ROBIN SNOWDEN

v. Docket No. 96-BOD-420

BOARD OF DIRECTORS/WEST LIBERTY STATE COLLEGE

DECISION

Grievant, Robin Snowden, is employed as a librarian at West Liberty State College. Her grievance was filed September 3, 1996, and states as follows:

I am not being given any credit on the salary schedule for my prior years of professional experience nor for the eight and one half months of experience accrued at West Liberty State College. Section 18B-9-3(j) of WV State Code states, “Employment for less than full time or less than nine months during any fiscal year shall be prorated.” I would like my prior professional experience to be taken into consideration for placement on the salary schedule. According to the July 31, 1991 memo of Chancellor Paul B. Marion, “The State College and University Systems (SCUSWV) are committed to a fair and equitable classification and compensation system.” I fail to see equity or fairness in a system which awards twelve months of service to those with nine, while failing to give any amount of credit to those with less.

At Level II, an unfavorable decision was rendered September 5, 1996. The matter was waived to Level IV on or about October 2, 1997. The parties continued by agreement the hearing set for November 21, 1996, whereupon, the Level IV hearing was reset and held on January 17, 1997. It was held in the Wheeling offices of the West Virginia Education and State Employees Grievance Board. At that hearing, Respondent filed a Motion to Dismiss alleging that there was no grievable event as defined by W.Va. Code §18-29-2(a). Respondent further alleges that it has engaged in no discriminatory acts regarding Grievant, and that it has consistently applied W.Va. Code § 18B-9-2(j), which pertains to employee salaries. This motion was taken under advisement.

DISCUSSION

Grievant was hired as a full time employee in the position of Staff Librarian. During the first year, 1995-1996, she worked 8 ½ months. If she had completed 9 months, she would have been credited with one year's experience on the salary scale. She believes that the language of W.Va. Code, § 18B-9-2(j) is applicable. It reads as follows:

(j) "Years of experience" means the number of years a person has been an employee of the state of West Virginia and refers to the horizontal column heading of the salary schedule established in **section three** (emphasis added) of this article. For the purpose of placement on the salary schedule pursuant to said section, **employment for nine months or more shall equal one year of experience** (emphasis added), but no classified employee may accrue more than one year of experience during any given fiscal year. **Employment for less than full time or less than nine months during any fiscal year shall be prorated** (emphasis added). For the purpose of determining the amount of annual salary increase pursuant to subsection (b), section five § **18B-9-5(b)]** of this article, employment for less than twelve months during any fiscal year shall be prorated. In accordance with rules established by the appropriate governing board, a classified employee may be granted additional years of experience not to exceed the actual number of years of prior, relevant work or experience at accredited institutions of higher education other than state institutions of higher education.

Reference is made in the above code section to section three of the following statute which states in part:

18B-9-3. Higher education classified employee annual salary schedule.

There is hereby established a state annual salary schedule for classified employees consisting of a minimum annual salary for each pay grade in accordance with years of experience: Provided, That payment of the minimum salary shall be subject to theavailability of funds, and nothing in this article shall be construed to guarantee payment to any classified employee of the salary indicated on the schedule at the actual years of experience absent specific legislative appropriation therefor. **The minimum salary herein indicated shall be prorated for classified employees working less than**

thirty-seven and one-half hours per week. (emphasis added)

HIGHER EDUCATION CLASSIFIED EMPLOYEE

ANNUAL SALARY SCHEDULE

YEARS OF EXPERIENCE

0 1 2 3 4 5 6 7 8

10,092 10,788 11,028 11,268 11,508 11,760 12,012

While the above is not the total chart, enough is shown to illustrate Grievant's and Respondent's contentions. The salaries displayed are also for illustration, and are not intended to be Grievant's actual salary figures. The numerals above, from zero to eight indicate the years of experience. The scale indicates that the employee's salary increases as she completes each year. It is has no gradations smaller than one year. However, Grievant believes that the 8 ½ months worked in her first year should have been credited in a prorated manner, such that she would have received a pay increase after that year of employment in the proportion of 8 ½ as it relates to 9. Expressed in the form of a fraction, this would be 17/18. In terms of decimals, this would have resulted in a pay increase of .94 of the amount Grievant would have received had she completed 9 full months. On the scale above, for completion of nine full months, or a year's credit, she receives a $996.00 increase in salary. Grievant's contentions would result in a salary increase of $936.24, or is .94 of $996.00. But, instead, employees with 9 months employment during a year are credited with one year's experience, while she with 8 ½ months, was credited with zero years experience. Grievant claims this is unfair.

