REBECCA STELLING,

Grievant,

v.

DOCKET NO. 01-PEDTA-507

WEST VIRGINIA PARKWAYS, ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

Grievant, Rebecca Stelling, filed this grievance against her employer, the West Virginia Parkways, Economic Development and Tourism Authority ("Parkways") on or about June 4, 2001. Her statement of grievance reads:

> I was originally transferred from a covered civil service position to the Parkways Authority. At the time of my transfer, I was promised that I would be a state employee throughout my course of employment. I believe that the Parkways Authority has breached this agreement. Additionally, when the Parkways Authority transferred my job to a private employer, I believe they violated applicable West Virginia law in that the Parkways Authority did not put out for public bid these employment opportunities with private employers and, therefore, violated West Virginia law. I further believe that the Parkways Authority violated internal rules and regulations dealing with reorganization and restructuring. More particularly, I believe that (i) they violated Personnel Policy II-11 dealing with layoffs of employees; (ii) violated Personnel Policy II-14; and (iii) Personnel Policy II-7, among other violations.
>
> Relief sought: Reinstatement to my position as an employee for the Parkways Authority, together with an award of attorney's fees, back pay,interest, benefits and all other monetary relief to which I am entitled under West Virginia law. (See footnote 1)

The grievance was denied at all lower levels of the grievance process, and Grievant appealed to level four on September 18, 2001. A level four hearing was conducted at the Grievance Board's

Charleston, West Virginia, office on December 11, 2001, and this matter became mature for decision on February 28, 2002, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Arden J. Curry, II, Esq., Pauley, Curry, Sturgeon & Vanderford, and Parkways was represented by A. David Abrams, Jr., Esq.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits

Ex. 1 -

Modification and Extension Agreement between Parkways and WC Workshop, Inc., dated June 6, 2001, effective June 7, 2001.

LIII Parkways Exhibits

Ex. 1 -

Parkways Personnel Policy II-11, Layoff of Employees.

Ex. 2 -

Minutes of the Joint Economic Development and Tourism (EDT) and Finance Committee Meeting, May 24, 2001, with attachments.

Ex. 3 -

Minutes of the Parkways Board Meeting, May 24, 2001.

Ex. 4 -

Parkways Layoff Plan.

Ex. 5 -

One page document entitled “Reasons for Restructuring Tamarack Organization.”

LIV Grievant's Exhibits

Ex. 1 -

Modification and Extension Agreement between Parkways and WC Workshop, Inc.,

dated June 6, 2001, effective June 7, 2001.Ex. 2 -
Modification and Extension Agreement between Parkways and WC Workshop, Inc., dated October 25, 2001, effective June 7, 2001.

Ex. 3 -

State of West Virginia Certificate of Incorporation for WC Workshop, Inc., dated June 17, 1997.

Ex. 4 -

December 3, 2001 letter from Arden J. Curry, II, to Steve King re: Freedom of Information Act Request; December 7, 2001 letter from Stephen R. King to Arden J. Curry, II.

Ex. 5 -

Parkways Personnel Policy II-7, Termination of Employment.

Ex. 6 -

August 10, 2001 letter from Rod Stoner to Rebecca Stelling; August 2, 2001 memorandum from Jon Reecher to Mr. Stoner; May 21, 1999 letter from William H. Gavan to Rebecca Stelling; August 9, 1999 letter from William H. Gavan to “Pins”; August 31, 1999 letter from William H. Gavan to Rebecca Stelling; Employee Performance Evaluation for Rebecca Stelling, dated June 1, 2000.

Ex. 7 -

Parkways Personnel Policy II-11, Layoff of Employees.

Ex. 8 -

Minutes of the Joint Economic Development and Tourism (EDT) and Finance Committee Meeting, May 24, 2001, with attachments.

Ex. 9 -

July 5, 2001 letter from Lawrence F. Cousins to Rebecca E. Stelling, with attached Minutes of the Parkways Board Meeting, May 24, 2001.

Ex. 10 -

One page document entitled “Reasons for Restructuring Tamarack Organization”; Parkways Layoff Plan.

Ex. 11 -

Parkways Comprehensive Financial Report for fiscal years ending June 30, 1999, June 30 2000, and June 30, 2001.

Ex. 12 -

December 18, 1992 memorandum from Commissioner to Staff, Division of Culture and History.

LIV Parkways Exhibits

Ex. 1 -

August 17, 1995 buck slip from D. L. Lake to Larry Cousins; August 21, 1995 letter from Thomas A. Heywood to Cela Burge with enclosed Request for Proposals Employment and Staff Management Services.

