**CHERYL FARSON, .**

**Grievant, .**

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**v. . Docket Number: 95-HHR-162**

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**WEST VIRGINIA DEPARTMENT OF HEALTH .**

**AND HUMAN RESOURCES at COLIN .**

**ANDERSON CENTER, .**

**Respondent. .**

## D E C I S I O N

Cheryl Farson (hereinafter Grievant) was an employee of the West Virginia Department of Health and Human Resources, classified as an Office Assistant I and assigned to the Colin Anderson Center (hereinafter Center) in St. Mary's, West Virginia, prior to her layoff effective July 16, 1993. She filed a grievance pursuant to West Virginia Code §§29-6A-1 et seq., on or about June 17, 1993, alleging that she had been laid off in retaliation for having made allegations of sexual harassment against her supervisor to the administration at the Center. The grievance was dismissed at level three of the grievance procedure by Order dated January 12, 1994, after a hearing held on October 14, 1993. The Order was based upona ruling that claims alleging a violation of the West Virginia Human Rights Act, W. Va. Code §§5-11-1, et seq., or the federal Age Discrimination and Employment Act of 1963, as amended, (citation omitted), were not cognizable under the grievance procedure. (See footnote 1)

Grievant appealed to level four on or about January 27, 1994, challenging the ruling at level three.

Due to an error, this appeal was neither assigned a docket number nor set for hearing and no action was taken until April 21, 1995, when the case was assigned to the Undersigned for disposition. Thereafter the case was set for hearing on June 8, 1995. (See footnote 2) After four continuances which were granted for good cause, an evidentiary hearing was held at this Board's Charleston, West Virginia office on September 12, 1995. The record was closed and the case became mature for decision at the conclusion of said hearing.

## Position of the Parties

Grievant alleges that during her employment and assignment within the payroll unit of the Center, her supervisor, Clarence Lynch, sexually harassed her beginning sometime in 1990. Grievant states that she made Allen Ward, then the Center's Administrator, aware of this allegation. Thereafter, in April 1992, she agreed to transfer to another unit within the center in order to escape Mr. Lynch's conduct and because her co-worker within payroll was jealous of the "favoritism" she was shown by Mr. Lynch. Grievant then contends that when the lay off was implemented, she was laid off because she was in a position which she would not have been in had she not been forced to transfer due to Respondent's failure to address the reason for the transfer. She avers that after her transfer, a similar position to the one she held prior to April 1992 was reclassified by the Division of Personnel; therefore, her former position would have been reclassified and she would not have been laid off.

Also, Grievant notes that Mr. Lynch is related by marriage to Betty Barron, a long-tenured administrator at the Center, by being married to her niece who also works under Ms. Barron. She maintains that both Ms. Barron and Mr. Lynch participated in the decision-making process which resulted in the determination of the final number of positions to be eliminated, and that they retaliated against her by influencing the Respondent to lay her off because she had made allegations against Mr. Lynch that he had sexually harassed her. Otherwise, she claims that she would not have been laid off.

Respondent contends that Grievant volunteered to transfer to another unit in 1992, and therefore, any claim that she should nothave been transferred in 1992 is untimely. It makes the same argument against any claim by Grievant that she was misclassified while in the payroll unit. Regarding the layoff, Respondent denies that either Ms. Barron or Mr. Lynch unduly influenced the ultimate decision as to which **position** (and not which **person**) was to be eliminated in the July 1993 layoff in

retaliation for Grievant having accused Mr. Lynch of improper conduct. It maintains that the decision-making process was lengthy, involved and carried out in conjunction with administrators outside of the Center and within the Division of Personnel. Therefore, the decision to lay off Grievant was not improperly influenced nor could it have been. Finally, it opines that Grievant would have been laid off in 1993 had she been in the same position she occupied prior to her transfer.

Discussion

Grievant is content to rely upon the evidence adduced at level three, supplemented only by the evidence elicited through cross-examination of Respondent's witnesses at level four. Respondent offered little testimony at level three; however, it offered the testimony of Betty Barron at level four in an attempt to explain thoroughly the decision-making process leading to the layoffs in July 1993. It also introduced various memoranda as exhibits which tracked the communication between the administrators at the Center, the Division of Personnel and Ruth Ann Panepinto, its Secretary, to establish that various positions within the Center were, at one time, targeted for layoff for reasons related to client population,funding and the necessity for the functions of the positions. Ms. Barron denied that either she or Mr. Lynch attempted to make sure that Grievant's position was eliminated. At level three, Mr. Ward also testified that the layoff was due to the Center's drop in the number of clients and that the clerical positions were looked at for elimination. However, he emphasized that positions and not people were targeted as seniority within classifications is the determinative factor in layoffs.

