JANET BOLE

v. Docket No. 93-BOD-278

WEST VIRGINIA BOARD OF DIRECTORS/
WEST VIRGINIA NORTHERN COMMUNITY COLLEGE

D E C I S I O N

Grievant, a classified employee of Respondent West Virginia Northern Community College (WVNCC) since 1985, alleges various improprieties on the part of WVNCC with respect to the elimination of her position as Director of Publications on June 30, 1993. WVNCC claims Grievant failed to initiate timely a grievance regarding the elimination of her former position and otherwise failed to prove any wrongdoing relative to that personnel action. The matter became mature for decision on February 20, 1995, the parties' designated time for the completion of responsive briefing and rebuttal.1

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1Grievant's brief was submitted January 9, 1995, and WVNCC's, on February 7, 1995. No rebuttal was thereafter filed. It is noted that the parties chose to cover the issues in this grievance as well as those of a second, later-filed grievance, Bole v. W.Va. Northern Com. Coll., Docket No. 94-BOD-528 (June 30 1995), via consolidated, written arguments.

Background

Information regarding Grievant's employment status in recent years is necessary. Grievant's five-year-old job as WVNCC's "Director of Public Information/Coordinator of Printing Services" initially came under scrutiny after Dr. Ronald Hutkin

was installed as the school's new president in mid-1990. In early 1991 President Hutkin changed Grievant's working title to "Director of College Publications," reassigned some of her duties to other workers, and altered the administrative chain of command relative to her position. As a result of these person nel actions, Grievant brought a grievance action seeking resto ration of her former duties, job titles and hierarchy within WVNCC, relative to the school's organizational chart of adminis trators. Grievant did not prevail in the grievance at level four and did not appeal that decision thereafter. See Bole v. W.Va. Northern Com. Coll., Docket No. 91-BOD-194 (October 30, 1992) (Bole I).

Less than five months after the decision was rendered in Bole I, specifically, by letter dated March 12, 1993, President Hutkin advised Grievant that her position of Director of Publi cations would be terminated at the end of the 1992-93 fiscal year. Specifically, President Hutkin informed Grievant that

the administrative structure at [WVNCC] will be reorganized effective July 1, 1993. This reorganiza tion plan is in response to a directive by the State College System Board of Directors and the Governor to cut administrative costs. Therefore, I regret to inform you that your employment as Director of Publi cations will terminate effective June 30, 1993.

President Hutkin also advised Grievant to contact "Charles Steinman or Dick Smith" to discuss possible alternative posi tions and to notify him in writing by March 19, 1993, if she wished to "invoke" her "seniority rights."

Of record is a memorandum by Grievant addressed to Sharon Bungard, then WVNCC's Dean of Services and Grievant's immediate

superior, dated April 1, 1993, and referenced "Conference."
Grievant wrote in the memorandum: "I request a meeting with you
to discuss the notification that my current position as Director
of Publications will be terminated at the end of this fiscal
year and to talk about some possible 'bumps.'" GR EX 1
(3/31/94). Pursuant to that request, Ms. Bungard and Grievant
met and conferred on April 9, 1993.
Thereafter, Grievant filled out a grievance form, dated
April 23, 1993, in which she specifically alleged that the
elimination of her Director's position
was a deliberate plan started in January, 1991 to
reduce my salary. [WVNCC] knowingly and systematical
ly pared away responsibilities from my job description
in a deliberate attempt to eliminate the position in
event of a reduction in force, compelling me to "bump"
a position with a much lower salary.
The resulting action of cutting my salary is a viola
tion of WV Code 18B-9-5.
Furthermore, the procedure followed in effecting the
reduction in force for classified personnel violates
institutional policy for reduction in spending and
fiscal exigency.

Grievant did not indicate what relief she sought in the action.2
However, Grievant and Ms. Bungard apparently discussed the
written grievance on April 30, 1993.
By handwritten letter dated April 30, 1993, Ms. Bungard
responded as follows:
Response to grievance:

Mrs. Bole,

In our discussion of April 30, 1993, I requested
that you clarify the nature of the redress that you
are seeking in your grievance. You responded that the
implied relief . . . is that the decision to eliminate
the Director of Publications position be rescinded.
As your immediate supervisor, I cannot grant that
relief.