Ex. 2 -

October 30, 1995 memorandum from Cela Burge to David Dickirson, Ann Bradley, Gov. Hulett Smith.

Ex. 3 -

Press Release from House of Wonder, Wyoming County Workshop.

Ex. 4 -

March 7, 1996 Memorandum of Understanding between Parkways, Wyoming County Workshop, and West Virginia Association of Rehabilitation Facilities re: temporary staffing services.

Ex. 5 -

Draft Agreement between Parkways and W. Va. Association of Rehabilitation Facilities ("WVARF").

Ex. 6 -

W. Va. Code § 17-16A-1, et seq. West Virginia Parkways, Economic Development and Tourism Authority.

Ex. 7 -

By-Laws of Parkways, dated August 23, 1989.

Testimony

Grievant testified in her own behalf, and presented the testimony of Lynn Shaffer, Carrie Roache., and Lawrence Cousins. Parkways presented the testimony of Carrie Roache., Dwight D. Trent, Cela

Burge, and Lawrence Cousins.

BACKGROUND

On June 1, 1989, pursuant to Chapter 17, Article 16A of the Code of West Virginia, 1931 as amended (the "Act"), the West Virginia Turnpike Commission (the "Turnpike Commission") was abolished and the West Virginia Parkways, Economic Development and Tourism Authority (the "Authority" or "Parkways") was created. The duties, powers and functions of the Turnpike Commission were transferred to the Authority, and the Authority assumed all assets, property, obligations, indebtedness. and other liabilities of the Turnpike Commission on that date. Personnel of the Turnpike Commission were also assumed by and transferred to the Authority, which became the successor in interest to the Turnpike Commission in all respects under the Act. Upon its creation in 1989, the Authority replaced the Turnpike Commission in the mission of operating the West Virginia Turnpike.

The Act directed the Authority to promote and enhance economic development and tourism within the State of West Virginia. As required by the Act and by a certain agreement between the Federal Highway Administration, and the West Virginia Department of Transportation and the Turnpike Commission (the "Tri-Partite Agreement"), the Authority does not use Turnpike tolls to fund programs in these areas. Such programs, including the facility known as "Tamarack", are funded by non-toll revenues.

Tamarack is perhaps the most visible component of a coordinated system of retailing, wholesaling, warehousing, marketing and training known as the "TamarackSystem" or the "Tamarack Project." Tamarack is a year-round center marketed as a destination location, so as to draw from the 24 million people who pass by the facility each year. Tamarack contains exhibition areas, galleries, retail shops, wholesale operations, and special events and shows, designed to promote the many positive attributes of West Virginia and to offer an opportunity to West Virginia artisans and food producers who wish to develop and preserve their skills and find a market for their products. LIV R. Ex. 1.

Through a series of contract and modification agreements which are discussed in more detail below, the employees and management services at Tamarack are offered by a third-party provider, WC Workshop, Inc. In addition, fourteen (14) Parkways employees in its Economic Development

Division, provided services to Tamarack, including Grievant, who was the Director of Creative Services.

In May of 2001, Parkways decided to eliminate all positions in its Economic Development Division which resulted in a layoff of the 14 Tamarack employees and craft warehouse employees, including Grievant. Parkways then arranged for W. C. Workshop, Inc., its contractual third party personnel provider for Tamarack, to provide these positions. Any Economic Development Division employee facing a layoff would have the chance to work for W. C. Workshop, Inc., at the same wage level previously earned at Parkways. A number of these employees facing the layoff, if they met certain criteria, were entitled to certain "bumping rights", by which they could displace a less senior Parkways employee within specific occupational areas. Grievant declined employment with W. C. Workshop, Inc., and was unable to exercise bumping rights at Parkways. She was terminated from Parkways effective August 3, 2001.

ISSUES AND ARGUMENTS

Grievant contends she was improperly terminated from her employment with Parkways for each of the following reasons:

A. Grievant asserts Parkways violated the provisions of W. Va. Code § 17-16A-3 when it terminated her employment on August 3, 2001, and transferred her position, together with 13 other Parkways positions, to W. C. Workshop, Inc., as it did not competitively bid its contract with W. C. Workshop, Inc.

B. Grievant asserts that even if the contract with W. C. Workshop, Inc. and Parkways appropriately complied with or was exempted from the competitive bidding requirements of West Virginia law, Parkways nonetheless violated the provisions of W. Va. Code § 17-16A-7(14), which sets forth the specific powers granted Parkways by the West Virginia Legislature. W. Va. Code § 17-16A-7(14) permits Parkways "to make and enter into all contracts, agreements or other arrangements with any agency, department, division, board, bureau, commission, or authority or other governmental unit of the state to operate, maintain or repair any project." Grievant asserts this Code section limits the types of entities that Parkways can contract with to operate its projects, and W. C. Workshop, Inc. does not fall within any of the enumerated categories with which Parkways is allowed, as a matter of law, to contract.

