DARRYL CLAUSELL,

Grievant,

v. **Docket Nos. 00-HE-297/309**

INTERIM GOVERNING BOARD/WEST VIRGINIA

NORTHERN COMMUNITY COLLEGE,

Respondent.

D E C I S I O N

Grievant, Darryl Clausell, employed by West Virginia Northern Community College (Respondent) as a Program Assistant II, filed a level one grievance on July 17, 2000, in which he alleged that he "was treated differently than other employees of the institution in reference to job evaluations [and that Respondent] violated institutional strategic plan; decision to exclude certain employees from job evaluations." For relief, Grievant requested "level III/level IV rulings that justify job evaluation refusals relating to discriminatory practices." After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three and advanced his appeal to level four on September 18, 2000.

On August 7, 2000, Grievant filed a second grievance in which he alleged:

1) issue with elimination of position vs. elimination of jobs - case law determination;

2) issue with options of future employment given by other state institutions vs. options given by WVNCC - case law determination;

3) issue with seniority determination of position - WV Code Sec 18B-7-1;

4) issue w/downgrade determination - Title 131, Series 62, Sec. 16.1;

5) issue with affirmative action, equal opportunity - Title 131, Series 45 case law determination.

No relief was requested on the grievance form; however, at hearing Grievant requested that his salary be restored to pay grade 16, and that he be compensated for traveling to the Weirton campus, and that he be granted "exempt" status since his salary now exceeds the pay scale for pay grade 13. The matter was denied at levels one and two. After bypassing level three, appeal was made to level

four on September 25, 2000. The grievances were consolidated and a level four hearing was conducted in the Grievance Board's Wheeling office on April 4, 2001. Grievant represented himself, with some assistance from Robert Wycherly, and Respondent was represented by Kristi A. McWhirter, Assistant Attorney General. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law on or before April 26, 2001.

The following facts are derived from the record in its entirety, including the level two transcripts and exhibits, and the level four record.

Findings of Fact

1. Grievant was initially employed by Respondent on August 1, 1977, as the Bookstore Manager. Subsequent to the Mercer reclassification in 1994, Grievant held the title of Manager/Bookstore II, pay grade 16, with an annual salary of $36,456.00.

2. During the 1999-2000 academic year, Respondent determined that it would outsource the bookstore operation to Barnes and Noble as a cost cutting measure. Grievant was notified of Respondent's intention in October 1999.

3. By memorandum dated June 28, 2000, Garnet Persinger, Interim President, memorialized a meeting held with Grievant advising him that the bookstore operations, including his position, would be eliminated effective July 31, 2000. At that time Grievantwas offered the position of Program Assistant II, pay grade 13, with an annual salary of $31,872.00. (See footnote 1) This position was located on Respondent's Weirton Regional Campus, but was reassigned, effective March 19, 2001, to the Wheeling Campus.

4. Based upon Grievant's education and experience levels, he was not qualified to bump any employee in pay grade 16, 15, or 14.

5. Grievant was not evaluated during the 1999-2000 academic year until June 25, 2000. Grievant suffered no harm as a result of this delay.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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. Grievant argues that numerous violations occurred

relating to his transfer. Respondent asserts that Grievant's position was simply eliminated, and that he was transferred to the next position for which he was qualified.

Grievant first notes that while his position was eliminated, the job still exists, and Respondent did not negotiate with Barnes and Noble on the employees' behalf. Grievant does not cite any violation of a law, rule, regulation, or policy regarding this issue. The facts establish that Respondent entered into an agreement with Barnes and Noble to operate the campus bookstore. This agreement included the fact that Barnes and Noblewould be responsible for staffing the operation. Grievant's position with Respondent was clearly eliminated, there no longer being a need for a Bookstore Manager. Grievant could have applied for a position with Barnes and Noble, but did not inquire until it had been filled. He also learned that Barnes and Noble offered only a $25,000.00 annual salary. Certainly, Grievant would like to continue as Bookstore Manager, and possibly Respondent could have made another arrangement with Barnes and Noble, but it was under no obligation to do so.