Respondent's Motion to Dismiss, alleging that Grievant has failed to state a“grievance”, as that term is defined in W.Va. Code § 18-29-2(a) shall be examined first.

W.Va. Code § 18-29-2(a) defines grievance to mean,

any claim by one or more affected employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-

county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

Grievant is alleging that Respondent unfairly and incorrectly applied W.Va. Code §18B-9-3(j). She does not use the word, “discrimination”, that she is, being treated differently from other employees who are similarly situated; however, the allegation of unfairness does imply favoritism or bias (See footnote 1) . Accordingly, the undersigned believes that Grievant has stated a claim that is within the definition of grievance as defined by W.Va. Code § 18-29-2(a). There is an allegation of a “misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work”, in the words of the statute above.

Respondent's Motion to Dismiss also declares that Grievant's claim must fail because the remedy sought is not within the scope of powers of Respondent to perform. No evidence was presented on this point beyond a reference to the State Board ofTrustees and Directors of Higher Education's powers to create procedural rules. (See footnote 2) The undersigned recognizes the potential argument Respondent is making, but without more legal development, it cannot be considered. Accordingly, Respondent's Motion to Dismiss is Denied.

The controlling issue in this case is the application of the words contained within W.Va. Code § 18B-9-3, “employment for less than full time or less than twelve months during any fiscal year shall be prorated.” The language seems clear and Grievant's point is well taken.

However, Respondent presented testimony at Level IV by Margaret Robinson Buttrick, Human Resources Administrator for the State College and University Systems of West Virginia, which explained Respondent's position. She stated that the proration applies only to part time or temporary employees, not full-time. Ms. Robinson Buttrick referred to Rules promulgated by the State College System establishing policy regarding employment classifications. In Rule 2.1.1, a full time, regular employee is defined as, “Any employee in a classified position created to last a minimum of nine

months of a twelve month period and in which such employee is expected to work no less than 1,040 hours during said period." (See footnote 3) Grievant was a full-time, regular employee. As such, her term of employment was created to be for a minimum of nine months, which when completed would be regarded as one year's or twelve month's experience on the salary schedule. Grievant's 8 ½ months employment out of nine is not converted on a pro-rata basis to an equal proportion of twelve, which would otherwise be 11 and 1/3 months. However, the next year, if Grievant works nine months, she will be given credit for twelve months. In that event, she would receive twelve months credit for her nine months of work. According to Ms. Robinson Buttrick, this 12 months would be added to the prior 8 ½ months to total 20 and ½ months. At this point, using the 9 months equals one year formula, Grievant will now have in excess of two years of experience. She would be somewhat lower on the salary schedule for one year, but would have caught up by the beginning of the third year. Her years of experience would jump from zero to two in one step. (Level IV Testimony, Jan. 17, 1997.)

A part time or temporary employee's experience would be calculated differently. A part time employee is defined in Rule 2.1.2 as, "An employee in a position created to last less than 1,040 hours during a twelve month period." Rule 2.1.3 defines a temporary employee as, "An employee hired into a position expected to last fewer than nine months of a twelve month period regardless of hours worked per week".

The administrative rules are the basis of a formula which calculates the number of years of experience to be given a part-time or temporary employee. (Level II hearing, Respondent's exhibit No. 3.) The formula provides for the calculation of an FTE or "full time equivalent" which yields a fraction or decimal which is then used to determine the number of month's credit to be allowed out of nine. A part-time employee working one half the hours of a full-time employee would have an FTE of .5. This would be prorated to 4.5 months, or .5 times nine. To obtain nine month's experience would take two years. Thus the part- time employee would not advance on the salary scale until two years hadelapsed.