C. Grievant asserts Parkways violated Personnel Policy II-7 [effective July 1, 1995] dealing with termination of employment. She asserts the Policy abolished employment-at-will with Parkways and provides only two mechanisms for the terminationof employees: (a) voluntary termination, and (b) involuntary termination for improper work related conduct, neither of which was applicable to her termination.

D. Grievant asserts Parkways violated Personnel Policy II-11 [effective January 1, 1994] dealing with the layoff of employees in that such Policy provides that the layoff provisions contained therein shall only come into effect if layoffs are “necessary by reason of shortage of work or funds”. Grievant asserts that neither of these two contingencies existed and, therefore, her layoff was improper.

E. Grievant asserts that at the time she became employed by Parkways on January 4, 1993, Parkways orally contracted with her that so long as her job duties continued to exist, her job would continue to be covered under the West Virginia Pension and Retirement System. Grievant asserts her job duties continued to exist, as is evidenced by the fact that W. C. Workshop, Inc. was required under an agreement with Parkways to retain Grievant's employment with her current job duties, and therefore, Parkways violated their oral contract obligation in transferring her job to an entity not covered by the State Pension and Retirement System.

Parkways asserts it has the inherent authority to eliminate positions that it created and hired for, and that Grievant is misinterpreting the written policies that she relies upon. Personnel Policy II-7 entitled “Termination of Employment” dealing with at-will employment status, is effective only under circumstances involving disciplinary discharges. Personnel Policy II-11 entitled “Layoff of Employees” neither authorizes nor precludes layoffs, but rather is a procedural rule which must be complied with in order to provide all rights to employees that are facing a layoff. Parkways argues that its contract with W. C. Workshop, Inc. is not relevant to the grievance, and is not in violation of any law, ordinance, rule or regulation.

FINDINGS OF FACT

After a careful review of the testimony and evidence of record in this matter, the undersigned finds the following facts have been proven by a preponderance of the evidence.

1. Prior to her employment with Parkways, Grievant was employed by the West Virginia

Division of Culture of History.

2. As a result of conversations with Cela Burge, then Director of Parkways' Economic Development Division, Grievant agreed to be hired by Parkways.

3. Grievant was employed by Parkways from January 1, 1993, until August 4, 2001.

4. As a result of studies and analysis by Parkways, a decision was made to eliminate its Economic Development Division and the 14 positions which staffed it. It was determined that these jobs, or substantially similar jobs, would be provided through contract with a third-party provider, W. C. Workshop, Inc., a non-profit entity, and successor in interest to that contract from Wyoming County Workshop, Inc., a non-profit sheltered workshop.

5. The original agreement between Parkways and the West Virginia Association of Rehabilitation Facilities ("WVARF"), an agreement later assigned to Wyoming County Workshop, Inc., was accomplished by Parkways under the mandatory requirements of theState Use Law, W. Va. Code § 5A-3-10, permitting the purchase of commodities, services, and other items without competitive bidding.

6. The original process by which Parkways was attempting to fill its need for a personnel services provider, commenced under and was substantially completed as a result of competitive bidding at the time it became aware of WVARF, Wyoming County Workshop, Inc., and the State Use Law.

7. In May of 2001, Parkways prepared and adopted a layoff plan dealing with all 14 of its employees in the Economic Development Division whose positions were abolished.

8. Re-employment by W. C. Workshop, Inc., a non-profit entity, was offered to Grievant at the same salary level, but not the same benefits, she was making while employed by Parkways. That proposal was rejected by Grievant.

9. At the time of her separation, Grievant was a classified-exempt employee of Parkways.

10. Neither Grievant nor any of the other 13 employees who were separated from Parkways were discharged for any work-related misconduct.

11. At the time the decision was made to abolish Grievant's position, Parkways had in effect Personnel Policy II-7 entitled "Termination of Employment" effective July 1, 1995, and Personnel Policy II-11 entitled "Layoff of Personnel" effective January 1, 1994.

DISCUSSION

As this is a non-disciplinary matter, Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. Procedural Rules of WestVirginia Education and State Employees Grievance Board, 156 CSR 1 § 4.21 (2000); Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-1, et seq.

A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probably than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof.

