be concluded that the employer violated or misapplied the provisions of the statute.

6) The Grievance Board cannot order a grievant reinstated to a position which is no longer available. Pulice v. Marion County Bd. of Educ., Docket No. 93-24-469 (Aug. 20, 1993).

7) "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code §18-29-2(o).

"'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employee or agreed to in writing by the employee." W. Va. Code §18-29-2(m).

Grievant did not meet her burden of proof to establish a prima facie case on the issue of favoritism or discrimination. Grievant stated she had been discriminated against because she challenged her supervisor's lack of commitment to the Graphics Department. Grievant did not

present any evidence to support this statement, and did not demonstrate that she was similarly situatedto other employees who have been given an advantage or treated with preference, or that she was not treated similarly to other employees in a significant matter. Further the evidence reveals that during Dr. Boyer's tenure, six or seven division chairperson positions have been eliminated, some custodial services have been contracted out, and former full-time deans are now part-time deans, part-time faculty. Additionally, two administrative and one associate dean positions have been eliminated.

8) "'Reprisal' means the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. Va. Code §18-29-2(p).

As to the issue of retaliation, little evidence was presented. The Grievant did receive a reprimand for not following the chain of command and seeking safety advise from the County Fire Marshall instead of SWVCC Comptroller. However, no information was presented as to whether the reprimand was issued before or after the decision to close the Graphics Department was made. Additionally, all other evidence demonstrated that the Department was closed because the services could be provided more cheaply by contracting out.

9) A transfer for good cause shown does not constitute discrimination, favoritism, or retaliation. cf. Phares v. W. Va. Dept. of Public Safety/Div. of Corrections, Docket No. 91-CORR-273 (Dec. 31, 1991).

10) The Grievant has not met her burden of proof on the issues of favoritism, retaliation, or discrimination.

11) The Grievant has not met her burden of proof in demonstrating the Respondent violated W. Va. Code §18B-7-1.

12) The Grievant is not entitled to be laid off, "bump" other employees, or be placed on the preferred recall list, since her Department was closed as a cost saving measure, she was placed in another vacant position, and she did not suffer any financial harm. Her pay grade will most likely result in only a decrease of two pay grades from a 14 to a 12.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision 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. 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: June 14, 1994

Footnote: 1This grievance has been denied at all lower levels. A Level IV hearing was held on November 29, 1993 and the grievance became mature for decision on January 11, 1994.

Footnote: 2The parties requested the entire record from below be considered in making this decision.

Footnote: 3It is somewhat unclear if Grievant realizes that granting her the relief she seeks could result in unemployment and placement on the preferred recalled list if a position is not found for which she is qualified. Testimony was clear that there were no other positions in Graphics.