JANET BOLE

v. Docket No. 94-BOD-528

WEST VIRGINIA BOARD OF DIRECTORS/
WEST VIRGINIA NORTHERN COMMUNITY COLLEGE

D E C I S I O N

On or about August 31, 1994, Grievant Janet Bole, employed by Respondent West Virginia Northern Community College (WVNCC), advanced a grievance to level four in which she complained that WVNCC failed to follow the proper procedures to provide her with alternative employment after her classified job had been target ed for elimination. She also alleged that school officials committed other improprieties in conjunction with her efforts to secure a replacement job. WVNCC denies wrongdoing and contends it made every effort to provide Grievant with the means to select an alternative job of her choosing.1 The case became mature for decision on February 20, 1995, the parties' designat ed time for the completion of responsive briefing and rebuttal.2

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1A hearing was set for September 1994, but continued at the request of the parties, and one set for October 1994, was cancelled when the parties agreed to a record decision.

2Grievant's brief was submitted January 9, 1995, and WVNCC's, on February 7, 1995. No rebuttals were filed.
Some brief background information, as well as some proce dural and related matters, must be recounted at this juncture.
Sometime in 1985, Grievant was hired by a former WVNCC president to become WVNCC's "Director of Public Information." Later,

Grievant also assumed duties as "Coordinator of Printing Servic es." In mid-1990, a new president, Dr. Ron Hutkin, was in stalled at WVNCC. In early 1991, Dr. Hutkin changed Grievant's working title to "Director of College Publications," reassigned some of her duties to other workers, and altered the administra tive chain of command relative to her position.3 As a result, Grievant brought a grievance action seeking to restore the status quo. However, adverse decisions resulted at the lower grievance levels and at level four, and Grievant declined to appeal further.4 See Bole v. W.Va. Northern Comm. Coll., Docket No. 91-BOD-194 (October 30, 1992) (Bole I).

By letter dated March 12, 1993, Dr. Hutkin notified Grievant that her position of Director of Publications would be terminated on June 30, 1993. This prompted Grievant to file another grievance protesting the action to eliminate her job. When Grievant did not prevail at the lower levels, she appealed to level four. Bole v. W.Va. Northern Comm. Coll., Docket No.

3In early Fall 1994, Dr. Hutkin resigned from his post at WVNCC and accepted an academic post in another state.

4There were accusations made in the instant grievance which suggest that Grievant might wish to relitigate the same issues raised in Bole I. For example, in Grievant's original pleadings in this case, she states, in part: "I have been subject to unfair demotion, reduction in salary and work hours, and my rights to due process have been violated."

93-BOD-278 (June 30, 1995). (Bole II). However, during the course of Grievant's level two hearing in Bole II, she addition ally accused WVNCC's administrators of thwarting her efforts to

secure a suitable, alternative position via a so-called "bump ing" process and other wrongdoing. The level two grievance evaluator ruled that, pursuant to W.Va. Code 18-29-3(j), those charges constituted the basis of a new grievance. Grievant thereafter filed a second grievance, the within action.5 The record reflects that, after Grievant had been notified of the impending termination of her position and that she had "bumping" rights for alternative job placement within WVNCC, the bumping process ensued. Grievant was the only employee who held the job title/classification of Director of Publications, so there was no less senior employee in that class for her to displace. WVNCC compiled a list of class titles which repre sented jobs held by less senior employees and gave the list to Grievant to consider. Grievant requested job descriptions of the positions and filled in names, those she knew, of the specific incumbents who held those jobs. Most of the positions, mainly clerical jobs, were not comparable to Grievant's job as Director of Publications in terms of salary or status. Grievant

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5The level two hearing in this case was conducted on February 9, 1993 (at that time a WVNCC faculty member served as Grievant's representative and advocate, but no evidence was taken) and May 26, 1994 (Grievant had retained counsel by the time the parties finally met for the second session of the hearing). The adverse level two decision was issued on August 24, 1994. Thereafter, a level four appeal was filed, and the parties requested a decision based on the record below. was to select from among the jobs before the effective date of her job's termination, June 30, 1993.