Grievant asserts her layoff from Parkways was improper as it resulted from various statutory and policy violations. As Grievant's employment status with Parkways could be determinative of many of her claims, that issue will be addressed first, and the other allegations will be addressed in turn.

A.

Whether Grievant was an at-will employee who could be discharged at any time for any or no reason from Parkways?

"Public employees holding positions which are statutorily exempt from coverage under the classified service are deemed at-will employees. As a general rule, the employment-at-will doctrine allows an employer to discharge an employee for good reason, no reason, or bad reason, without incurring liability, unless the firing is otherwise illegal under State or federal law." Roach v. Regional Jail Auth., 198 W. Va. 694, 482 S.E.2d 679 (1996). Employees of Parkways are considered statutorily classified-exempt, that is, they are not covered by the civil service protections afforded employees of the State of West Virginia. There are only two ways positions in State government can be added to the classified service. First, the legislature can place positions in the classified service or remove positions from such service. Second, W. Va. Code § 29-6-4(b) provides a procedure by which the Governor, by Executive Order, can add (but not remove) positions to the classified service. Logan v. W. Va. Regional Jail and Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

Here, neither the Governor nor the legislature has afforded classified service job protection to

employees of Parkways. The general powers and duties of the Authority are set forth in W. Va. Code § 17-16A-6. Subsection (a)(1) authorizes the Authority to make by-laws for the regulation of its affairs and the conduct of its business. Subsection (a)(13) provides that the Authority has the power "to employ consulting engineers, attorneys, accountants, architects, construction and financial experts . . . and such other employees and agents, as may be necessary in its judgment. . .". These statutory provisions do not show any type of legislative intent to include the employees of Parkways in the classified service.

Grievant asserts, however, that Parkways's Personnel Policy II-7, dealing with termination of employment, abolished employment-at-will with Parkways, and provides only two mechanisms for the termination of employees: (a) voluntary termination, and (b) involuntary termination for improper work conduct, neither of which was applicable to her termination, thus entitling her to reinstatement with Parkways. Parkways argues that Personnel Policy II-7 does not alter the at-will status of its employees, but merely provides for certain notices and "due process" in the event of disciplinary discharge. Further, Parkways argues that even if Personnel Policy II-7 does alter Grievant's at-will employment status, there is nothing in that or any other Parkways policy which would grant her a right to continued employment in her position.

Parkways's Personnel Policy II-7 (effective July 1, 1995) states, in pertinent part:

A. Policy.

1. The previous policy of "at-will" employment is Canceled.

2. From time to time the employment of an individual at the West Virginia Parkways Economic Development and Tourism [Authority] may be terminated either by voluntary termination on the part of the employee or as the result of due process resulting from action initiated by the Parkways Authority. This policy sets forth certain procedures to be followed in either of the above cases.

B.

Procedure

2. Involuntary Termination of Employment (Dismissal) -

   a. The Parkways Authority reserves the right to dismiss any employee for improper work related conduct. Dismissal will be in accordance with due process under the provisions of Policy II-3 and II-4.

   b. In the event an employee is involuntary terminated he/she will be given an opportunity to reply to the specific matters of the dismissal on their own behalf in writing, or upon request appear personally to present the matters.

LIV G. Ex. 5.

There can be no doubt that the language of Personnel Policy II-7 appears to abolish "at-will" employment at Parkways. The undersigned is at a loss to see how it could be made any clearer than it is in Section A, where it says, "[t]he previous policy of 'at-will'employment is Canceled." However, as noted above, there are only two ways positions in State government can be added to the classified service, and neither of those actions took place here. Parkways does not have the authority itself to place positions designated by statute as at-will into the classified service. See Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). Nevertheless, there is nothing which would prevent Parkways from establishing internal procedures or guidelines to follow when disciplining employees, and once instituting those procedures, it would be bound to follow them.

In any event, Personnel Policy II-7 does not apply to Grievant's termination from Parkways. She was not dismissed for cause; she was laid off. Grievant's argument that an employee at Parkways cannot be terminated unless it is voluntary or for cause is simply wrong. There is nothing in any law, rule, regulation, or statute, which prohibits a State agency, or quasi-State agency from reorganizing its internal structure, and effecting layoffs when it becomes necessary or efficient to do so. Thus, it is Parkways' policy on layoffs which must be examined in determining whether Grievant's separation from employment was effected in accordance with proper policy and procedure.

B.

Whether Grievant's lay-off was in accordance with Parkways's Personnel Policy II-11, Layoff of Employees?