First of all, it is not relevant for purposes of this decision to determine whether Mr. Lynch actually harassed Grievant or not. The only issue to be addressed is whether Grievant's layoff was appropriate. Grievant's first argument is that she was targeted for layoff by Ms. Barron and Mr. Lynch; therefore, her layoff was inappropriate. Second, she argues that "but for" her transfer to the scheduling unit from payroll, which was really an involuntary transfer because of the working conditions she perceived existed, she would not have been laid off.

Regarding Grievant's second allegation, the evidence does not establish by a preponderance of the evidence that Grievant was laid off based upon any particular actions taken or statements made by either Ms. Barron or Mr. Lynch. Grievant has established, at best, a prima facie case of retaliation. However, given the nature of the decision-making which led to the ultimate layoff plan, the number of

individuals involved in the decision within Respondent and the Division of Personnel, the time lapse between the transfer and the layoff and the number of positions which were targeted forelimination, Respondent has rebutted Grievant's argument that she was laid off due to her allegations of sexual harassment.

Grievant's "but for" argument is really a red herring in this case. Respondent's position that any complaint concerning Grievant's transfer in 1992 is untimely is persuasive. For Grievant to have challenged either the alleged harassment or the transfer resulting from it, she would have had to have filed a grievance either within ten days from the last occurrence of the harassment or within ten days from the effective date of the transfer. This grievance was not filed until after Grievant's layoff in 1993, long after the time for challenging either of the other two events ended. Therefore, it can only be assumed that Grievant was properly assigned to the scheduling unit at the time of the layoff. Given this, Grievant has failed to establish any violation of statute, law, policy, rule, regulation or written agreement which would operate to invalidate her layoff. Grievant's transfer in 1992 was not the proximate cause of her layoff in 1993 and any argument to the contrary is untenable.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

## Findings of Fact

1. Prior to Grievant's layoff effective July 16, 1993, she was employed as an Office Assistant I within the scheduling unit of Respondent's Colin Anderson Center.

2. In April 1993, due to a steady decrease in the number of residents at the Center which began in 1991, approximately seventy-two state positions were scheduled to be eliminated by July 1993. On June 30, 1993, the Division of Personnel approved the elimination of fifty-four positions, effective July 16, 1993, at noon.

3. As of April 1993, Respondent intended to eliminate five Office Assistant I positions at the Center. The duties performed by the incumbents in these positions were to be absorbed by the remaining staff.

4. The layoffs within each civil service classification of employment were performed based upon seniority.

5. The plan of elimination of positions at the Center was created and ultimately adopted by

Administrator Alan Ward, Acting Assistant Administrators Betty Barron and Clarence Lynch, Assistant Administrator Joann Powell, Special Project Director Rein Valdov and Legal Aid Advocate Martha Evans.

6. The plan of elimination of positions was approved by Respondent's Secretary Ruth Ann Panepinto and Director of the Division of Personnel Michael Smith.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusion of law.

Conclusions of Law

1. Grievant's claim of sexual harassment and her related claim that her subsequent transfer in 1992 was improper due to the alleged harassment are time-barred by W. Va. Code §29-6A-4.

2. Grievant has failed to establish by a preponderance of the evidence any violation, misapplication or misinterpretation of anystatute, policy, rule, regulation or written agreement on behalf of Respondent in relation to her layoff on or about July 16, 1993.

3. Grievant has failed to establish that her layoff was the result of retaliation on behalf of Respondent.

Therefore, this grievance is hereby **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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**ALBERT C. DUNN, JR.**

**Administrative Law Judge**

**December 14, 1995**

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*Footnote: 1This dismissal at level three was based upon this Grievance Board's holdings in Norten v. W. Va. Northern*

*Community College, Docket No. 89-BOR-503 (Apr. 28, 1993) and Nolan V. W. Va. Dept. of Health and Human Resources, Docket No. 93-HHR-263 (Sept. 9, 1993).*

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*Footnote: 2Prior to the level four hearing, Respondent filed a Motion to Dismiss the grievance based upon the same grounds relied upon for the dismissal of the case at level three. Pursuant to the Supreme Court of Appeal's decision in Vest v. Board of Education of County of Nicholas, 455 S.E.2d 781 (W. Va. 1995), this motion was denied. Briefly, it was held in Vest that the Grievance Board has the statutory authority to provide relief to employees who have established claims of "discrimination," "favoritism" or "harassment" as those terms are defined in Code §18-29-2 (1992), even though the substance of those claims may overlap claims under the Human Rights Act.*