DONNA J. WAUGH, AND

CLIFFORD LIVENGOOD,

Grievants,

v. DOCKET NO. 96-MCHD-163

MONONGALIA COUNTY BOARD OF HEALTH, and

WEST VIRGINIA DIVISION OF PERSONNEL, (See footnote 1)

Respondents.

DECISION

Grievants, Donna J. Waugh and Clifford Livengood, filed this grievance against Respondent, Monongalia County Board of Health (MCBH), alleging:

> [Our] demotion[s], (reduction in pay) effective April 1, 1996, w[ere] in violation of the West Virginia Administrative Rule[s] of the Division of Personnel and West Virginia Code, Chapter 29, Section 6, Article 10. This demotion was discriminatory in that some employees at [the] Monongalia County Health department are employed at salaries above the maximum salary range for their job classifications as established by the Division of Personnel when at the same time, [our] salary was significantly lowered.

In addition, Grievant Waugh alleges:

> I also believe that reprisal is being sought against me due to my election to previously file a grievance against the department due to a misclassification of my job title. The final outcome of this previous grievance has not yet been established (See footnote 2) but all documents appear, todate, to see judgement in my favor.

As relief, Grievants seek:

> Reinstatement to [their respective] salary rate prior to the April 1, 1996 demotion plus any interest accrued. Assurance that the Monongalia County Health Department will comply with the provisions of the West Virginia Administrative Rule of the Division of

> Personnel to ensure that [we] will be properly classified with the Division of Personnel and to ensure [our] security of tenure as a classified employee[s].

Grievants were denied relief at the lower levels of the grievance procedure. At Level IV, an evidentiary hearing was held at the Grievance Board's office in Morgantown, West Virginia, on October 1, 1996, and the case became mature for decision at that time because the parties waived submission of post-hearing briefs.

The following findings of fact were derived from the record.

FINDINGS OF FACT

1. In 1993, the West Virginia Division of Personnel (DOP) filed a Writ of Mandamus, in the Circuit Court of Kanawha County, against the MCBH. MCBH was not complying with DOP's Administrative Rules and Regulations. This case was dismissed on June 7, 1994, by the Court, on its own motion, because of lack of activity for overone year. Level IV, Gr. Ex. #13.

2. DOP has never approved MCBH to have it's own Merit System.

3. In June, 1994, Dr. Sally Taylor became interim Executive Director of MCBH. She became Executive Director in February, 1995.

4. Dr. Taylor has been communicating with DOP, and working towards getting MCBH in “full compliance” with DOP's Administrative Rules and Regulations by July 1, 1996.

5. Grievants were reduced-in-force (RIF'd), and their supervisory positions eliminated because MCBH reconfigured it's management structure. (See footnote 3)

6. On Friday, March 22, 1996, Grievants, were individually informed by Dr. Taylor that their supervisory duties were eliminated immediately through a RIF procedure. Dr. Taylor also informed Grievants of the RIF procedure, their rights under the RIF procedure, and that they could apply for another specified position. Grievants were required to apply for the specified position by Monday, March 26, 1996.

7. Grievant Waugh was informed by Dr. Taylor that she could “bump” Marlene Labin, an Office Assistant II. On Monday, March 26, 1996, while at work, she completed the application form for an Office Assistant II position. Her salary was reduced $2,834.40 peryear, or approximately 15.5%.

8. Grievant Livengood, a Sanitarian Supervisor of Environmental Health, was informed by Dr. Taylor that he could apply for a Registered Sanitation position. Dr. Taylor "created" this position for him. On Monday, March 26, 1996, he filed an application for the position Dr. Taylor specified. His salary was reduced $3,369.84 per year, or approximately 12.3%. His new salary was the same as another Registered Sanitarian who has twice the seniority as Grievant Livengood.

9. All MCBH employees lost their family health insurance.

10. MCBH failed to comply with Rule 12.04(b) of the DOP's Administrative Rules and Regulations. It requires that "[t]he appointing authority shall submit to the State Personnel Board for approval a description of the unit or units to which a layoff will apply."