Parkways's Personnel Policy II-11, Layoff of Employees, provides in pertinent part:

A.
Policy

This policy has been developed to comply with West Virginia Administrative rules promulgated by the West Virginia Division of Personnel. While the Parkways Authority does not anticipate a reduction in the work force, now or in the near future, should it become necessary by reason of shortage of work or funds, the West Virginia Parkways, Economic Development and TourismAuthority may initiate a layoff in accordance with the provisions of the following procedures.

LIV G. Ex. 7.

Grievant contends the above language limits the circumstances in which Parkways can layoff its employees to “shortage of work or funds.” and since neither of those reasons were given for her layoff, that action violated the policy, and she is entitled to reinstatement. Parkways contends that its efforts to reorganize its agency are entirely within its discretion, and there is nothing which would prevent it from laying off employees as a result of a reorganization. Further, Parkways's policies with regard to discharge and layoff mirror the West Virginia Division of Personnel's Administrative rules.

Parkways does not dispute that the reasons for abolishing the Economic Development Division do not include shortage of work or funds. It asserts, however, that following Grievant's position to its logical conclusion, any agency operating under DOP's Administrative Rule would be precluded from ever eliminating positions because the combination of policies similar to the ones in this case are fatally defective. Of course, such agencies can abolish positions provided they comply with the rules similar to Parkways's Policy II-11.

The language of Personnel Policy II-11 Grievant relies on is set forth more as examples of reasons a layoff might occur at Parkways, and there is no express or implied language to support her contention that those are the sole reasons a layoff may be effected. Other than her primary argument that Parkways cannot layoff its Economic Development Division employees because it is not suffering a shortage of funds or needfor work, Grievant does not contend that the procedural steps to be taken to effect a layoff were not complied with in Personnel Policy II-11. Thus, Grievant has failed to prove that her layoff was in violation of Personnel Policy II-11.

C.

Whether Parkways violated State Use Law in bidding out its Tamarack service contract to W. C. Workshop, Inc.?

Parkways was created by the legislature following the abolishment of the West Virginia Turnpike Commission in 1989, and its enabling legislature is codified in W. Va. Code § 17-16A-1, et seq. Pertinent to Grievant's allegation that the third-party provider contract entered into between Parkways and W. C. Workshop, Inc. is invalid, W. Va. Code § 17-16A-3 provides:

> The Parkways Authority shall cause, as soon it is legally able to do so , all contracts to which it is a party and which relate to the operation, maintenance, or use of any restaurant, motel or other lodging facility, truck and automobile service facility, food vending facility or other service facility located along the West Virginia Turnpike, to be renewed on a competitive basis. All contracts relating to any facility or services entered into by the Parkways Authority with a private party with respect to any project constructed after the effective date of this legislation shall be let on a competitive bid basis only.

There is no dispute that the construction and operation of the Tamarack facility located in Beckley, West Virginia, is a project of Parkways. Parkways argues however, that even if its contract with W. C. Workshop, Inc., for services related to the Tamarack facility, could be found to be illegal or improper, that finding is irrelevant to this grievance, as Parkways would simply contract with another third-party provider for those services, and Grievant's status of employment would remain unchanged. Lawrence Cousins, General Manager of Parkways, testified regarding the history of Parkways' contract with W. C. Workshop, Inc. In 1995, the Authority issued a Request for Proposals ("RFP") for employment and staff management services at Tamarack. This competitive bid specified that the scope of the services to be provided included employment of an appropriate number of individuals to effectively staff and operate Tamarack. LIV R. Ex. 1. Ten responses were received to the RFP, and upon a recommendation from Cela Burge, then Director of Economic Development, the Parkways Board authorized her to enter into contract negotiations with the low bidder, 4-C CDC, for staffing and management services, and to "package" offerings from the West Virginia Association of Rehabilitation Facilities ("WVARF")(janitorial services only) and Security America (security staff only), as needed. LIV R. Ex. 2.

During the course of negotiations with 4-C CDC, the Wyoming County Workshop, Inc.'s "House of Wonder" approached the committee and said that under State Use Law, it wanted to enter into

negotiations for the services contract. State Use Law, W. Va. Code § 5A-3-10, holds in part:

> A purchase of and contract for commodities, printing and services shall be based, whenever possible, on competitive bids. . .provided, however, That the director shall, without competitive bidding, purchase commodities and printing produced and offered for sale by nonprofit workshops, defined in...5A-1-1..., which are located in this state.