Grievant next argues that the options given to him were not the same as those offered to employees at state institutions when bookstores were outsourced. Specifically, Grievant stated that in other situations the Manager had been retained as a state employee but had been paid by the bookstore. Again, Grievant cites no violation committed by Respondent. While other accommodations could possibly have been made, Respondent was not compelled to retain the employees, or insure that they remained in the bookstore.

Grievant cites violations of W. Va. Code §§ 18B-7-1 and 4 when his seniority was not used to allow him to bump another employee, giving him a choice of positions into which he could be transferred. W. Va. Code § 18B-7-1 provides that seniority is to be considered during a reduction in force, and provides that employees who are terminated as a result shall be given preferred recall status. This provision does not apply in this matter since Grievant was the only Bookstore Manager. Respondent did adhere to the seniority considerations when it determined that Grievant would be transferred to the position held by the least senior Program Assistant. W. Va. Code § 18B-7-4 addresses the retention or nonretention of probationary faculty members, and has no relevance to this grievance. Again, Grievant clearly expressed his desire to have a choice of positions toconsider, but Respondent was under no obligation to provide a selection. In fact, Michele Wetherald, Human Resources Administrator, testified at level four that based upon Grievant's education level, Program Assistant was the highest level position for which he was qualified. (See footnote 2)

Grievant next argues the transfer was a downgrade that did not follow the requirements of Title 131, Series 62, Section 16.1, which states in pertinent part:

Downgrades result from the process of job evaluation where a determination is made that a significantly lower level of skill, effort and responsibility exists in the employee's current position. A new pay grade shall then be established based on the application of the job evaluation plan and the calculation of a revised total point value for the position.

Although Grievant's claim regarding this issue is unclear, his transfer was not a downgrade of the Bookstore Manager position, and Section 16.1 does not apply. Because Grievant was reassigned to a position three pay grades lower than that of Bookstore Manager, he was subject to a demotion, as addressed in Section 15.

Demotions result from an employee moving from his/her current position assigned to a different job title and lower pay grade, and which requires a significantly lesser degree of skill, effort and responsibility than that of the employee's current position.

Grievant also asserts a violation of Title 131, Series 45, “Equal Opportunity and Affirmative Action” resulted from his change of status and the elimination of an African- American at the institution. Section 2.1 of this policy provides that equal opportunity shall be provided for all qualified persons, and discrimination in employment due to race, sex,age, color, religion, national origin, veterans status, or handicap is prohibited. The policy does not restrict the employer in taking personnel actions which are the result of legitimate program changes or the elimination of services. Further, Grievant continues to be employed by Respondent so there has been no termination of an African-American employee.

Finally, Grievant stated at the level four hearing that his concern regarding the failure of Respondent to provide him a performance evaluation was that the evaluation could have been used to determine other positions for which he was qualified. Because Grievant's transfer had to be consistent with the Mercer classification system utilized by the institutions of higher learning, his performance evaluation as Bookstore Manager was not used by Ms. Wetherald in determining the positions for which Grievant was qualified. Further, the performance appraisal was provided to Grievant on July 25, 2000. By his own admission, Grievant has suffered no harm from any delay in receiving the evaluation.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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 has failed to prove any violation of statute, policy or rule occurred when the position of Bookstore Manager was eliminated, and he was transferred to the position of Program Assistant II.

3. Grievant suffered no harm from any delay in providing him a performance evaluation for the 1999-2000 academic year.

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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 10, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Because the Program Assistant position is three pay grades lower than Bookstore Manager, Grievant's salary was decreased by fifteen percent.

Footnote: 2

Ms. Wetherald further explained that under the Mercer classification system Grievant would not have been qualified to hold the position of Bookstore Manager, which explains why she was forced to review positions in lower pay grades.