Grievant appealed to level two where an evidentiary hearing
was conducted on June 29 and July 1, 1993. At that time,
Grievant was represented by a WVNCC faculty member. Among other
things, Grievant requested at hearing that the grievance evalua
tor consider the "implied" relief contained in her grievance
statement as the relief sought, and that the evaluator also hear
evidence and rule upon new charges of improper actions on
WVNCC's part, acts which allegedly occurred subsequent to the
termination notice. In turn, WVNCC raised a timeliness issue.
The grievance evaluator ruled upon some procedural issues
and the timeliness defense. He found the grievance to be
untimely filed. In addition, he determined that Grievant's
complaints at the level two hearing regarding actions on WVNCC's

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2The grievance form utilized by Grievant directs the
complainant to "include a brief but complete description of the
grievable event and the relief you are seeking."
part following the termination notice, including allegations of
impropriety about the bumping situation, could be the basis of a
new grievance. This ruling was perfectly proper and in confor
mance with W.Va. Code 18-29-3(j). See W.Va. Dept. of Health &
Human Res. v. Hess, 432 S.E.2d 27 (W.Va. 1993). Finally, the

level two grievance evaluator then addressed the merits of the case, finally recommending that the grievance be denied. By letter dated July 9, 1993, President Hutkin concurred with the grievance evaluator's recommendation and denied the grievance. Following the issuance of the level two decision, Grievant filed a new grievance relative to WVNCC's implementation of a procedure to secure alternative employment for her. Thereafter, she retained an attorney and appealed the within action to level four on or about July 19, 1993. Thus, at about the same time that Grievant appealed this grievance to level four, she had already filed a second grievance.

At level four, numerous hearings were set, but continued for cause shown. Eventually, a level four hearing was conducted on March 31, 1994. At that time, the parties merely supplement ed the lower level record, primarily in response to a motion and cross motion filed by WVNCC and Grievant on March 18 and March 31, 1994, respectively, on the timeliness issue. At the conclu sion of the hearing, the parties requested that the case be kept in abeyance pending the level two hearing on Grievant's second grievance, later advanced to level four as a companion case, Bole v. W.Va. Northern Com. Coll., Docket No. 94-BOD-528 (June 30, 1995).

The Timeliness Issue

WVNCC basically contends it had no forewarning that Grievant intended to bring a grievance action until six weeks after Grievant had been notified of the termination of her position, and that the grievance is, therefore, untimely filed. Grievant claims she timely filed her grievance. This is a thorny issue because Grievant's actions concerning her grievance seemingly fell within allowable time lines. Conversely, based

on the evidence, WVNCC's claim that it was unaware until April 23, 1993, that Grievant intended to bring a grievance action also rings true.

W.Va.Code 18-29-4(a) states, in pertinent parts:

(1) Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, . . . the date on which the event became known to the grievant or . . . the most recent occurrence of a continuing practice giving rise to a grievance, the grievant . . . shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought. [Emphasis added.]

[At t]he conference with the immediate supervisor concerning the grievance . . . any discussion shall be by the grievance in the grievant's own behalf . . . .

(2) The immediate supervisor shall respond to the grievance within ten days of the conference.

(3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor by the grievant . . . .

The evidence certainly indicates that Grievant, if she indeed had any intentions of timely initiating a grievance at level one, did not take the proper steps.

According to Ms. Bungard, she and Grievant had a discussion on Friday, March 12, 1993, when Grievant was advised that her job was to be eliminated. Fourteen days later, by note dated April 1, 1993, Grievant requested a conference with Ms. Bungard. GR EX 1 (3/31/94). This request for a conference fell within

the allowable time to initiate a grievance conference. However, in the note, Grievant made no mention of a grievance or a possible grievance. Moreover, the topics which Grievant did mention in the note for discussion appeared to be of a "where do we go from here" nature, and Grievant did not raise any specific questions or accusations regarding the appropriateness of the decision to terminate her Director's position.

It appears that Grievant and Ms. Bungard may have conferred once or twice in early April 1993, about scheduling and other matters. See T2.11-13, 16-18. They also met on April 9, 1993, apparently to discuss the matters raised in Grievant's note of April 1. According to Ms. Bungard, Grievant posed some ques tions about positions being cut, WVNCC's cost-cutting measures, and a position in which Grievant expressed interest. She testi fied that Grievant never indicated to her that the meeting was a level one "preconference." T2.18-20.

There was testimony that Grievant waited for a "response" after the April 9, 1993, conference, and when no response was forthcoming, she filed a written grievance. However, it hardly seems possible that Ms. Bungard could respond to a grievance when no grievance issue had been explicitly raised nor any relief requested at the conference. In fact, Grievant admitted at the level two hearing that, up until the time she filed the written grievance, April 23, 1993, when an "incident" occurred at a classified staff meeting, she was not sure she was going to pursue a grievance at all.3 T2.73-74.