Wyoming County Workshop, Inc. informed the committee by letter that it had "been designated one of the four Community Rehabilitation Programs in West Virginia to provide temporary staffing services to units of state government by the West Virginia Association of Rehabilitation Facilities under the auspices of a state-use law." LIV R. Ex. 3. It had notbeen among the original entities which responded to the RFP. Wyoming County Workshop, Inc. is a sheltered workshop, and State Use Law provides that if a sheltered workshop can provide the services needed by a State agency, then the opportunity should be given to the sheltered workshop without competitive bid.

The Wyoming County Workshop submitted a fee which was well under the fee set by 4-C CDC, and the committee ceased negotiations with 4-C CDC and, on March 7, 1996, entered into a temporary memorandum of agreement with Wyoming County Workshop, Inc., and WVARF, which provided for:

> 1. The designation of the Wyoming County Workshop, Inc. ("Workshop") to provide temporary staffing services to units of State government by and through the West Virginia Association for Rehabilitation Facilities ("WVARF") under the auspices of state-use law;
>
> 2. The agreement to initiate, immediately, a program to provide such temporary staffing services to the West Virginia Parkways, Economic Development and Tourism Authority ("Parkways") commencing March 15, 1996 through the Workshop/WVARF affiliation to meet Parkways requirements for the "Tamarack" facility due to open in the near future;

LIV R. Ex. 4.

In April 1996, the memorandum of agreement was reduced to an official contract for services between Parkways, Wyoming County Workshop, Inc., and WVARF to provide staffing for a period of five (5) years. LIV R. Ex. 5. Subsequently, in late Fall or early Winter 1996, Parkways received a letter from WVARF indicating they were going to stand aside and assign their staffing to Wyoming

County Workshop, Inc. Thereafter, Parkways continued to receive services from Wyoming County Workshop, Inc. As the Tamarack project moved forward, one of the items to be addressed was a retirement plan for the employees. Wyoming County Workshop, Inc. had a retirement plan in place for its employees, but it included some provisions that Parkways did not want. A separate entity was formed known as W. C. Workshop, Inc. as a conduit to facilitate its retirement plan, primarily because it wanted the retirement funds to stay within Tamarack, and not be spread through Wyoming County Workshop, Inc. Thereafter, on or about July 1, 1997, Wyoming County Workshop, Inc. assigned its obligation to provide the staffing services to W. C. Workshop, Inc. LIV G. Ex. 1.

On June 6, 2001, and five years after the execution of the original contract agreement, Parkways and W. C. Workshop, Inc. entered into a Modification and Extension Agreement, effective June 7, 2001, which provided that W. C. Workshop, Inc. would continue to provide staffing and management services to Parkways for Tamarack for another five (5) years. LIV G. Ex. 1. On October 25, 2001, but effective June 7, 2001, a revised Modification and Extension Agreement was executed, with substantially the same terms and conditions as the June 6, 2001 Agreement, with the addition of a 30-day cancellation clause. LIV G. Ex. 2.

Parkways' long-term plan with regard to staffing and management of Tamarack was to ultimately have all those services provided by a third-party provider. Upon the expiration of the first 5-year term, and after much study and analysis, the Parkways Board determined that it would abolish the Economic Development Division, which included the 14 Parkways employees who were assigned to the Tamarack facility, which has resulted in the filing of this grievance. Grievant claims the Contract Agreement with W.C. Workshop, Inc. is invalid, because W.C. Workshop, Inc. is not a sheltered workshop under State Use Law, and thus Parkways has violated the competitive bidding provisions of the State Code.

Parkways argues that this Grievance Board lacks jurisdiction to determine the validity of its contract with W. C. Workshop, Inc. Further, Parkways denies the charge, relying on the above history to demonstrate that its initial contract was competitively let, then abandoned when Wyoming County Workshop, Inc., a sheltered workshop, offered its services. Thereafter, through several acts of assignment, W. C. Workshop, Inc. is now the contract holder. Parkways argues Grievant has failed to prove by a preponderance of the evidence that W. C. Workshop, Inc. is not a sheltered workshop. And finally, Parkways asserts that even if its contract with W. C. Workshop, Inc. violates State Use

Law, the relief Grievant seeks, reinstatement, does not flow directly from that violation, as Parkways would simply enter into a third-party contract with another entity, and would not recreate its Economic Development Division.

W. C. Workshop, Inc. was formed on or about June 17, 1997, through the issuance of a Certificate of Incorporation by the State of West Virginia Secretary of State. LIV G. Ex. 3. The Articles of Incorporation filed with the Secretary of State's office indicate that W. C. Workshop, Inc.

> is organized and shall be operated exclusively for charitable and educational purposes, and in furtherance thereof, shall provide, maintain and operate a workshop for physically and mentally handicapped persons so that they maybecome useful and productive members of society, and in connection therewith, may obtain qualified personnel for the management, guidance and training of such individuals.