Grievant expressed interest in some positions, those of administrative aides to college administrators, but was advised she had to pass a typing test, a factor not mentioned in the job descriptions. Grievant did not follow up on this matter. She was also advised that one administrative aide job might not be available because the incumbent was being "accommodated" due to a handicap. Ultimately, on June 30, 1993, at approximately 4:30 p.m., Grievant notified a WVNCC administrator that she choose the position of Coordinator of Community Education (CCE). Grievant had previously been told the CCE position, then on full-time status, but traditionally less than a full-time position at WVNCC, would revert to half-time status again in the summer.

The bumping process implemented by WVNCC, when completed, resulted in Grievant being relegated to a half-time job and a substantial cut in salary. Thus, the issues to be decided in this grievance are whether WVNCC violated any laws, policies or regulations with respect to Grievant's right to possible alter native employment, and/or whether WVNCC otherwise acted in an egregious fashion subsequent to the time it notified Grievant that her Director's job would be terminated so as to compel some relief on the issue. In conjunction with the termination of her Director's job and placement in the CCE position, Grievant also argues that WVNCC is prohibited from reducing the salary she commanded as the Director of Publications. Grievant asks to be made whole via an opportunity to "rebid on another position" and that she recover all lost pay and benefits.

As this is a non-disciplinary matter, Grievant bears the burden of proof. See Thomas v. Marshall Univ., Docket No. 92-BOT-443 (Feb. 14, 1995); Baroni v. Fairmont State Coll.,

Docket No. 92-BOD-271 (Feb. 11, 1993); Canfield v. W.Va. Univ., Docket No. 90-BOT-127 (Sept. 29, 1990). Possibly, WVNCC erred in its manner of handling the proposed lay-off and "bumping" situation, as more fully explained below. However, whether Grievant is entitled to relief on that issue remains to be seen. Grievant cites W.Va. Code 18B-9-5(f) in support of her claim that WVNCC is prohibited from reducing her salary:6

> The current monthly salary of any classified employee may not be reduced by the provisions of this article nor by any action inconsistent with the provisions of this article, and nothing in this article shall be construed to prohibit promotion of any classified employee to a job title carrying a higher pay grade if such promotion is in accordance with the provisions of this article and the personnel classification system established by the appropriate governing board.

Grievant's reliance on Code 18B-9-5(f)(1993) is misplaced. Article nine, entitled "Classified Employee Salary Schedule and Classified System," generally addresses the establishment of classified structures and salary schedules. Article nine, entitled "Classified Employee Salary Schedule and Classified System," generally addressed requirements for the establishment of a uniform personnel classification system and salary

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6Apparently, Grievant's brief contains some typographical errors. She wrote "W.Va. Code 18B-9-6(f)" several times, but actually quoted Code 18B-9-5(f).

schedules for employees other than "faculty and nonclassified" employees within higher education. Specifically, 18B-9-5

established for classified employees a salary increase of $125.00 per month for fiscal year 1993, a small annual experi ence increment, the minimum scheduled salary for each worker's pay grade and/or placement on the salary schedule at the appro priate experience level if any funds remain, and the ability to receive merit increases. Subsection (f) simply prohibits the reduction of employees' salaries in order to implement the provisions of article nine, including those outlined in section five. The statute has nothing whatsoever to do with employees' salaries upon the proper abolition of their jobs.

Moreover, lawmakers clearly contemplated that a classified employee might lose a higher-paying job and end up with a lower-paying position. This is demonstrated in the very statute Grievant cited, W.Va. Code 18B-7-1(b), in support of her claim that WVNCC failed to follow the proper bumping procedures in her case.7 Code 18B-7-1(b) provides:

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

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7Grievant's counsel made no argument in his level four brief that Grievant's "rights to due process" had been violated, or that Grievant had been subjected to incidents of discrimination, issues which Grievant had specifically cited in her pleadings. Therefore, it is presumed these allegations made by Grievant before she hired counsel were subsequently

abandoned. In addition, Grievant's mention of retaliation in this case is not addressed because that issue was litigated in her companion case, Bole II.

higher education. In the event that the institution wishes to lay off a more senior employee, the institu tion 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. If two or more employees accumulate identical seniority, the priority shall be determined by a random selection system established by the employees and approved by the institution.

As noted above, Grievant may be correct that WVNCC did not properly implement the process by which she, or similarly-situ ated employees, might secure alternative employment. This is not to say that Grievant was correct in her assessment of any alleged deficiencies. For example, she claimed WVNCC did not provide her with a complete list of all jobs held by less senior employees from which to pick an alternate position. It appears the list furnished by WVNCC eliminated certain jobs held by less senior employees within a job class and, instead, listed the least senior position in the classification.

