

**HOWARD K. THACKER,**

**Grievant,**

**v.**

**DOCKET NO. 96-BOT-068**

**BOARD OF TRUSTEES/WEST**

**VIRGINIA GRADUATE COLLEGE,**

**Respondent.**

## **D E C I S I O N**

Grievant, Howard K. Thacker, filed this grievance on or about December 22, 1995:

I am in disagreement with the decisions that I am not eligible for seniority based displacement. I am asking to be made whole again.

Following adverse decisions at the lower levels, Grievant appealed to level four on February 14, 1996. Hearing was held on April 15, 1996 and June 3, 1996, and this matter became mature for decision on June 24, 1996, the deadline for the parties' proposed findings of fact and conclusions of law.

The material facts are not in dispute and are set forth in the following findings.

### Findings of Fact

1. Grievant was employed by West Virginia Graduate College (WVGC) as a LAN (Local Area Network) Specialist, pay grade 18, from December 27, 1994, through December 8, 1995, when he was laid off. This was his only period of employment in the higher education system of West Virginia.

2. In the fall of 1995, the president of WVGC, Dr. Dennis Prisk, determined that a reorganization of the computer services department was necessary to deal with problems of computer maintenance and installation of new lines for service and distribution of educational

programs.

3. WVGC hired a computer consultant, HGO Technology, to study the existing computer services at WVGC and make recommendations regarding restructuring the computer services area. One of the recommendations of HGO was to eliminate the position of LAN Specialist, the position held by Grievant.

4. Grievant was notified on November 27, 1995, by memorandum from Dr. Larry Froelich, Vice President for Academic Affairs, that his position was being abolished effective that date due to the reorganization. Grievant was informed he was eligible to participate in seniority-based displacement as provided in W. Va. Code § 18B-7-1.

5. That same memorandum authorized Grievant to work at home with pay through December 8, 1995, "unless superseded by placement in another position in the College." G Exh. Package, p.

64. [\(See footnote 1\)](#) 6. The following day, November 28, 1995, Dr. Froehlich issued a memorandum to all faculty and staff advising that "[a] change is being made in network support for the Graduate College. The present position of LAN Specialist is being discontinued and is in the process of being redefined. Several alternatives for network support are being studied; one of which is outsourcing from a commercial firm. Another is to recruit for a position with qualifications which more closely match the current network needs of the College." G Exh. Package, p. 66.

7. By letter dated December 7, 1995, President Prisk offered Grievant the position of General Trades Helper, pay grade 9, and informed him that if he accepted the position, he was to report to work on December 18, 1995. President Prisk advised Grievant that he had three options with regard to the offer of appointment: he could accept the offer; he could reject the offer and request in writing to be considered for seniority-based displacement; or he could reject the offer, accept voluntary lay-off, and be placed on the preferred recall list. The letter also explained his rights regarding seniority-based displacement and placement on the recall list. R Ex. 7.

8. Grievant requested seniority-based displacement by memorandum dated December 13, 1995. R. Ex. 8.

9. Grievant was informed by Mr. Jim Stephens, Director of Human Resource Development, by memorandum dated December 22, 1995, that there were three positions occupied by classified employees with less seniority than Grievant, identified as pay grades 16, 12, and 10, but that Grievant was not qualified for any of those positions; therefore, he could not be accommodated by

seniority-based displacement. G. Exh. Package, p. 78.

10. In the meantime, a notice appeared in the Charleston Gazette on December 10, 1995, advertising the position of Network Administrator at WVGC. The position was posted at pay grade 19. Grievant was not notified of this vacancy.

11. Grievant, having seen the notice in the paper, notified WVGC in writing that he was interested in the position. WVGC confirmed receiving Grievant's communication on January 25, 1996. Grievant did not receive an interview for the position, and did not receive an offer for the position.

12. Grievant subsequently filed this grievance. [\(See footnote 2\)](#)

### Discussion

Grievant alleges WVGC violated W. Va. Code § 18B-7-1 and West Virginia Board of Trustees Policy 37, Classified Employees Layoffs and Reassignments, by failing to follow the proper bumping procedures set forth therein.

W. Va. Code § 18B-7-1 provides, in pertinent part:

(b) All decisions by the appropriate governing board or their agents at state institutions of higher education concerning reduction 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 lay off 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. 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.

(c) Any employee laid off during a furlough or reduction in work force shall be placed upon a preferred recall list and shall be recalled to employment by the institution on the basis of seniority. An employee's listing with an institution shall remain active for a period of one calendar year from the date of termination or furlough or from the date of the most recent renewal. If an employee fails to renew the listing with the institution, the employee's name may be removed from the list. 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. An employee on the preferred recall list shall not forfeit the right to recall by the institution if compelling reasons require such employee to refuse an offer of reemployment by the institution.

