CONNIE BENNETT

v. Docket No. 95-DHHR-206R

DEPARTMENT OF HEALTH AND HUMAN RESOURCES

D E C I S I O N

Grievant, Connie Bennett, filed a grievance at level four on May 24, 1995, following the termination of her employment, effective May 1, 1995. Ms. Bennett had been employed at Sharpe Hospital for approximately ten and one-half years as a Licensed Practical Nurse II when she was injured while attempting to control a combative patient in November 1992. Following the injury, Grievant received temporary total disability benefits from Workers' Compensation in March 1993, and was first granted a medical leave of absence without pay, and later a personal leave of absence without pay for medical reasons. She was awarded a ten percent permanent partial disability from Workers' Compensation in December 1994. In April 1995, Grievant was notified that her leave of absence could not be continued indefinitely and that unless she could present a physician's release to return to work, her employment would be terminated May 1, 1995. Grievant's physican determined that she remains unable to return to work as an LPN due to the 1992 injury.

Grievant claimed entitlement to the position of telephone operator under the provisions of W.Va. Code §23-5A-3(b), which provides in pertinent part:

It shall be a discriminatory practice . . . for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing. A comparable position for the purposes of this section shall mean a position which is comparable asto wages, working conditions, and, to the extent reasonably practicable, duties to the position held at the time of the injury . . . . In the event that neither the former position nor a comparable position is available, the employee shall have a right to preferential recall to any job

which the injured employee is capable of performing which becomes open after the injured employee notifies the employer that he or she desired reinstatement. Said right of preferential recall shall be in effect for one year from the day the injured employee notifies the employer that he or she desires reinstatement. . . .

The grievance was granted and Respondent appealed to the Circuit Court of Lewis County. By Order dated November 8, 1996, the grievance was remanded to the Grievance Board “to determine whether Petitioner filled the telephone operator position for which Respondent applied in July 1995, and whether this position is available.” A level four hearing was conducted on February 4, 1997, and the matter became mature with the submission of post hearing proposals and reply on March 26, 1997.

The undisputed facts of this matter are as follows:

1. In April 1995, telephone operator Martha Mitchell notified her supervisor of her impending, but unspecified, date of resignation.

2. Ms. Mitchell's budgeted position #1316 was posted with a tentative hiring date of June 1995. This vacancy was to be filled by original appointment, promotion, demotion, lateral class change, transfer or reinstatement.

3. On June 29, 1995, Ms. Mitchell resigned leaving Sharpe Hospital with four telephone operators and one supervisor.

4. Also in June 1995, Grievant spoke with Human Resources Director Ann Jennings about the possibility of her returning to work in some capacity other than LPN. Ms. Jennings asked Sue Bush, the Switchboard Supervisor, to talk with Grievant about the tentative vacancy, eventhough the posting period had been officially closed.

5. During May and June 1995 the patient census dropped and the Administrator determined that vacant positions would not be filled if a current employee could be reallocated from an overstaffed area. Subsequently, the open posting was rescinded and the position of telephone operator was reposted on June 30, for in-house employees only.

6. In late July or early August, the Administrator determined that the Switchboard staff could be reduced from six to five employees. As a result of this decision,
the plan to reallocate a position to fill the vacancy created by Ms. Mitchell's resignation was abandoned.

7. In September 1995, the Administrator authorized an in-house posting for the position of telephone operator. The position was to be filled by a current staff member through reallocation.

8. Sometime later, the Administrator again determined the position would not be filled.

9. On January 5, 1996, telephone operator Bill Hamon (budgeted position #1333) notified his supervisor that he was resigning. This left the Hospital with a staff of four telephone operators, including the supervisor.

10. The Administrator determined that Mr. Hamon's position vacancy would be posted in-house only, and would be filled by reallocation of a current employee.

11. In February 1996, Paul Leavitt, a Health Service Worker (budgeted position #1651) was reallocated, with his budgeted position number, to fill the telephone operator position vacated by Mr. Hamon.

12. At some time prior to February 1997, budgeted position #1316, previously held by Ms. Mitchell, was deleted from the Hospital's budget. 13. Budgeted position #1333, previously held by Mr. Hamon, remains vacant with no plans for the position to be filled.

Grievant argues the plain language of the statute dictates that she should have received one of the two telephone operator positions which have become available. Grievant challenges Respondent's use of reallocation to deny her a position, first, because it is part of the classification process which is entirely within the purview of the Division of Personnel, and not a tool to enable Respondent to be more efficient. Grievant's second point is that reallocation is defined by the Division of Personnel Administrative Rules as the “reassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or difficulty of duties and responsibilities assigned to the position.” Grievant asserts that a change must occur in an employee's job duties as a pre-requisite of reallocation, i.e., reallocation is a method for Personnel to address the evolution of a particular job position within the scope of its classification plan. Grievant asserts that Respondent misconstrues the provision to move a job position, not because the nature of the job has evolved but as a means of efficiency. Grievant further notes that the reallocation was not part of any downsizing, nor were any employees “laid-off.”

Respondent argues that Code §23-5A-3 does not require employers to reinstate before they reallocate, and that Grievant only has a right to reinstatement to a comparable, available position, e.g., a position which is open, but filled through reallocation, is not available under that provision. It

asserts that “[a] position is only available to be filled through reinstatement under the Workers' Compensation Act when an employer plans to expend resources to fill the position.” Respondent's Finding of Fact No. 16. Under this theory, Respondent asserts that Grievant was only eligible to apply for the Martha Mitchell position when it was available through open posting. Because thatposition was never filled, Respondent argues that Grievant has not been entitled to reinstatement.

Respondent further argues that by reallocating an employee it had no need to increase employee rolls and hire an additional telephone operator to replace Mr. Hamon, therefore, that position was never available for Grievant. Addressing the issue of whether a vacancy currently exists, Respondent argues that the decision to post or not post vacant positions, such as position #1333, is within the discretion of agency directors. Hamilton, et al. v. W.Va. Human Rights Comm'n, Docket No. 91-HRC-446 (Feb. 28, 1992). (See footnote 1) Finally, Respondent asserts that to accept Grievant's position would require that it increase its employment rolls and spend money to reinstate an additional employee it does not need.

Unquestionably, Respondent's efficient administration of resources is desirable, and as a general rule, reallocation of employees, with the approval of Personnel, is permissible. However, the provisions of Code §23-5A-3 create a distinct exception to this general rule, regarding employees who have been injured on the job. The language of the statute is clear and unambiguous in defining the failure to reinstate said employees as a discriminatory practice. Contrary to Respondent's argument, no exceptions are made and no contingencies permitted by the provision.

Ordinarily, the use of the term “shall” establishes that reinstatement is mandatory. Taylor v. Taylor, 189 W.Va. 515, 432 S.E.2d 785 (1993). There are no provisions, or even implications, that any reinstatement would be subject to other personnel changes, such as reallocation. The lackof such provisions, which are specifically included in other statutes, must be interpreted to mean that none were intended (See footnote 2) . This application is not unreasonable because this provision does not apply to employees whose employment was terminated due to reductions in force, but to employees who, but for the injury sustained on the job, would likely continue to be employed in their prior positions. Although disabled to an extent which does not permit them to return to their original assignment, the legislature has determined that such individuals warrant specific protection to ensure continued employment in some capacity.

Respondent's argument that Ms. Mitchell's position was not available because it was limited to an

in-house posting, and that position #1333 is not currently available because it has not chosen to post the vacancy, is not persuasive. As previously stated, the directive to reinstate does not limit the action to situations which involve open, as opposed to closed, in-house postings. Without addressing the validity of an employer carrying a budgeted position with no intent to fill the vacancy, the determination not to post cannot be used as a device to avoid the provisions of Code §23-5A-3.

In this case, Respondent has a budgeted, unfilled, position which is deemed "available" for purposes of this decision. It is noted that because the position is budgeted, the instatement of Grievant would not create a financial hardship for Respondent, nor would it increase its employee rolls above those already budgeted. The position vacated by Ms. Mitchell, #1361, was vacant, and therefore available, when Grievant spoke with Ms. Jennings in June 1995, and when her application was received in July 1995. The position remained available until it was deleted from the budget, prior to February 1997. Presently, position #1333, remains budgeted, unfilled, and available. Although Respondent's administrators would choose not to fill the position, Code §23-5A-3 overrides that decision and require Grievant's instatement.

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. Under the provisions of W.Va. Code §23-5A-3(b), Grievant was entitled to the position of telephone operator which was vacant and available at Sharpe Hospital at the time Grievant requested reinstatement in June and/or July 1995.

2. Grievant is entitled to the position of telephone operator which is currently vacant and available at Sharpe Hospital.

Accordingly, the grievance is GRANTED, and Respondent Ordered to instate Grievant effective July 24, 1995, with back pay and benefits to which she is entitled.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, 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 thisoffice of the intent to appeal and provide the civil action number so that the record

can be prepared and transmitted to the appropriate court.

DATE: 6/18/97 _____

SUE KELLER

Senior Administrative Law Judge

Footnote: 1

Ms. Jennings testified that the position continues to be budgeted to allow Sharpe some flexibility in meeting personnel needs. For example, the money allocated to the vacant telephone operator position might be combined with money intended to compensate a guard, and facilitate the acquisition of a registered nurse. If the position is deleted from the budget, as Ms. Mitchell's was, the funding and the position would be lost.

Footnote: 2

For example, W.Va. Code §18A-4-7a provides that professional employees who are released from employment during a reduction in force shall be placed on a preferred recall list and shall be offered positions for any professional position opening within the area where they had previous been employed, or to a lateral area for which they have certification. Recall shall be on the basis of seniority "if no regular, full-time professional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept such position."