First, nothing in the language of Code 18B-7-1(b) indi cates that an employee whose position has been targeted for "abolition" or a reduction in force action has the right or responsibility to select an alternate position of his or her own

choosing. It is readily seen that the statute requires the institution to "demonstrate" the senior worker targeted for reduction "cannot" perform jobs held by junior employees. While the language in the statute is somewhat ambiguous, or perhaps incomplete, this seems to indicate that the institution or employer bears the responsibility of scrutinizing its records to determine whether the party who is to lose her position is more senior than other employees holding the same, comparable or lesser jobs, and to determine whether the employee is qualified for alternate employment. WVNCC, not Grievant, should have conducted its own assessment of whether possible alternative employment existed for Grievant.

It stands to reason that the employer is in the best position to make determinations regarding a possible job for an employee whose job class is to be reduced or whose job class is to be reduced or whose job is to be abolished if she is senior to other employees holding the same, comparable or lesser jobs, and if she possesses the qualifications to perform said job. See Lockhart v. W.Va. Univ., Docket No. 91-BOT-443 (Apr. 30, 1992). However, necessity and reason also dictate that the employer should select a job held by the least senior employee in a particular class. If the replacement job was held by an employee more senior than yet another employee in another office or department holding the same classification, Code 18B-7-1(b) would come into play again, perhaps a number of times. Such potential prolonged "bumping" by affected employees could seriously undermine the college's operations.

Although not explicitly stated in the statute, it would appear that once the employer has determined that jobs are held by less senior employees, the most appropriate job held by the

least senior employee in the relevant class should be selected and offered to the more senior employee whose job has been eliminated. At that point, the proviso, "if an employee refuses to accept a position in a lower job class, such employee shall retain all rights of recall hereinafter provided," may be appli cable. See Id.

Without a doubt, WVNCC's failure to properly apply the statute and, instead, to thrust upon Grievant the hard choice of selecting among many alternative positions, presumably none of which were as desirable as her present position, directly exacerbated what was probably already a stressful situation for Grievant. Further, WVNCC's handling of the situation prompted unnecessary and unprofessional public manifestations of impa tience on Dr. Hutkin's part when Grievant was unable to make her choice more quickly as the time approached for her Coordinator's job to end. See, T.10-13.

On April 23, 1993, WVNCC was conducting meetings regarding the college's latest reorganization. That afternoon the classi fied staff met to discuss the "bumping" situation as there was much concern about whose job Grievant would take. During that meeting, Dr. Hutkin told the staff something to the effect that it was not his fault the issue had not been resolved yet, rather it was Grievant's fault for not making up her mind yet.

The next question then is whether WVNCC's actions were so egregious that it must repeat the procedure correctly and offer Grievant the most appropriate alternate employment in a manner consistent with the intent of Code 18B-7-1(b).8 The harm done

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8Note that this is not the relief that Grievant has

requested. She wants an opportunity to select another job of her choosing.

in this case was not inconsequential, although the damage was somewhat minimized considering that Grievant was given a choice of jobs. Therefore, Grievant is entitled to relief in this grievance, although not to the extent that she has requested.

In short, while Grievant was given some advantages in a job termination situation, advantages which Code 18B-7-1(b) does not even require, this circumstance nonetheless placed an unnec essary burden on Grievant to exercise her own judgment about a suitable, appropriate job. Moreover, the unprofessional acts of WVNCC's then president regarding the bumping situation, and the inability of WVNCC's administration to act in some proactive fashion to find alternate employment for Grievant, dictate that Grievant be offered some relief in this situation.

Grievant's relief, however, must be limited. She is not entitled to have her pick and choice of classified positions at WVNCC. Again, Code 18B-7-1(b) does not create such an option for an employee whose job is eliminated. The legal obligation on WVNCC's part is to revisit the circumstances present in 1993 and to determine, within some reasonable time not to exceed sixty days, what would have been the most suitable full-time job for Grievant, including any newly-created jobs (not job duties) which were to become available after July 1, 1993, as part of WVNCC's reorganization at the time. WVNCC must then offer said job to Grievant for her consideration.9 At that point Grievant

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9Grievant may have to take qualifying tests. If she refuses, available options might be diminished.

will have two choices: Accept WVNCC's job offer for full-time alternate employment or refuse the job offer in favor of lay-off/recall status per Code 18B-7-1(b).10

While Grievant is entitled to have a second opportunity with respect to alternative employment, but only to accept or refuse an alternate job offer, she is not entitled to back wages in the event she elects to take any new job offered by WVNCC.

