MICHELE DeRITA,

Grievant,

v. Docket No. 03-HE-160

WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Michele DeRita ("Grievant"), employed by West Liberty State College ("WLSC") as a Human Resources Representative, filed a grievance at level one on April 24, 2003, in which she alleged, "I have been doing two jobs both at a .80 FTE [Full Time Employee] and paid for doing one job. This violates the Wage Payment and Collection Code at WV Code Sec. 21-5-3. Due to the increase in work load I have also lost several vacation days." For relief, Grievant requests that she be returned to a 1.0 FTE, back pay from February 1, 2003. This relief was later amended to back pay from December of 2002, and lost vacation days restored, or that she be paid for them. The grievance was denied at levels one and two. At level three, Richard H. Owens, Ph.D., WLSC President, denied Grievant's request to be restored to a 1.0 FTE, and for back pay, but directed that a portion of her workload be distributed to other employees, and granted her request regarding the lost vacation days. Grievant filed a level four appeal on June 5, 2003. After several settlement attempts failed, an evidentiary hearing was conducted in the Grievance Board's Wheeling office on May 26, 2004. Grievant was represented by Daniel Tomassetti, Esq., and WLSC was represented by Assistant Attorney General Kristi A. McWhirter. The grievance became mature for decision upon receipt of post hearing submissions filed by the parties on or before July 16, 2004. The following findings of fact have been derived from a preponderance of the evidence admitted into the record at levels three and four.

Findings of Fact

1. Grievant has been employed by WLSC for approximately seventeen years, and has held the position of Human Resources Representative, pay grade sixteen, since 1997. This position is exempt from wage and hour laws concerning overtime pay.

2. By memorandum dated April 26, 2002, Grievant was notified that effective the 2002-2003 fiscal year, her position would be reduced from 1.0 FTE to .80 FTE. This action was taken in response to mandatory budget reductions, and was applied to all four employees in the Human Resources Department.

3. Effective July 1, 2002, Grievant was required to keep at least thirty scheduled office hours, but as an exempt employee, was required to complete her work regardless of the number of hours worked.

4. In November 2002, the Administrative Secretary, pay grade ten, was granted a leave of absence, and the remaining three employees in the department assumed her duties. The duties Grievant assumed were the same duties she had performed as part of her Human Resources Representative position from 1997 until they were reassigned in 2000.

5. In January 2003, WLSC eliminated approximately thirty-two staff positions, including the position of Administrative Secretary in the Human Resources Department.

6. Pursuant to the level three decision, two duties were removed from Grievant's job title, and in March 2004, she rewrote her Position Information Questionnaire (PIQ) to accurately reflect her duties. Upon review of this PIQ the Job Evaluation Committeedetermined that her position was that of Administrative Assistant, pay grade fifteen. Grievant did not grieve this decision.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears 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); See W. Va. Code § 29-6A-6. Grievant argues that she has been performing the duties of two .80 FTE positions since November 2002, and requests additional compensation at pay grade ten for her secretarial services, and that the duties be removed from her. In the alternative, she requests reinstatement to a 1.0 FTE position, with reduced secretarial duties. WLSC denies that Grievant is required to perform the duties of two positions, and argues that as an exempt employee, she is not entitled to double compensation or overtime compensation.

The Grievance Board has previously held that an institution of higher education may reduce employee hours rather than implementing a reduction in force due to financial

constraints. Frymier v. HEPC/Glenville State College, Docket No. 03-HEPC-217 (Nov. 5, 2003). This holding was based upon the reasoning in Lucion v. McDowell County Board of Education, 191 W. Va. 399, 446 S.E.2d 487 (1994), in which the Court held that when a board of education seeks to reduce employment costs, the board may decide that the schools' best interests require either the elimination of some service personnel jobs or the retention of all service personnel jobs, but with reduced employment terms. The Court also noted that "[f]rom the humanitarian prospective, the firing of people in economic hardtimes, rather than reducing everyone's hours defeats government's implied goal of helping to provide counter cyclical employment." That reasoning would apply to the present case which involves the same factual scenario albeit on a different educational level.

WLSC properly acted within its authority when it reduced Grievant's hours. An employer may also change an employees' duties to meet institutional needs. In this case, Grievant was assigned significant secretarial duties. She was also required to complete her Human Resources Representative duties, all within thirty paid hours per week. This situation was inequitable; however, Grievant simply cannot be compensated for two .80 positions performed simultaneously.

Dr. Owens resolved much of this grievance at level three. Grievant's position description has been reviewed by the JEC, and she has been reclassified into a position title which takes into account her duties as Human Resources Representative and Administrative Secretary. Since she was compensated at the higher pay grade for the time prior to her reclassification as an Administrative Assistant in May 2004, no back pay is due for that period of time.

An issue first raised at level four, is whether Grievant's revised position is exempt from overtime under the provisions of the Fair Labor Standards Act. WLSC must review Grievant's duties and responsibilities pursuant to her reclassification, to determine whether she continues to be exempt under the FLSA. If she is not exempt, she must be paid for any documented overtime worked since May 2004. In any case, Grievant's position has been reduced by 20 percent, and WLSC must ensure that her workload has been reduced proportionally. 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 bears 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); See W. Va. Code § 29-6A-6.

2. Grievant has failed to prove that she is entitled to the salary of a Secretary, in addition to her regular salary, or have her 1.0 FTE restored.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or the county in which the grievance arose, and 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 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: AUGUST 6, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE