DORIS HOUSTON, et al.,

Grievants,

v.

DOCKET NO. 92-BOT-500

BOARD OF DIRECTORS/WEST VIRGINIA UNIVERSITY,

Respondents.

D E C I S I O N

Grievants Houston, et al., (See footnote 1) filed this grievance on June 12, 1992, alleging the Board of Directors/West Virginia University ("Respondent") violated W. Va. Code § 18B-7-1 when it employed less senior people during the summer months, while Grievants were laid off. Grievant Sharon McCord filed a similar grievance on September 7, 1992, alleging that:

> Management failed to follow W. Va. Code 18B-7-1, WVE&SGB's decisions and other law & policy regarding lay-off & recall of Sharon McCord; less senior employees worked in summer while Grievant was laid off.

Following adverse decisions at the lower levels, Grievant McCord appealed to level four on August 3, 1992. Thereafter, the parties requested her grievance be held in abeyance pending appeal of the Houston grievance. The Houston grievance was appealed to level four on December 18, 1992. Following several continuances, and a lengthy abeyanceperiod, the cases were consolidated at level four on May 27, 1997. A level four hearing was held on September 17, 1997, in the Grievance Board's Morgantown Office, and the matter was reassigned to the undersigned Administrative Law Judge on November 5, 1997. The matter became mature for decision on December 10, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Level II Grievant's Exhibits

Ex. 1 -

West Virginia Higher Education Position Information Questionnaire dated October 1, 1991, for Sharon McCord.

Ex. 2 -

Handwritten schedule of Sharon McCord for summer 1992.

Ex. 3 - Summer schedule for 1992.

Level II University Exhibits

Ex. 1 -

Unemployment Compensation Statute, W. Va. Code § 21A-6-15.

Ex. 2 -

W. Va. Code § 18B-7-1.

Ex. 3 -

June 17, 1992 letter from Andrew Richardson to Regina Charon.

Ex. 4 -

June 25, 1992 memorandum from Timothy P. Williams to Drayton Justis.

Ex. 5 -

WVU Recruitment and Selection Policy.

Ex. 6 -

Kisner and Kisner v. BOT/West Virginia Univ., Docket No. 90-BOT-477 (Apr. 30, 1991).

Ex. 7 -

Level Two Decision, Gunnoe, Lee, Grund, Davidson, et al. grievance.

Ex. 8 -

Level Two Decision, Kisner and Kisner grievance, dated May 28, 1991.

Ex. 9 -

Lockhart v. BOT/West Virginia Univ., Docket No. 91-BOT-443 (Apr. 30, 1992).

Level Four Grievant's Exhibits

Ex. 1 -

October 12, 1993 Decision of Board of Review, West Virginia Bureau of Employment Programs.

Ex. 2 -

May 1, 1996 Final Order of Circuit Court of Kanawha County, West Virginia, The Honorable Irene Berger.

Ex. 3 -

Monthly earnings of James Darnell for 1992.

Testimony

Grievants presented the testimony of Sharon McCord, Doris Houston, and James Darnell. The University presented the testimony of David Master.

ISSUE

The issue to be decided is whether the University violated W. Va. Code § 18B-7-1, when it hired students to work during the summer months of 1992 instead of offering the employment to Grievants, who held nine-month contracts with the University.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievants were employed by the University in the Department of Housing and Resident Life. The period of employment in dispute pertains to the Summer of 1992.

2. Grievants were employed as nine-month employees whose terms of employment ran from approximately the middle of August 1991 until early May 1992. All of these individuals had reasonable assurances of returning to work the following Fall semester, and indeed, they returned to work in the Fall of 1992.

3. Grievants received benefits on a twelve-month basis.

4. During the summer months, when school is not in regular session, the need for staffing services at the University is necessarily decreased.

5. Nevertheless, during the summer, the University hosts various conferences, athletic camps, and the Governor's Honors Academy.

6. When these various activities are taking place, the need for staffing services is increased for the duration of the individual activities.

7. In the past, it had been the University practice to offer any staffing positions which became available due to need to nine-month employees who indicated a willingness to work in the summer. 8. Employees interested in working during the summer would sign up with the Department of Housing and Resident Life, and the Personnel Department, to indicate their availability for work.

9. Nine-month employees who signed up for work were not obligated to accept such work when it was offered.

10. Due to a previous grievance which was resolved at level two, it was the University's practice in the past to pay nine-month employees their regular hourly rate of pay for any work performed during the summer months.

11. In the Summer of 1992, the University decided to change its past practice, and posted various temporary summer staffing positions in the “Mountaineer Spirit”, the student newspaper, at a minimum wage hourly rate, with no benefits.

12. The University employed students to work during the Summer of 1992 in the various positions previously filled from time to time by Grievants.

13 Grievants did not apply for the posted positions, as they were not interested in working for minimum wage.

14. The University did employ some or all of the Grievants again, on an as- needed basis, in the Summer of 1992, but not in the same amount or manner in which they were employed in the

past. They were paid their regular hourly rate for the time worked.