Very early in the "bumping" procedure, Grievant expressed interest in one particular job, that of CCE. The CCE position is a half-time job at WVNCC's New Martinsville campus and at its Weirton campus. Moreover, since the inception of the position at the Wheeling campus in 1988, the CCE position had been a full time job for only four months prior to the time Grievant select ed it. Finally, Grievant was advised in May 1993 that the community education job was slated to return to half-time status that Summer. The record does not reflect that anyone promised Grievant that the job would be a full-time position again. Nonetheless, Grievant selected the CCE job, despite its less than promising history.

Grievant had an adequate period of time to consider the situation in Spring 1993. After due consideration, and with full understanding of the risk involved that she would not have full-time status in the future, Grievant selected the CCE

10This is not to say that Grievant would be precluded from keeping the half-time CCE job (or bringing the funding for the job up to full-time status via productivity).

position. On balance, the advantage of choice outweighed any monetary harm done to Grievant in this situation.

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

Findings of Fact

1. In conjunction with a reorganization at WVNCC, Grievant was notified in March 1993, that her classified posi tion as Director of Publications was scheduled for elimination on June 30, 1993.

2. After the notification WVNCC offered Grievant her choice of a number of positions held by junior employees, none of which were comparable in salary or status to Grievant's Director's position.

3. Grievant expressed interest in a Coordinator of Community Education (CCE) position at WVNCC, then a full-time job for approximately four months, but which historically had not been funded for full-time status.

4. Because Grievant's selection might impact on other classified employees, WVNCC's administrators urged Grievant to make a prompt decision about the job she wanted.

5. After some weeks had gone by and Grievant had not yet selected her choice from among the jobs under consideration, WVNCC's president made public statements about Grievant's delay in response to inquiries from other classified employees whose jobs were at risk in the matter.

6. In late June 1993, Grievant selected the CCE position, even though she had knowledge that the job was historically a half-time position, had been apprised that job was scheduled for half-time status in the Summer, and had never been promised the job would ever revert to full-time status again.

7. As predicted by administrators, the CCE position reverted to half-time status, and Grievant suffered a substan

tial loss of wages.

Conclusions of Law

1. Given the circumstances of the abolition of Grievant's position, the salary requirements set forth in W.Va. Code 18B-9-6(f) are not applicable in this case.

2. Grievant failed to demonstrate a violation of Code 18B-9-6(f).

3. Under W.Va. Code 18B-7-1(b), a classified higher-education employee targeted for a lay off may be entitled to alternate employment in a position held by a junior employee, and such employee shall retain recall rights if alternate employment in a lower job class is refused. See Lockhart v. W.Va. Univ., Docket No. 91-BOT-443 (Apr. 30, 1992).

4. Code 18B-7-1(b) does not grant a laid-off, senior employee a choice from among jobs held by junior employees. However, a reasonable interpretation of the statute is that the employer must make determinations regarding a possible job for a senior employee whose job is to be abolished from among positions held by junior employees within the same, comparable or lesser job classifications, in that order, for which the targeted employee qualifies, and that the employer offer the job held by the least senior employee in a particular classification.

5. WVNCC failed to properly implement the provisions of Code 18B-7-1(b) when it placed the burden upon Grievant to find alternate employment and neglected to take a more "proactive" role. See Id.

6. Grievant proved a violation of Code 18B-7-1(b) by a preponderance of the evidence; therefore, she is entitled to relief in the form of an opportunity to accept another position at WVNCC.

7. Notwithstanding the fact that WVNCC had not properly implemented the provisions of Code 18B-7-1(b) with respect to its duty to find possible alternative employment for Grievant, given that WVNCC offered Grievant a number of jobs from which to select, the benefit of choice outweighed any monetary harm done to Grievant.

8. Under the circumstances, Grievant has failed to prove she is entitled to any money damages in the form of back wages.

Accordingly, this grievance is GRANTED to the extent set forth above, and Respondent West Virginia Northern Community College is Ordered to comply with the directives herein.

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