Had there been a grievance issue and relief sought dis cussed at the April 9 conference, Code 18-29-4(a)(2) required some kind of response by Ms. Bungard then or within ten days. Notably, there is no requirement for a written response. At the

level four hearing, Grievant introduced some notes she made during the April 9, 1993 conference. GR EX 2 (3/31/94). According to the notes, Grievant asked Ms. Bungard a number of questions, and Ms. Bungard responded in some fashion to each and every query.4 Of course, as far as time lines go, Grievant

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3On April 23, 1993, WVNCC was conducting meetings regarding the college's latest reorganization. On that morning, the classified staff met to discuss the reorganization. That afternoon the classified staff met again to discuss the "bumping" situation (apparently, there was concern about whose job Grievant would take) and future matters. According to Grievant, just as she entered the meeting, Dr. Hutkin remarked that staff should not "raise hell" with him, rather they should "gang up" on Grievant to "make her move." T2.73. Grievant characterized the incident as "a form of intimidation and harassment" on the part of Dr. Hutkin. T2.73-74. These charges became part of Grievant's second grievance, since they formed the basis of her claim that WVNCC treated her in an unlawful manner after the termination notice.

4In Grievant's March 31, 1994 written response to WVNCC's March 17, 1994 written Motion to Dismiss, Grievant moved for "a grant of relief by default," due to WVNCC's purported "failure to follow the time lines" with respect to a response after the April 9, 1993 conference. W.Va. Code 18-29-3(a) provides that a grievant may "prevail by default" should the employer not follow the time lines at the lower grievance levels. Code 18-29-3(a) does not authorize the Grievance Board to enforce a default or otherwise act on the matter unless the employer

appeals the default within five days. Thus, Grievant must resort to a court of competent authority to enforce a default. It is unknown how a circuit court would treat the matter when a default is claimed nearly a year after the alleged default incident occurred.

filed a written grievance on April 23, 1993, ten days after the April 9, 1993 conference. Here again, Grievant met the time lines of 18-29-4(a)(3), because she filed her written grievance within ten days following the conference.

No doubt, Grievant followed the level one grievance proce dure time lines, but WVNCC was denied an opportunity to know the nature of the grievance until Grievant filed the written griev ance statement on April 23, 1993. Even then, Grievant neglected to state the relief sought. On the other hand, WVNCC never claimed that it had been prejudiced by this delay, or perhaps impreciseness, on Grievant's part to properly initiate a griev ance, and the undersigned is not aware of any harm done. Accordingly, viewed in a light most favorable to Grievant, it is accepted that she timely initiated and followed through with the formal measures to file a grievance.

The Position Elimination Issue

In a non-disciplinary case such as this, a grievant must prove her grievance by a preponderance of the evidence.5 Thomas v. W.Va. Board of Trustees/Marshall Univ., Docket No. 92-BOT-443 (Feb. 14, 1995); Baroni v. Fairmont State Coll., Docket No. 92-BOD-271 (Feb. 11, 1993); Lockhart v. W.Va. Board of Trust ees/W.Va. Univ., Docket No. 91-BOT-443 (Apr. 30, 1992); Carrere

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5At the first level two hearing session, Grievant's

advocate incorrectly argued that WVNCC had to present its case first because it had terminated Grievant's position. The elimination of Grievant's position had nothing whatsoever to do with any disciplinary procedures.

v. So. W.Va. Comm. Coll., Docket No. 90-BOR-117 (June 29, 1990).

After due consideration of the record as a whole, the parties' arguments and the applicable law, it is determined that Grievant failed to prove the elimination of her Director's position was contrary to any statute or regulation or otherwise motivated by ill-will or retaliation.

It must be noted at the outset that, when Dr. Hutkin first arrived at WVNCC, he felt that Grievant's salary as a classi fied, non-administrative employee was too high compared to other classified employees and deans at the school, and that a differ ent method and means to publicize the college's activities than what Grievant had in place would best serve the college's needs. Thereafter, Dr. Hutkin reassigned some of the tasks Grievant had been performing to other, in his view, more appropriate persons. However, these items were all covered in Bole I. Because Grievant declined to appeal the adverse decision in Bole I, she cannot relitigate those issues in this grievance.

