AMANDA FRYMIER,

Grievant,

v. Docket No. 03-HE-217R

GLENVILLE STATE COLLEGE,

Respondent.

D E C I S I O N

Amanda Frymier ("Grievant") employed by Glenville State College ("Respondent") as an Accounting Assistant I, filed a grievance on or about June 3, 2003, after her assignment was reduced in full-time equivalency ("FTE") from 1.0 FTE to .87 FTE. For relief, Grievant requested reinstatement to 1.0 FTE. (See footnote 1) **The grievance was advanced to level four where three issues were presented. First, whether Respondent had the authority to reduce employees' work assignments rather than eliminate positions entirely. Second, whether Grievant should have been given the opportunity to "bump" into a 1.0 FTE position held by a less senior employee. Third, whether Respondent erred in hiring temporary summer employees rather than offering the work to Grievant. A level four decision denying the grievance was issued on November 5, 2003.**

Upon appeal, the Circuit Court of Gilmer County affirmed the level four decision, but remanded the grievance to afford the Administrative Law Judge "the opportunity to hear the [Grievant's] allegations of favoritism, since that issue was never brought before the [ALJ]." Grievant, represented by Kathleen Abate, Esq., of Cohen, Abate & Cohen, and Respondent, represented by Elaine L. Skorich, Assistant Attorney General, agreed to submit the case for decision based upon the record, supplemented with proposed findingsof fact and conclusions of law. The matter became mature for decision upon receipt of final post-hearing submissions on October 29, 2004.

The following facts are derived from a preponderance of the evidence made part of the original record.

Findings of Fact

1. Grievant has been consistently employed by Respondent since May 19, 1980, and has

been classified as an Accounting Assistant I, pay grade 12, since July 2000. Until July 2003, Grievant's assignment was for 37 ½ hours per week, or 1.0 FTE.

2. In response to state-mandated budget cuts, Respondent reduced the assignments of thirty-six employees, including Grievant, from 1.0 FTE, to less than 37.5 hours per week. Positions were identified for reduction based on an assessment of those job duties which were most essential to Respondent's operation. Neither seniority nor job performance were considered when the reductions were made.

3. Effective July 1, 2003, Grievant's position was reduced to .87 FTE, with her salary and benefits prorated accordingly. Grievant's salary was reduced from approximately $30,000 to $26,000 per annum.

4. Mawhana Gifford, also classified as an Accounting Assistant I, with eight years of seniority, retained a 1.0 FTE position based upon her duties as school cashier, which require that she be present during business hours. Other Accounting Assistants, including Grievant, have no mandated working hours. There is no question that Grievant is qualified for the position held by Ms. Gifford, since she had been offered the job a few months earlier when Ms. Gifford left Respondent's employ. When Ms. Gifford asked toreturn to work, Grievant agreed to resume her position in the Business office as she was unaware of the impending reductions.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Grievant argues that Respondent has failed to treat similarly-classified employees equally,

and acted arbitrarily and capriciously by showing favoritism when it assigned a less senior employee to a full-time position while reducing the FTE of a more senior employee. Respondent argues that the grievance should be dismissed because Grievant did not raise the issue of favoritism in any administrative hearings, and is barred from doing so at the Circuit Court level by the Department of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993). Respondent further asserts that Grievant cannot prevail on the merits because it provided a legitimate justification for the difference in treatment.

As a procedural matter, Respondent's "Motion To Dismiss" will first be addressed. In Hess, supra, the West Virginia Supreme Court of Appeals determined that the final levelof the grievance procedure where alteration of the substance of a grievance can occur is level three. This conclusion was based upon the provisions of W. Va. Code § 29-6A-2(j) which defines "grievance evaluator" as the "individual authorized to render a decision on a grievance under procedural levels one, two and three," and Code § 29-6A-3(j) which states in part:

Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level where the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw it, the parties may consent to the evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance.

Just as in Hess, the issue of favoritism was not raised by this Grievant at any administrative level. It is noted that Grievant changed counsel upon appeal to the Circuit Court; however, this factor does not ameliorate the decisions made by prior counsel as to which arguments would be pursued. To allow a grievant to amend his or her complaint after the administrative process has been completed, requiring that the grievance be remanded for the new issue to be considered, provides the grievant a second opportunity to gain the relief sought by a different approach. Nevertheless, in compliance with the Circuit Court Order, the "Motion To Dismiss" is denied, and the issue of favoritism will be addressed.

W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another orother employees." The test to determine whether Grievant has established a prima facie case of favoritism requires a grievant to establish by a preponderance of the evidence:

(a) that she is similarly situated in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her and that there is no known or apparent justification for this difference.

Kincaid v. Div. of Corrections, Docket No. 98-CORR-144 (Nov. 23, 1998); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Once a grievant establishes a prima facie case of favoritism, the employer can offer a legitimate reason to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant has established that she was similarly situated to Ms. Gifford, who was allowed to retain full-time status. However, Respondent has provided a legitimate reason for the difference in treatment, i.e., Ms. Gifford's duties as school cashier require her to work regular business hours. There is no evidence that the stated reason was pretextual. Again, Grievant believes that she should be allowed to bump into Ms. Gifford's positionbased on seniority, and she is not entitled to bump because there was no reduction in force. Grievant has failed to prove that Respondent engaged in favoritism.

Administrative notice is taken that the West Virginia Supreme Court of Appeals recently revised the legal test for discrimination/favoritism claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, Slip Opinion No. 31717 (Oct. 28, 2004), a grievant must establish a case of favoritism by showing:

(a) that he or she has been treated differently from one or more similarly-situated

employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee. (See footnote 2)

Grievant has demonstrated that she was treated differently than Ms. Gifford in that her employment was reduced while Ms. Gifford's was not, and that she did not agree to the different treatment in writing. However, the evidence establishes that the difference in treatment was based on the actual job responsibilities of the two individuals. Ms. Gifford was not treated favorably in retaining her 1.0 FTE assignment because she serves as theschool cashier, and the cashier's window is required to be open during all regular business hours. Conversely, Grievant's position had no mandated hours of operation. Thus, Grievant failed to prove favoritism under the revised standard.

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 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); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

3. A grievant must establish a prima facie case that the employer engaged in favoritism by showing:

(a) that she is similarly situated in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her and that there is no known or apparent justification for this difference.

Kincaid v. Div. of Corrections, Docket No. 98-CORR-144 (Nov. 23, 1998); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Once a grievant establishes a prima facie case of favoritism, the employer can offer a legitimate reason to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

4. Grievant has established that she was similarly situated to Ms. Gifford, who was allowed to retain full-time status. However, Respondent has provided a legitimate reason for the difference in treatment, and Grievant does not allege that the reason was pretextual.

5. Grievant has failed to prove that Respondent engaged in favoritism under the legal test applied by the Grievance Board, or the recently revised test set forth by the West Virginia Supreme Court of Appeals in The Board of Education of the County of Tyler v. White, Slip Opinion No. 31717 (Oct. 28, 2004),

Accordingly, the 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 filedwithin 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.

DATE: NOVEMBER 16, 2004

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievant was restored to a 1.0 FTE in September 2004, limiting the time period for which any relief may be granted.

Footnote: 2

[2]The White decision does not become final until the expiration of the rehearing period (30 days) and issuance of the mandate. However, the test set forth in that unanimous decision is being applied in this case since the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above.