11. MCBH failed to comply with all three sections of Rule 12.04(c) of the DOP's Administrative Rules and Regulations. (See footnote 4)

12. MCBH failed to comply with all of the components of W. Va. Code §29-6-10(12). (See footnote 5)

13. DOP considered MCBH's noncompliance with the statute a technical violation, in that the outcome would have been the same.

DISCUSSION

During the Level IV hearing, the terms "demoted" and "RIF" were used. It is important to note that Grievants were RIF'd, and not demoted as they contend. Rule 11.04, of the Administrative Rules and Regulations of the DOP, entitled Demotions provides:

> Demotions - There are two types of demotion, involuntary and voluntary. An involuntary demotion is a reduction in pay and/or a change in classification to a lower classification due to the inability of an employee to perform the duties of a classification or for improper conduct. A voluntary demotion is a change in classification of an employee to a lower classification, a transfer of an employee to a lower classification or a reduction in pay due to business necessity. An appointing authority may demote a permanent employee after presenting the employee with the reasons for thedemotion stated in writing, and allowing the employee a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or his/her designee. The appointing authority shall file the statement of reasons for the demotion and the reply with the Director Personnel. An appointing authority may demote a probationary employee as provide for in Section 10.04 of this rule.

This is a RIF case. Grievants did not ask for a classification change or a reduction in pay. Therefore, Grievants were not voluntary demoted. Moreover, since Grievants were good employees,

they were not involuntarily demoted because of poor work performance.

The Grievance Board decided a similar case involving a RIF of a state employee in Scott v. W. Va. Alcohol Beverage Control Adm., Docket No. 91-ABCC-285 (May 21, 1992). In Scott, a Steno-Secretary III was RIF'd after legislation was enacted requiring the State of West Virginia to cease operation of retail liquor stores. The dispositive issue was whether ABCA violated subsection 13.04, the Layoff Section, of the Administrative Rules and Regulations of West Virginia Division of Personnel (DOP) in effecting Ms. Scott's layoff. Rule 13.04, reproduced in the above findings of fact, states that the appointing authority, shall file with the director a proposed plan which shall include certain items. The Administrative Law Judge, in Scott, reasoned that "[t]he use of the word 'shall' in the RIF regulation mandates that the information be in the proposed plan," since "[t]he Supreme Court of Appeals of West Virginia has ruled on numerous occasions that the word 'shall' is ordinarily given a mandatory connotation. See, e.g., Nelson v. W.Va. Public Employees Ins. Bd., 300 S.E.2d 86 (1982)." Scott was appealed to the Circuit Court of Kanawha County which reversed the ALJ's decision. The Circuit Court, in reversing Scott, found "no detrimental reliance argument" on behalf of the grievant, and held that since ABCA "substantially complied" with the RIF regulations "there was 'no error with regard to the procedures relating to the (grievant's) separation from employment.' [W.Va. Dept. of Health v. Mathison, 301 S.E.2d 783, 787 (W.Va. 1983)]." W.Va. Alcohol Beverage Control Administration and W.Va. Div. of Personnel v. Scott, Civil Action No. 92-AA-177 (June 1, 1993). (See footnote 6)

In this case, although Grievants proved several errors by Respondent, they failed to prove by a preponderance of the evidence that if Respondent had adhered to the statutory RIF procedures that the outcome would have been different, or that these errors substantially affected any entitlement provided to them by the statute. At the Level IV hearing, Mr. Lowell Basford, Assistant Director of Classification and Compensation, testified:

> The functional events that occurred largely involved bumping rights and there's really not a lot of possibilities there. I mean if employees bump within occupational groups as the rule requires, it's usually down to the next lower level. Mr. Livengood was a Sanitarian Supervisor. The next lower level - Registered Sanitarian. Mrs. Waugh was a Secretary I. There was no Office Assistant III position, but there was an OA II. So that is the next series down. So it's not as if there are a significant number of variations involved.