With regard to Dr. Hutkin's efforts to financially stream line and reorganize WVNCC, it is quite clear that he considered Grievant's position one of the most "vulnerable" classified positions at the school. From Grievant's perspective, her job was the only one considered for elimination because it was the one which, in fact, was ultimately eliminated. However, the record establishes that reorganization and administrative changes were compelled by directives from the BOD and the Governor to cut administrative costs. Grievant's belief that

the elimination of her job was an arbitrary, capricious or retaliatory act on Dr. Hutkin's part is not supported by any evidence.

Grievant's claim of retaliation apparently arose in re sponse to a statement made by Dr. Hutkin during his extensive testimony at the level two proceedings. See, T2.89-124. When asked by Grievant's then advocate exactly when he decided to eliminate Grievant's Director's position, Dr. Hutkin commented,

Probably two years ago as a result of a Level IV grievance. I was on record at that time saying that in the event that there was a reduction in force, that the position of director of publications would be the first position to go. That was two years ago.

T.2.89. It is clear that Dr. Hutkin referred to Grievant's former grievance as a marker in time. In fact, Dr. Hutkin had testified at level four in Bole I about the vulnerability of Grievant's job.

When next asked why he did not eliminate Grievant's job two years before, Dr. Hutkin responded he had not earlier advised workers that jobs might be eliminated because he hoped attrition and other means would eliminate the overstaffing situation. Grievant has simply taken the "result of a Level IV grievance" and other circumstances out of context, relative to her allega tion of retaliation.

Neither is there any evidence that WVNCC violated college policy with respect to position eliminations in the case of financial exigency. The December 19, 1986 "Plan For Reduction in Spending and Financial Exigency" requires that all cost-cut ting "actions taken shall have the minimum impact possible on the quality of programs/courses and on students." Grievant

believes Dr. Hutkin should not have eliminated her job for budgetary reasons, rather he should have implemented other cost-cutting methods such as placing all classified employees on unpaid leave for a period of time. Simply put, Grievant does not manage WVNCC, administrators do.

An administrative decision to eliminate jobs when the college is already overstaffed is not unreasonable or arbitrary and capricious. See W.Va. Code 18B-9-1, et seq.6 Whole departments are sometimes eliminated in higher education, and classified and non-classified staff alike sometimes lose their jobs for budgetary reasons. See Thomas v. W.Va. Board of Trustees/Marshall Univ., Docket No. 92-BOT-443 (Feb. 14, 1995); Lockhart v. W.Va. Univ., Docket No. 91-BOT-443 (Apr. 30, 1992). There was no showing in this case that the actions taken by Dr. Hutkin in reducing positions at WVNCC were not designed to "have the minimum impact possible on the quality of programs/courses and on students."

In addition to the foregoing, the following findings of fact and conclusions of law are appropriate.

6Legislators clearly acknowledge that a classified employee might lose his or her employment due to budgetary reasons. W.Va. Code 18B-7-1(b) provides, in pertinent part:

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.

Findings of Fact

1. During the early 1990s, higher-education suffered a loss of revenue, and institutions were ordered to reduce spend ing and cure overstaffing.

2. At WVNCC during the early 1990s, Grievant's position of Director of Publications was deemed vulnerable with respect to the overall needs of the college.

3. Attrition and other means during that time did not cure the overstaffing at WVNCC.

4. In March 1993, Grievant was advised that her Direc tor's position would be terminated, effective the end of the 1992-93 fiscal year, June 30, 1993.

5. Within fifteen days of notification of the termination of her position, Grievant requested a conference to discuss her options and other matters, although she did not specifically mention the word grievance or discuss any remedy.

Conclusions of Law

1. Given the circumstances in this case, Grievant timely initiated and followed through with the formal measures to file a grievance pursuant to W.Va Code 18-29-1, et seq.

2. Under W.Va Code 18B-9-1, et seq., positions within higher education's classified system enjoy certain statutory rights relating to tenure, seniority and salary. See Thomas v. W.Va. Board of Trustees/Marshall Univ., Docket No. 92-BOT-443 (Feb. 14, 1995); Lockhart v. W.Va. Univ., Docket No. 91-BOT-443 (Apr. 30, 1992).

2. Nothing in Code 18B-9-1, et seq. guarantees a classified employee life-long employment; rather, the statute anticipates that jobs will be abolished and personnel reduced in

force from time to time.

3. Grievant failed to prove by a preponderance of the evidence that WVNCC violated any law, policy or regulation with respect to the elimination of the position of Director of Publications.

Accordingly, this 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.

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NEDRA KOVAL

Administrative Law Judge

Date: June 30, 1995