The institution shall be required to notify all employees maintaining active listings

on the preferred recall list of all position openings that from time to time exist. Such notice shall be sent by certified mail to the last known address of the employee. It shall be the duty of each employee listed to notify the institution of any change in address and to timely renew the listing with the institution. No position openings shall be filled by the institution, whether temporary or permanent, until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment.

West Virginia Board of Directors Policy 37 provides, in pertinent part:

3.1

A full-time classified employee facing layoff for reason of lack of funds or work, or abolition of position, or material changes in duties or organization, will first be considered for reassignment to vacant positions within the institution as set out in Section 4 of this rule, and such reassignment may be made at the institution's discretion and upon the authority of the president or president's designee. If the employee refuses such reassignment, to a position within the same paygrade, he/she relinquishes rights outlined in Sect. 18B-7-1 and will be terminated. If the employee refuses assignment to a lower pay grade and is subsequently laid off, he/she shall retain all recall rights set out in this rule.

If reassignment attempts are unsuccessful, and layoff is imminent, the employee will be given the opportunity, pursuant to the procedures set out in this rule, to displace a less senior employee in the same job title or any other equivalent or lower job title within the institution for which the senior employee is qualified, if such position exists.

If displacement is not possible, or if the employee refuses displacement rights offered by the institution to a lower job title, the employee will be laid off with rights of recall set out in this rule. [\(See footnote 3\)](#)

Grievant alleges WVGC violated the above Code Section and Policy as evidenced by Dr. Prisk's December 7, 1995 letter outlining his options. See, Finding of Fact 7, supra. Specifically, Grievant alleges that it was improper for WVGC to require Grievant to choose among the options listed. Rather, he argues, WVGC was obligated, by statute, to automatically provide Grievant with seniority-based displacement and preferred recall rights. Further, Grievant alleges Respondent violated the Code Section by not providing him with a list of less senior employees and their titles for use in determining whether he was qualified for any of the positions. Grievant also alleges Respondent violated the Code by not automatically placing him on the preferred recall list, or if he was placed on

the list, by not sending him notices of vacancies, including the Network Administrator vacancy. Finally, Grievant alleges he was qualified for the three less senior positions identified and should have been offered one of those positions.

It is incumbent upon the Grievant to prove all allegations constituting the grievance by a preponderance of evidence. Riddle v. BOD/Southern W. Va. Comm. Coll., Docket No. 93-BOD-275 (June 14, 1994); Bole v. BOD/W. Va. Northern Comm. Coll., Docket No. 91-BOD-194 (Oct. 30, 1992). Under W. Va. Code § 18B-7-1, 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. Bole; supra; Lockhart v. W. Va. Univ., Docket No. 91-BOT-443 (Apr. 30, 1992). Code § 18B-7-1 does not grant a laid-off, senior employee a choice from among jobs held by junior employees. However, 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 offer the job held by the least senior employee in a particular classification. Bole, supra. Further, Code § 18B-7-1 requires the institution to place all laid-off employees on a recall list; to recall these employees, based upon seniority, to any vacant positions in classifications in which they had previously worked or any lateral vacancy for which they are qualified; to notify employees of vacant positions; and to give employment priority to employees on the recall list. Lockhart, supra.

Grievant apparently considered the options set forth in Dr. Prisk's letter as mutually exclusive in that, if he chose one, he would forego all the others. If that were the case, Grievant would be correct that Respondent violated his rights under W. Va. Code § 18B-7-1 and Policy 37. However, Grievant has not shown that he was precluded from exercising any of the rights provided him under Code § 18B-7-1 or Policy 37.

After determining that Grievant's position as LAN Specialist was to be eliminated, Respondent reviewed its personnel listings for a vacancy for which Grievant would be qualified and offered him that position. The position of General Trades Helper was in a lower job class than that occupied by Grievant. There was no evidence presented that there were any vacancies within the same job class as Grievant's. Grievant was informed that, if he did not accept that offer, he would be considered for seniority-based displacement, and if that was not successful, he would be laid-off and placed on the

preferred recall list. That is all the Code or Policy 37 require.

