BIDDIE PHILLIPS,

Grievant,

v v.

Docket No. 98-BOT-207

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent,

CINDY GILLESPIE,

Intervenor.

D E C I S I O N

Grievant, Biddie Phillips, employed by the Board of Trustees as a Postal Worker at West Virginia University (Respondent), filed a level one grievance on December 14, 1998, in which she alleged the "improper creation and filling of position, disparate treatment, age discrimination . . . unequal opportunity and unethical conduct in employment practices . . . ." Grievant requests that she be trained and given the opportunity to apply for the position of Lead Postal Worker.

The grievance was denied at levels one and two, and Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c). A level four appeal was filed on June 16, 1998, and after a number of continuances, and the joinder of Intervenor, a hearing was conducted on April 29, 1999. Grievant was represented by Diane Parker, L.I.U.N.A, Local #814, Respondent was represented by Gregory G. Skinner, Assistant Attorney General, and Intervenor appeared on her own behalf. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law on June 1, 1999.

Discussion

___As this grievance does not involve a disciplinary matter, Grievant has the burden ofproving each element of her grievance 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-

88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

This matter arises from an action taken by Respondent in April 1998, to upgrade the position held by Cindy Gillespie from Postal Worker to Lead Postal Worker. Grievant argues that Respondent created and filled a new position without posting it, thereby denying her the opportunity to apply for the promotion. The allegations of disparate treatment and unethical conduct are based not only on the failure to post, but on a claim that Sandra Dinardo, Manager of the Post Office and Grievant's supervisor, had treated her unfairly over a number of years by not allowing her to cross train in preparation for the Lead position being posted, that Ms. Dinardo had once called her a liar, and told her to “shut-up.” The age discrimination arises from an alleged comment made by Ms. Dinardo in 1994 that Grievant should let the younger people “learn the computers.” Grievant also asserts that some employees are allowed to take breaks while she must continue working. In particular, when another employee was absent three years ago, she was required to perform part of that employee's duties as well as her own, while other employees rested. (See footnote 1) Respondent denies that a new position was created, and asserts that the position held by Ms. Gillespie was simply upgraded to reflect the duties she had been performing for a number of years. Respondent does not deny that Grievant may be working while other employees are taking a break, but notes that all the employees have slow periods throughout the day. Respondent also denies the charge of age discrimination, noting that it is based on a single comment allegedly made four years prior to the upgrade.

At level four, Grievant amended her allegation that a position had been created and filled without posting. Since the Post Office continues to have the same number of employees as it did prior to an appointment of a Lead Worker, Grievant now alleges that Ms. Gillespie was trained for the position, while Ms. Dinardo denied Grievant the same opportunity.

The record offers several examples of disputes which have arisen between Grievant and Ms. Dinardo. For example, Grievant stated that she wanted to open the window to customers earlier; Ms. Dinardo specifically recalled that Grievant wanted to open it later. Ms. Dinardo stated that some employees would not answer the telephone, while Grievant claimed that Ms. Dinardo would appoint one person to answer the telephone. Ms. Dinardo denies ever calling Grievant a liar, but the record indicates that Tim Bostonia, Manager of Operations for Business Services, conducted a meeting with the postal workers, apparently at the request of Grievant's representative and as the result of this incident, regarding their communications problems. There was some discussion at that time about

cross training the workers, but no plan was ever developed to implement such a procedure.

While it is evident that Grievant and Ms. Dinardo do not enjoy the most productiveworking relationship, perhaps the most revealing testimony was offered by Ms. Dinardo when she explained that Ms. Gillespie had been performing the functions of a Lead Postal Worker for at least five years, as the result of her own initiative to learn new tasks and accept more responsibility. By comparison, Ms. Dinardo stated that whenever she requested Grievant do something, she would respond with a negative comment, such as “that's not my job.” Grievant testified that she had never refused to do anything that was asked of her, but, “I might say something about it but I don't refuse.”

Grievant's own statement indicates an attitude that she was less than enthusiastic in cooperating, or assuming additional tasks to ensure the work of the Post Office was completed. Certainly, any supervisor would be reluctant to approach an employee with a request for assistance, when they could expect a negative comment. Grievant's argument is somewhat confusing in that she requested training to take on additional duties of a Lead Worker, and yet, she complained when asked to do something, and complained when other employees had completed their work and enjoyed a few minutes respite. By comparison, Ms. Gillespie actively pursued new and additional duties, and performed them well for a significant period of time. Because of her long-term efforts, the duties and responsibilities of her position changed to such an extent that an upgrade was processed by the Human Resources Department. Grievant failed to prove that Ms. Gillespie had been groomed for the position, or that Grievant had been denied an equal opportunity for the same upgrade. The claim of disparate treatment fails for the same reasons.

Grievant has failed to prove the claim of age discrimination. The only evidence she offered regarding this issue was an alleged comment made by a supervisor four years priorto the upgrade. Even if it is accepted the comment was made, the upgrade was processed by the Human Resources Department and was clearly based upon a change in Ms. Gillespie's duties. That change in duties has been determined to have occurred due to Ms. Gillespie's initiative and motivation, and not as a means to bypass an older worker.

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

Findings of Fact

1. Grievant has been employed by West Virginia University for approximately seventeen years,

and has been assigned as a Postal Worker for that entire period of time.

2. In April 1998, the position held by Intervenor was upgraded from Postal Worker to Lead Postal Worker.

3. Intervenor had been voluntarily performing the duties of Lead Postal Worker for a number of years.

4. Grievant had previously requested that she be allowed to cross train in anticipation of the Lead Postal Worker position being filled. However, when asked to perform certain duties by her supervisor, Grievant “usually had something to say”, indicating she did not want to do duties other than her own.

5. The Department of Human Resources conducted an on-site interview and a desk audit prior to upgrading Ms. Gillespie's position.

6. The upgrade of Ms. Gillespie rather than Grievant was not the result of age discrimination.

Conclusions of Law

1. ___As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. Grievant failed to prove that a position had been created and filled without posting, or that Intervenor had been groomed for the upgraded position of Lead Postal Worker.

3. Grievant failed to prove that she had been denied the opportunity to volunteer to learn and perform additional duties.

4. Grievant failed to prove that the decision to upgrade Intervenor's position was based upon age discrimination.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to theCircuit 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.

Date: June 29, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Because Grievant presented no evidence regarding unethical conduct at level two or level four, that claim is deemed abandoned. The testimony regarding the work fluctuations of other employees may be illustrative of the claim of unequal treatment, but has no connection to the issue of whether Grievant suffered harm as a result of the upgrade, and warrants no individual consideration in this decision.