Management of the agency and RIF'ing decisions are not made by the State Personnel Board or

DOP, and their scope of review islimited. As Mr. Basford testified:

> The State Personnel Board and the Division of Personnel, or at least the Director of Personnel, really has a limited role in reduction-in-force. First, of all, if you'll note in Rule 12.04(b), the State Personnel Board actually is responsible for approval of the organization- al unit that is to be determined where the layoff is; and if you'll note too, there are several options there as to what the agency can submit to us for consideration. And then in 12.04(d), the Personnel Director actually evalu- ates the tenure qualifications of those individuals that are to be laid off and that is a verification process to make sure that the tenure they are being credited with in fact is consistent with our records in the Division of Personnel.

> Having been to several years of State Personnel Board meetings, I don't want to say that the Personnel Board's approval is a pro forma activity, I don't want to say that, but the Personnel Board does not get involved in the substantive reason of "Well, we don't think you ought to have a lay off and maybe that's not a good idea." It is to make sure that first of all that the organizational unit is correct, and secondly, that the tenure calculations have in fact been done. Beyond that the Personnel Board does not get involved with the actual management of the agency.

In this case, Grievants did not challenge the tenure calculations, or whether the organizational unit was correct.

The outcome of this decision is also consistent with federal RIF precedent. Decisions by federal agencies in RIF cases are not reversed if it is shown that the error by an agency in not complying precisely with RIF regulations had no adverse effect on an employee's substantive entitlements. See Hill v. Dept. of Commerce, DC03518210663 (1984). (See footnote 7) In this case, the outcome of the RIF would have been the same, and the position held by each Grievant would have been eliminated.

Grievants' claim of discrimination also fails. A prima facie showing of discrimination (See footnote 8) , under W. Va. Code §29-6A-2(d), consists of a grievant establishing:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded to them;

> and,

(c) that the difference in treatment has caused a substantial inequity to them and that there is no known or apparent justification for this difference.

Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1991); Steele v. Harrison County Bd. of Educ., Docket No. 91-17-054 (Apr. 30, 1991); Britner v. W. Va. Dept. of Health and Human Resources, Docket No. 91-DHS-059 (June 13, 1991).

If a grievant successfully proves a prima facie case, a presumption of discrimination exists, which respondent can rebut byarticulating a legitimate reason for its action. (See footnote 9) However, a grievant may still prevail if it can be demonstrated the reason proffered by a respondent was mere pretext. See, Prince, supra; Steele, supra; Britner, supra. (See footnote 10)

In this case, Grievants failed to prove that they were "similarly situated, in a pertinent way, to one or more other employee(s).” Their claim of discrimination fails.

Grievant Waugh additionally claims Respondent retaliated against her because she previously filed a grievance concerning her position/classification. "Reprisal" is defined in W. Va. Code § 29-6A-3(p) as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In order to establish that an action constitutes reprisal, the burden is upon Grievant to show:

1. She engaged in a protected activity;

2. The employer had actual or constructive knowledge that Grievant engaged in the protected activity;

3. She was subsequently treated in an adverse fashion by her employer; and

4. The adverse action followed her protected activities within such period of time that one can infer retaliatory motivation.

W. Va. Div. of Natural Resources v. Myers, 443 S.E.2d 229 (W. Va.1994); Frank's Shoe Store v. W.

Va. Human Rights Comm'n., 179 W. Va. 53, 365 S.E.2d 251 (1986).

If Grievant meets the above burden, Respondent may rebut the presumption of retaliatory action by demonstrating that it had legitimate nondiscriminatory reasons for its action. Should Respondent succeed in rebutting the presumption, Grievant may still prevail if the proffered reason for the adverse action is

determined to be pretextual. Myers, supra; Frank's Shoe Store, supra.