Grievant did not accept the vacant position in the lower job class of General Trades Helper, and informed Respondent he wished to be considered for seniority-based displacement. Respondent performed a review of all less senior employees in equivalent or lower job titles, and determined Grievant was not qualified for any of those positions and thus not eligible for seniority-based displacement. In this respect, Respondent could have done a better job of communicating with Grievant. Mr. Stephens identified the three less senior positions to Grievant as pay grades 16, 12, and 10. This type of communication was of no use to Grievant in ascertaining his rights under seniority-based displacement. However, Respondent did not violate any law or statute in identifying the available positions as such. Grievant has no entitlement under the Code to a list of less senior employees and/or their positions. Nor was Grievant entitled to be interviewed for all less senior positions before a determination was made as to his qualifications for those positions. The determination whether an individual meets the minimum qualifications for a position is solely within the purview of the institution for purposes of seniority-based displacement. Bole, supra; Lockhart, supra. Thus, it follows that Grievant had no entitlement to the specific titles of the three positions available for consideration of Grievant's seniority-based displacement.

Following consideration of Grievant for seniority-based displacement and the determination that he was ineligible, Grievant should then have been placed on the preferred recall list. Grievant argues he was not placed on the preferred recall list because he did not receive notices of vacancies, including the Network Administrator position which was advertised on December 10, 1995. Mr. Stephens testified that Grievant was placed on the preferred recall list, but there have been no vacancies in the institution for which he is qualified, and thus he has received no notices.

With regard to the Network Administrator position, it does not appear that Grievant had yet been laid-off and placed on the preferred recall list at the time that position was advertised. Dr. Prisk's December 7, 1995 letter outlining Grievant's options indicated that if he chose to accept the offered position in the lower class, he was to report to work on December 18, 1995. The letter further stated that "[e]mployment and compensation for the period Monday, December 11, through Friday, December 15, 1995, will be at your former title and former pay grade. Working assignments for you during this period of time will be provided by Dr. John Buskey." Thus, it appears Grievant was still considered employed by the institution until at least December 15, 1995. Further, Grievant did not

communicate his response to Dr. Prisk's letter until December 13, 1995, at which time he indicated he wished to be considered for seniority-based displacement. G. Exh. Package, p. 77. Grievant does not indicate in this letter whether he accepted or rejected the offered position of General Trades Helper, although Respondent assumed as much by Grievant's request for seniority-based displacement.

Mr. Stephens informed Grievant by letter dated December 22, 1995, that a review had been completed of his eligibility for seniority-based displacement and that it was determined that he was not qualified to fill the three positions identified as pay grade 16, 12, and 10. G. Exh. Package, p. 78. Mr. Stephens also informed Grievant of his grievance rights in that letter. Grievant responded on December 26, 1995, indicating he was grieving the reorganization action taken against him and requested to be returned to work in the Network Administrator's position. G. Exh. Package, p. 79.

Finally, on January 3, 1996, Mr. Stephens communicated to Grievant regarding his employment status, leave usage, and compensation, and indicated that they considered that he had declined the appointment to the General Trades Helper position, and that they would be publicly posting that vacancy. In that letter, Mr. Stephens states "[y]ou indicated that you did not wish to return to the Graduate College and wished to accept lay-off. We are unable to do that according to the State code." G. Exh. Package, p. 81. It is unclear what Mr. Stephens was referring to by that statement. Mr. Stephens testified at level four that Grievant was considered as involuntarily laid-off and was placed on the preferred recall list. He testified that since January 1996 no positions for which Grievant is qualified have come open. Thus, with regard to the Network Administrator position, Grievant was not on the preferred recall list at the time that position was posted and advertised, and Respondent did not violate Grievant's preferred recall rights by not sending him notice of that vacancy. Moreover, Grievant has not shown that he was harmed in any way by that inaction, as he saw the advertisement for the position at the time it was posted, and applied for the position.

With regard to Mr. Stephens' testimony that no vacancies have existed for which Grievant is qualified since his lay-off, Code § 18B-7-1 does not state that notification shall only be sent to individuals on the preferred recall list for positions for which they are "qualified." It states "[t]he institution shall be required to notify all employees maintaining active listings on the preferred recall list of all position openings that from time to time exist. . . . No position openings shall be filled by the institution, whether temporary or permanent, until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment."

To the extent that Mr. Stephens and/or the institution only send notices of vacancies to individuals on the preferred recall list for which they are deemed qualified, this is in error. The Code clearly states that all position openings shall be sent to those on the preferred recall list. Thus, with regard to Grievant's stated violations of Code § 18B-7-1, Respondent has possibly violated the notice requirements of the Section dealing with preferred recall with respect to Grievant, if in fact there have been any vacancies since January 1996. Grievant also alleges he was qualified for the three identified positions and thus, should have been given one of those positions. The positions were identified in these grievance proceedings as Applications Systems Programmer, Library Technical Assistant II, and Library Technical Assistant I. Mr. Stephens testified that he based his review of Grievant's qualifications on the various resumes which Grievant had submitted from time to time and which were in Grievant's personnel file.

