PATRICIA HENDERSHOT,

Grievant,

v. Docket No. 03-HEPC-061

HIGHER EDUCATION POLICY COMMISSION/

WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Patricia Hendershot, (Grievant), employed by West Liberty State College (WLSC) as a Secretary, filed a level one grievance on January 24, 2003, in which she alleged she had been improperly reassigned during a reduction in force. For relief, Grievant requested reinstatement to a full-time position in pay grade 10. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied at level two, and appeal was made to level four on February 25, 2003. A level four hearing was conducted in the Grievance Board's Wheeling office on April 18, 2003, at which time Grievant was represented by Daniel Tomassetti, Esq., and WLSC was represented by Assistant Attorney General Elaine L. Skorich. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before May 27, 2003.

The following facts are derived from a preponderance of the evidence made part of the record at levels two and four.

Findings of Fact

1. Grievant has been employed by WLSC for approximately eight years, and was classified as a full-time (.92 FTE), Administrative Secretary, pay grade 10, in January 2003.

2. On or about January 9, 2003, Grievant was notified that her position wasbeing eliminated and that her seniority of 114 months was sufficient to allow her to bump into another position at WLSC.

3. Grievant was subsequently reassigned as a Records Assistant II in the Registrar's Department, a 1.0 FTE position in pay grade 10.

4. Grievant was later notified that her seniority had been miscalculated, and she held

only 105 months of seniority. After seniority was recalculated for a number of individuals, Grievant was reassigned to the Housing Department in the position of Assignment Assistant, pay grade 10. The position of Assignment Assistant is part-time, .53 FTE, and was held by the least senior employee in pay grade 10.

5. When implementing the reduction in force, WLSC bumped the least senior employee in the pay grade of the position being eliminated, if the displaced employee was qualified to hold that position. If there was no position in the same pay grade for which the displaced employee was qualified, WLSC looked at the next lower pay grade for a position for which the employee was qualified. Seniority and pay grade were the only criteria used during the bumping process. Whether the position was full or part-time was not considered.

Discussion

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 § 4.21 (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 WLSC violated W. Va. Code § 18B-7-1 when it failed to reassign her to an equivalent, full-time position, while less senior employees were reassigned positions much closer to her original position and pay grade. WLSC asserts that it is not required to consider FTE's when reassigning employees displaced by a reduction in force, and making the decision based upon seniority and qualifications was not inconsistent with the relevant statutory provisions.

W. Va. Code § 18B-7-1(b) provides, in pertinent part:

All decisions by the appropriate governing board, the commission or its agents at state institutions of higher education concerning reductions in work force of full-time classified personnel, whether by temporary furlough or permanent termination, shall be made in accordance with this section. 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 laid off, consideration shall be given to an employee's seniority as measured by permanent employment in the service of the state system of higher education. In the event

that the institution wishes to lay off a more senior employee, the institution shall 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: Provided, That if an employee refuses to accept a position in a lower job class, the employee shall retain all rights of recall provided in this section. If two or more employees accumulate identical seniority, the priority shall be determined by a random selection system established by the employees and approved by the institution.

It appears that this issue has not been previously addressed by the Grievance Board. (See footnote 1) WLSC is correct that the statutory references to reductions in force in higher education only refer to seniority and qualifications. However, implicit in the language of the provision is the intent that employees be treated equitably. Senior employees displaced when their positions are eliminated are to be reassigned to a position in: (1) the same job class; (2) an equivalent job class for which he or she is qualified; or, (3) a lower job class for which he or she is qualified. This provision recognizes that not all employees can be reassigned to the same job title, or even the same pay grade, but directs that the employee first be assigned to a lateral position, if possible. Because WLSC recognized that an employee displaced by a reduction in force should be assigned to a substantially equivalent position by considering positions within the same pay grade, the failure to consider whether the position was full or part-time was arbitrary and capricious. Generally, an action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

Due to other reductions, there were no Administrative Secretaries with less seniority than Grievant. WLSC properly reviewed other positions in the same pay grade. However,the decision to consider full and part-time positions as substantially equivalent was in error. Notwithstanding counsel's argument that some people may value a position in terms other than financial, the vast majority of individuals work out of necessity, and their income is of paramount importance to them. Because of the importance placed upon seniority rights during a reduction in force, a full-time employee must be reassigned to a full-time position,

unless there are none for which he or she is qualified. In this case, Grievant was qualified for the first position to which she was assigned, Records Assistant II. This is a full-time position, in the same pay grade, for which Grievant is qualified, having held the assignment for a number of years. Further, the employee who holds that position has much less seniority than Grievant.

In addition to the foregoing findings of fact and discussion, it is appropriate to make 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 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 § 4.21 (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. During a reduction in force by a board of directors at a state college,W. Va. Code § 18B-7-1(b) requires that consideration be given to the employees' seniority and “shall demonstrate that the senior employee cannot perform any other job duties held byless sneior employees of that institution in the same job class or any other equivalent or lower job class for which the senior employee is qualfied.”

3. Generally, an action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

4. WLSC acted in an arbitrary and capricious manner when it chose not to implement a reduction in force without consideration of whether positions were full-time or part-time.

5. Grievant is entitled to the position of Records Assistant II.

Accordingly, the grievance is GRANTED, and WLSC Ordered to instate Grievant to the position of Records Assistant II, and to award her all back pay and benefits to which she is entitled.

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

Circuit Court of Ohio County. Any such appeal must be filed 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 tosuch 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

DATE: JUNE 18, 2003

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.In Bole v. Board of Director/West Virginia Northern Community College, Docket No. 94-BOD-528 (June 30,1995) the grievant was forced to select a position which she wanted to bump into after her position was eliminated. She selected a half-time position, and filed a grievance challenging the process. Although the issue was not directly raised, the ALJ determined that Ms. Bole was entitled to reassignment to a full-time position.