Assuming arguendo that Grievant proved a prima facie case of reprisal, MCBH provided a legitimate nondiscriminatory reason for its action. The record is clear that MCBH, not unlike other county health departments, (See footnote 11) needed to review its management structure, budget, and operating expenses to be more efficient with its resources. All MCBH employees lost their family health insurance, and several employees, especially those in supervisory positions, were RIF'd. Grievant's claim of retaliation fails.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. In nondisciplinary matters Grievants must prove all of the allegations constituting their grievance by a preponderance of theevidence. Rice v. W.Va. Dept. of Tax and Revenue, Docket No. 90- ABCC-452 (Jan. 23, 1992); Owens v. W.Va. Alcohol Beverage Control Comm'n, Docket No. 90-ABCC-003 (Apr. 30, 1990).

2. Although MCBH violated DOP's procedural requirements for implementing a reduction-in-force, Grievant's failed to prove by a preponderance of the evidence that their substantive rights were harmed.

3. Grievants failed to prove by a preponderance of the evidence a claim of discrimination.

4. Grievant Waugh failed to prove by a preponderance of the evidence that Respondent retaliated against her for filing a grievance.

5. Grievants failed to prove by a preponderance of the evidence that they are entitled to any relief.

Accordingly, the grievance is **DENIED**.

Any party 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.

Dated: 12/23/96 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

The West Virginia Division of Personnel (DOP) was made a party at Level IV.

Footnote: 2

At the beginning of the Level IV hearing in this case, Grievant Waugh's motion to dismiss her prior grievance was granted.

Footnote: 3

Grievants' position titles are working titles and/or titles given by MCBH because it has not complied with DOP's Administrative Rules and Regulations since, at least, the filing of the Writ of Mandamus by DOP in 1993.

Footnote: 4

Rule 12.04(c) provides:

> *Prior to the separation or involuntary demotion of any employee by layoff, the appointing authority shall file with the director a proposed plan which shall include:*
>
> *1. a statement of the circumstances requiring the layoff;*
>
> *2. the approved organizational unit(s) in which the proposed layoff will take place; and*
>
> *3. a list of the employees in each class affected by the layoff in order of retention.*

Footnote: 5

W. Va. Code §29-6-10(12) provides, in pertinent part:

> *For discharge or reduction in rank or grade only for cause of employees in the classified service. Discharge or reduction of these employees shall take place only after the person to be discharged or reduced has been presented with the reasons for such discharge or reduction stated in writing, and has been allowed a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or his deputy. The statement of reasons and the reply shall be filed as a public record with the director.*

Footnote: 6

While Administrative Law Judges of this Grievance Board are not bound to follow Circuit Court decisions as precedent, in this case, the rationale found in the Scott decision of the Circuit Court of Kanawha County is persuasive.

Footnote: 7

Federal law requires agencies to bear the burden of proving by a preponderance of the evidence that the applicable RIF regulations ere properly invoked and were properly applied to an adversely affected employee. The leading case on this issue is Losure v. Interstate Commerce Comm'n, 2 M.S.P.R. 195 (1980); Seealso, 5 C.F.R. § 351.201(a). In West Virginia, the grievant bears the burden of proof in a RIF action. See, Rice v. W.Va. Dept. of Tax and Revenue, Docket No. 90-ABCC-452 (Jan. 23, 1992); Owens v. W.Va. Alcohol Beverage Control Comm'n, Docket No. 90-ABCC-003 (Apr. 30, 1990).

Footnote: 8

W. Va. Code §29-6A-2(d) provides:

> *"Discrimination" means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.*

Footnote: 9

While the burden of production may shift, the overall burden of proof never does. See, Texas Dept. of Comm. Aff. v. Burdine, 450 U.S. 248 (1981).

Footnote: 10

The analysis is the same under both W. Va. Code §18-29-2 and W. Va. Code §29-6A-2.

Footnote: 11

At Level IV, Mr. Basford testified that several county health departments across the state have recently been faced with fiscal problems because of reduced or lost federal and state funding.