Dr. Prisk had informed Grievant in the December 7, 1995 letter that if he wished to update or correct any information in his resume, he was to provide Mr. Stephens with updated information at the same time he wrote and requested review for possible displacement. In this respect, Respondent again could have done a better job of communicating with Grievant regarding his rights under seniority-based displacement. The direction to Grievant in Dr. Prisk's December 7, 1995, letter, to provide Mr. Stephens with any updated information was helpful, but it should also have been given at the time a seniority-based displacement review was being undertaken. The more obvious way to have handled this situation would have been for Mr. Stephens to inform Grievant of the three less senior positions, by title, and then ask him to provide any additional information he felt would be helpful in aiding Mr. Stephens' review of his qualifications for those positions. Again, however, Respondent's failure to communicate effectively does not constitute a violation of any law or statute.

Respondent has demonstrated that Grievant was not minimally qualified to fill any of the three identified positions. Grievant did not present evidence sufficient to rebut Respondent's position. He presented his resumes and addenda to show that he had the training and experience required for the Applications Systems Programmer. However, Grievant's supervisor, Jim Gregg, and Elizabeth Gates, the computer consultant hired to make recommendations regarding the reorganization, both testified that there was nothing on Grievant's resumes or addenda to show that he possessed the necessary education, experience, or skills to perform the computer programming functions of that position. Further, despite Grievant's complaint that he could not demonstrate effectively his qualifications for



the position because Respondent only identified the position by pay grade, Grievant provided no additional evidence at level four to support his contention that he was minimally qualified for the position. Finally, Grievant provided no evidence that he was minimally qualified for either of the Library Technical Assistant positions, other than to opine that his Regent's Degree in Computer Science should be considered as a "degree in a related field" as specified on the position descriptions for those positions. Grievant did not explain how a Computer Science degree was "related" to a degree in Library Science.

### Conclusions of Law

1. Under W. Va. Code § 18B-7-1, 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. Bole v. BOD/W. Va. Northern Comm. Coll., Docket No. 94- BOD-528 (June 30, 1994); Lockhart v. W. Va. Univ., Docket No. 91-BOT-443 (Apr. 30, 1992).
2. Code § 18B-7-1 does not grant a laid-off, senior employee a choice from among jobs held by junior employees. However, 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 offer the job held by the least senior employee in a particular classification. Bole, supra.
3. Code § 18B-7-1 requires the institution to place all laid-off employees on a recall list; to recall these employees, based upon seniority, to any vacant positions in classifications in which they had previously worked or any lateral vacancy for which they are qualified; to notify employees of all vacant positions; and to give employment priority to employees on the recall list. Lockhart, supra.
4. Grievant has not proven by a preponderance of the evidence that Respondent violated Code § 18B-7-1 with respect to the application of seniority-based displacement.
5. Grievant has not proven by a preponderance of the evidence that Respondent violated Code § 18B-7-1 with respect to placement on the preferred recall list and notification of vacancies.
6. Grievant has proven that Respondent has violated Code § 18B-7-1 by failing to send notices of all vacancies to individuals on the preferred recall list.

Accordingly, this grievance is **DENIED** in part and **GRANTED** in part. Respondent is hereby

**ORDERED** to send Grievant notices of all vacancies, if any, which have arisen since Grievant's lay off in January 1996. Further, provided Grievant is the most senior employee, he shall be recalled to any position opening, if any, within the classification in which he had previously been employed or to any lateral position for which he is qualified.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of 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 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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**MARY JO SWARTZ**  
**Administrative Law Judge**

**Dated: August 27, 1996**

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[Footnote: 1](#)

*Grievant provided a lengthy, bound volume of material at the level four hearing, and requested that Sections 2, 3, 4, and 5 be admitted into evidence. Respondent reserved the right to object as specific documents were incorporated into the record through testimony. While a great portion of the material is not relevant to this grievance, because Respondent did not raise any objection to this material as a whole, it is deemed admitted, and items are referred to herein as "G. Exh. Package, p. \_\_\_\_".*

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[Footnote: 2](#)

*Grievant attempted to raise claims of harassment, discrimination and retaliation at level four over the objections of Respondent. Grievant claimed these claims were first raised at level three. A review of the level three transcript and decision indicates the grievance evaluator elected not consider these claims and limited his decision to the issue of seniority-based displacement. Therefore, pursuant to W. Va. Code § 29-6A-3(j), the undersigned disallowed these claims at level four.*

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[Footnote: 3](#)

*This Policy has not been approved by the Legislature and thus was not effective at all times relevant herein. Nevertheless, WVGC attempted to follow the provisions of the Policy when faced with layoff situations.*