15. At least one less senior nine-month employee was retained in the summer while Grievants' work assignments were terminated. It is unknown whether this nine-month employee was being paid his regular hourly rate, whether he applied for and accepted one of the minimum wage positions posted in the Mountaineer Spirit, or whether he wasemployed continuously throughout the summer, or sporadically, like Grievants. Level IV Test., Darnell.

16. Following the Summer of 1992, Grievants and others applied for unemployment compensation for the summer months, contending they were “laid off” from their summer employment.

17. The West Virginia Bureau of Employment Compensation Board of Review, by decision dated October 13, 1993, awarded Grievants and others unemployment compensation benefits for the Summer of 1992.

DISCUSSION

Grievants allege they were entitled to employment in the Summer of 1992, by virtue of the applicable provisions of W. Va. Code § 18B-7-1 regarding seniority, lay-off, and recall, and thus Respondent violated that statute when it hired students and others rather than offering them employment. Respondent contends that Grievants were under a nine- month contract, which ended in May, and thus were not laid-off for purposes of applying the seniority and recall provisions of Code § 18B-7-1.

At all times relevant to this grievance, W. Va. Code § 18B-7-1: Seniority for full-time classified personnel, seniority to be observed in reducing work force; preferred recall list; renewal of listing; notice of vacancies, provided, in part, as follows:

> (a) All decisions by the appropriate governing board or their agents at state institutions of higher education concerning reductions in work force or full-time classified personnel, whether by temporary furlough or permanent termination, shall be made in accordance with this section . . . . [T]he provisions of this section shall apply only to classified employees whose employment, if continued, shall accumulate to a minimum total of 1,040 hours during a calendar year and extend over at least nine months of a calendar year.
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> (b) 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 on the service of the state systems 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. . . .
>
> (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 . . . . An employee placed upon the preferred list shall be recalled to any position opening by the institution within the classification(s) to which the employee has previously been employed or to any lateral position for which the employee is qualified. . . .
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> . . . . 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.

In support of their position, Grievants rely on this Grievance Board's decision in Kisner and Kisner v. BOT/West Virginia Univ., Docket No. 90-BOT-477 (Apr. 30,1991). Kisner involved Food Service Workers at the Towers Dormitory who were employed during the summer of 1990 on a day-to-day as needed basis. The Kisner grievants complained that, during the summer of 1990, they were not called to work on several days, while less senior nine-month employees were retained in certain positions. The Administrative Law Judge held that seniority must be considered when filling available summer jobs, and the grievants should have been called to work before less senior nine-month employees.

Grievants also rely on the Board of Review's decision regarding their entitlement to unemployment compensation, as evidence that they were entitled to work during theSummer of 1992. In light of the West Virginia Supreme Court of Appeals decisions in Davenport v. Gatson, 192 W. Va. 117, 451 S.E.2d 57 (1994), Adkins v. Gatson, 192 W. Va. 561, 453 S.E.2d 395 (1994), and Raleigh County Bd. of Educ. v. Gatson, 196 W. Va. 137, 468 S.E.2d 923 (1996)(all of which held that nine-month employees of educational institutions, both professional and service, were not entitled to unemployment compensation benefits for work previously performed during the summer months, but not offered to claimants for the summers in questions, absent some explicit proof of an employment contract for the summer month employment), I question the merits of the Board of Review's decision in this matter. At any rate, this Grievance Board is not bound by the decision of another administrative

agency, in this case, the Board of Review. Given my doubts as to the soundness of that decision in light of the cases cited above, I will give that decision no weight in making my determination in this case.

Further, Kisner, supra, is distinguishable from this case. In Kisner, it appears that the less senior nine-month employees, as well as the grievants, were being paid at their regular hourly rate of pay, in accordance with Respondent's past practice. Here, the Respondent changed its past practice, and advertised summer jobs at a minimum-wage rate of pay. Grievants did not apply for the positions because they were not interested in working for minimum wage. Now they claim entitlement to those positions and want their regular rate of pay for the time worked in those positions. Quite simply, Grievants are nin- month contract employees who have shown no entitlement to summer positions for whichthey did not even apply, and have shown no entitlement to those positions at their regular rate of pay. (See footnote 2)

CONCLUSIONS OF LAW

1. It is incumbent upon the Grievants to prove the allegations in their complaint by a preponderance of the evidence.

2. Grievants have proven no entitlement under W. Va. Code § 18B-7-1 to temporary positions for the Summer of 1992, which were posted at minimum wage, and for which Grievants did not apply.

Accordingly, this grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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: January 28, 1998

Footnote: 1 *Betty Carrico, Barbara Hilling, Sarah Knisell, James Darnell, Dottie McDonald, Amy Wright, Mary Williams, Mary Jo Lemley, Robin McKinney, Michael Murray, Rosa Murray, Mary Myers, Juanita Radabaugh, and Mary Taylor.*

Footnote: 2 *The evidence shows that when the University did call those employees during the Summer of 1992 to work, it did pay them their regular rate of pay. It is frankly questionable whether the University was obligated to do that. Apparently, as a result of a level two decision several years prior to this grievance, the Respondent did pay summer workers at their regular rate of pay. However, that is not the issue which was presented in this grievance. Had Grievants applied for and accepted the minimum- wage summer positions, and then grieved over their rate of pay, that issue could have properly been addressed here.*