Neither the full-time nor the part-time employee would move on the salary scale until the completion of at least nine month's employment. Grievant, though it is not reflected on the salary chart and therefore in the paycheck until later, does receive credit for the 8 ½ months. The same is true of the part-time and temporary employees. It just takes longer to move on the scale. In this way, all are treated in an equal fashion. There would be no discrimination.

Grievant has also alleged that she was treated unfairly in that she was given not credit for prior years of professional experience obtained at other institutions. She specifically refers to that part of W.Va. Code, § 18B-9-2(j), which states that: “a classified employee **may** be granted additional years of experience not to exceed the actual number of years of prior, relevant work or experience at accredited institutions of higher education other than state institutions of higher education.” (emphasis added)

Ms. Robinson- Buttrick testified at the Level IV hearing that the word “may”, as emphasized above, indicates, whether to grant such experience is within the discretion of the University of West Virginia Board of Trustees and the State College System of West Virginia Board of Directors. They have not granted credit for experience obtained prior to and not within the state college and university system. There is no requirement under the statute that they do so.

Discrimination is defined in the W.Va. Code § 18-29-2(m) as the following:

> "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.”

To establish a prima facie case of discrimination, as defined above, Grievants mustprove:

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

(b) that they have, to their detriment, been treated by their employer in a manner that other employees have not, in a significant particular; and

(c) that such differences were not related to actual job responsibilities of the grievants and or other employees and were not agreed to in writing.

If grievants successfully prove a prima facie case, a presumption of discrimination exists, then respondent may rebut it by articulating a legitimate reason for its action. Grievants may still prevail if they can demonstrate the reason proffered by respondent was pretextual.

In this case, Grievant has presented no evidence which shows that she was treated differently from other similarly situated employees. Respondent has established that Grievant's situation was governed by rules which are enforced identically for all employees.

Grievant has the burden of proving her case by a preponderance of the evidence. (See W.Va. Education and State Employee Grievance Board, Procedural Rule 4.19).

In addition to the foregoing discussion, the following Findings of Fact and Conclusions of Law are

appropriate.

FINDINGS OF FACT

1. Grievant was employed as a staff librarian on a full-time basis by Respondent, West Liberty State College, for the 1995-1996 school year.

2. The school year is for a term of nine months. 3. Within that term, Grievant worked for a period of 8 ½ months.

4. For the higher education employee, nine months of employment is equivalent to twelve months or a full year of experience for the purposes of advancement on the salary schedule at W.Va. Code § 18B-9-3.

5. After Grievant's first year of employment, she was not credited with one year's experience and was still regarded on the salary schedule as having zero year's experience.

6. Grievant also received no additional years of experience credit for relevant employment experience received prior to her employment with Respondent, at institutions of higher learning not within the West Virginia State College System.

CONCLUSIONS OF LAW

1. In a grievance involving a non-disciplinary action, Grievant must prove her case by a preponderance of the evidence. Procedural Rules of the W.Va. Educ. & State Employees Grievance Bd. 156 C.S.R 1 §4.19 (1996)

2. Under W.Va. Code § 18B-9-2(j), there is no proration of the nine month employment requirement for the obtaining of one year's experience on the salary scale displayed at W.Va. Code § 18B-9-2(j), for a full-time employee.

3. Under W.Va. Code § 18B-9-2(j), it is not mandatory to credit Grievant with additional years of experience for prior related work performed at institutions of higher learning, not within the state system.

Accordingly the 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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JAMES D. TERRY

Administrative Law Judge

DATE: November 17, 1997

Footnote: 1

The American Heritage Dictionary, Second College Edition defines "fair" as, "free of favoritism or bias; impartial: a fair judge". "Unfair", would, of course, be the opposite.

Footnote: 2

W.Va. Code § 18B-1-6. Respondent's argument is probably that the governing board and not Respondent is empowered to make promulgate rules implementing statutes.

Footnote: 3

Legislative Rule 2.1.1, Title 131, Series 62, State College System of West Virginia, Personnel Administration.