LIV G. Ex. 3.

Mr. Cousins testified that the fees paid to W. C. Workshop, Inc. in exchange for its services allowed it to build a sheltered workshop in Wyoming County.

Grievant asked the West Virginia Association of Rehabilitation Services, by letter dated December 3, 2001, whether the State Board of Rehabilitation Services had ever approved W. C. Workshop, Inc. as a vendor or nonprofit workshop. In response, the West Virginia Association of Rehabilitation Facilities, Inc. said neither it nor the Division of Rehabilitation Services “currently transact[s] business with a vendor registered under that name.” LIV G. Ex. 4. Based on this letter, Grievant asserts W. C. Workshop, Inc. is not a sheltered workshop.

The undersigned agrees with Parkways that the Grievance Board lacks jurisdiction to determine the validity of the original or successive third-party contracts. In effect, Grievant is asking this Board to determine that W. Va. Code § 17-16A, the enabling legislation for Parkways, supercedes the provisions of the State Use Law. The Grievance Board is a quasi-judicial agency within the executive branch of State government. Under the basic separation of powers principles, the undersigned lacks the power and authority to decide which statute supercedes another. See, Akers v. W. Va. Dept. of Highways, Docket No. 89-DOH-605 (May 22, 1990); Sowa v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-159 (Sept. 14, 1992). Notwithstanding the above, the undersigned cannot conclude from the limited evidence presented that W. C. Workshop, Inc. does not meet the definition of a sheltered workshop for the purposes of State Use Law. WVARF's reply to

Grievant is somewhat non-responsive to her actual request, and certainly does not serve to prove unequivocally that W. C. Workshop, Inc. is not a sheltered workshop.

Furthermore, the relief Grievant seeks, were it found WC Workshop, Inc. was not a sheltered workshop, and the contract was illegally awarded to it, does not flow from that violation. There is little doubt the third-party contract would simply be awarded to another entity, and nothing in the Memorandum of Understanding, Agreement, or Modification and Extension Agreements, supports Grievant's contention that her position should be reinstated because of that potentially fatal contract flaw. Thus, Grievant has failed to prove her claim that the contract is invalid, and failed to prove the relief sought is mandated if it was.

D.

Whether Parkways breached a promise to Grievant that her position would be covered under the State Personnel Retirement System?

From October 1976 until December 1992, Grievant was employed by the West Virginia Division of Culture and History. Grievant's last job at Culture and History was Director of Marketing and Communication, and in that role, she had occasion to meet and work with former Parkways Director of Economic Development and Tourism, Cela Burge, on developing a cottage industry program on the West Virginia Turnpike.

Beginning in early 1991, Ms. Burge began recruiting Grievant and another employee at Culture and History, Lynn Shaffer, to work for Parkways on the cottage industryprogram. Following ongoing discussions and negotiations, Grievant and Ms. Shaffer resigned their positions with Culture and History on December 18, 1992, and began employment with Parkways. LIV G. Ex. 12.

Grievant's main concern during her discussions with Ms. Burge was that she wanted to remain a State of West Virginia employee, primarily so she could keep her retirement and leave benefits intact. Grievant testified that Ms. Burge assured her she would remain under the state's retirement system at Parkways. Grievant had 16 years and 2 months with the retirement system when she began working at Parkways. As of August 3, 2001, the date of her termination from Parkways, Grievant had 24 years and 9 months with the retirement system. At the time she was terminated, Grievant had almost 2 years of accumulated sick leave, which she froze with the retirement system. Thus, when Grievant reaches the age of 55, she will be credited with 27 years of service with the retirement system.

Lynn Shaffer, the other employee from Culture and History, who transferred to Parkways with Grievant, testified Ms. Burge told her that as long as her position existed, she would remain under the state retirement system.

Cela Burge testified in the level four hearing regarding her recollection of the negotiations she entered into with Grievant prior to her accepting employment at Parkways. Ms. Burge recalled that Grievant and Ms. Shaffer were concerned about their benefits transferring to Parkways from Culture and History, and she told them their positions at Parkways would be covered under the state retirement system. She also testified,however, that she had no authority to make promises to Grievant regarding any particular condition of employment.

Another ex-Parkways employee, Dwight Trent, testified he did not receive any representations from Ms. Burge when he went to work at Parkways regarding any condition of employment or longevity of employment.

Grievant's contention that Ms. Burge's representation to her that her position at Parkways was covered under the retirement system amounted to a promise that she would remain covered under that system until her retirement is not supported by the testimony of the witnesses on this matter. In answer to their question whether their positions at Parkways would be covered under the retirement system, Ms. Burge responded to Grievant and Ms. Shaffer in the affirmative, which was the truth of the matter. While it is apparent Grievant interpreted that assurance to mean she would remain employed at Parkways and/or covered under the retirement system as long as her services were needed, such a promise, even if made, could not stand to bind Parkways.

Quite simply, ultra vires, or unlawful, promises are not enforceable against a state entity. See Freeman v.Poling, 175 W.Va. 814, 338 S.E.2d 415 (1985). The Supreme Court of Appeals has "recognized that unlawful or ultra vires promises are non-binding when made by public officials, their predecessors, or subordinates, when functioning in their governmental capacity." See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991), citing Freeman, supra. It is well-settled that a supervisor's promises cannot be binding against an agency where the supervisor does not possess the authority to actually make that determination. Ollar v. W. Va. Dept. of Health and HumanServ., Docket No. 92-HHR-186 (Jan. 22, 1993). Grievant has presented no evidence that Ms. Burge had the authority to make such a promise, and Ms. Burge testified she had no such authority while at Parkways. Grievant had no discussions with any other person in authority at

Parkways regarding this matter, including Carrie Roache., Parkways' Director of Human Resources. Ms. Roache. testified she processed Grievant's paperwork when she was hired by Parkways, and nothing was ever mentioned to her by Grievant or Ms. Burge that would support Grievant's contention that she was promised continued coverage under the retirement system by Parkways until she retired.

CONCLUSIONS OF LAW

1. As this is a non-disciplinary matter, Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. Procedural Rules of West Virginia Education and State Employees Grievance Board, 156 CSR 1 § 4.21 (2000); Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-1, et seq.

2. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probably than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. 3. Although Parkways Personnel Policy II-7 purports to abolish employment-at- will at Parkways, it does not have the authority to convert its employees into classified employees under the State of West Virginia Civil Service System. See Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). Parkways employees remain classified-exempt, but are offered some protections upon their discharge or layoff from employment.

4. Parkways Policy II-7, Termination of Employment, does not apply to Grievant, as she was not dismissed for cause, but laid off.

5. Parkways Policy II-11, Layoff of Employees, does not limit the reasons Parkways can layoff employees to shortage of work or funds.

6. Parkways complied with the procedures set forth in Policy II-11 when it laid off Grievant from employment.

7. W. Va. Code § 17-16A-3 provides:

> The Parkways Authority shall cause, as soon it is legally able to do so , all contracts to which it is a party and which relate to the operation, maintenance, or use of any

> restaurant, motel or other lodging facility, truck and automobile service facility, food vending facility or other service facility located along the West Virginia Turnpike, to be renewed on a competitive basis. All contracts relating to any facility or services entered into by the Parkways Authority with a private party with respect to any project constructed after the effective date of this legislation shall be let on a competitive bid basis only.

8. An exemption to W. Va. Code § 17-16A-3 is found in the State Use Law, Code § 5A-3-10, which holds in part:

> A purchase of and contract for commodities, printing and services shall be based, whenever possible, on competitive bids. . .provided, however, That the director shall, without competitive bidding, purchase commodities and printing produced and offered for sale by nonprofit workshops, defined in...5A-1-1..., which are located in this state.

9. This Grievance Board lacks the jurisdiction or authority to determine Parkways' contract with W. C. Workshop, Inc. is invalid or illegal.

10. Grievant has failed to prove by a preponderance of the evidence that WC Workshop, Inc. is not a nonprofit corporation, or that it is not a sheltered workshop under the State Use Law definition found in W. Va. Code § 5A-1-1.

11. Ultra vires promises are not enforceable against a state entity. See Freeman v. Poling, 175 W.Va. 814, 338 S.E.2d 415 (1985). The Supreme Court of Appeals has "recognized that unlawful or ultra vires promises are non-binding when made by public officials, their predecessors, or subordinates, when functioning in their governmental capacity." See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991), citing Freeman, supra.

12. It is well-settled that a supervisor's promises cannot be binding against an agency where the supervisor does not possess the authority to actually make that determination. Ollar v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-186 (Jan. 22, 1993).

13. Grievant has failed to prove by a preponderance of the evidence that Cela Burge promised her continued employment or that she would remain under the state retirement system until her retirement.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: March 21, 2002

Footnote: 1

The Grievance Board has no statutory authority to award attorney's fees under W. Va. Code § 29-6A-1, et seq., and this relief cannot be granted by the undersigned.