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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**

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**KELLY RICE**

v.

Docket No. 90-ABCC-452

**WEST VIRGINIA DEPARTMENT OF TAX AND REVENUE, ALCOHOL BEVER-  
AGE CONTROL ADMINISTRATION, and WEST VIRGINIA DEPARTMENT OF  
ADMINISTRATION, DIVISION OF PERSONNEL**

**DECISION**

On October 19, 1990, Grievant Kelly Rice filed a claim at Level IV upon being laid off from his employment with the Alcohol Beverage Control Administration (ABC).<sup>1</sup> On October 31 the matter was remanded to Level I.<sup>2</sup> While it is not clear what occurred at Level I,<sup>3</sup> the grievance was denied at Level II and at Level III after hearing of April 25, 1991. Grievant appealed to Level IV, and hearing was held before

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<sup>1</sup>Grievant alleged, "Layoff effective October 12, 1990. I question whether this was accomplished by job class[,] pay grade and seniority and ask to be informed of other positions and openings."

<sup>2</sup>Administrative Law Judge M. Drew Crislip advised the parties by letter of October 23, "While certain complaints may avoid the lower levels, see W.Va. Code §29-6A-4(e), those related to layoffs do not fall into that category. Accordingly, Grievant's claim should first have been filed with his immediate supervisor (Level I)."

<sup>3</sup>Presumably the evaluator at that level determined he had no authority to decide the grievance.

the undersigned on July 23, 1991. Post-hearing the undersigned joined the West Virginia Department of Administration, Division of Personnel (Personnel), as a party-respondent and, upon providing copies of the transcript of the Level IV hearing to all parties, queried whether any party wished to present further evidence. When no party requested such, briefing was scheduled. Grievant advised the undersigned that, upon review of the record, he had presented his case to the best of his ability;<sup>4</sup> only Personnel filed a brief, on October 24, 1991.

At Level III Grievant maintained that he should not have been laid off from his employment at an ABC store in Parkersburg prior to the layoff of less senior or temporary employees of ABC. He testified he knew that a temporary worker in Tyler County continued employment after his own layoff and he argued that he should have been offered that position. He also stated that he was entitled to compensation because a store in Pennsboro was still open.

Ronald Moats, representing ABC, made the following statement:

We had approximately 153 stores and agencies and out of those stores and agencies, I think around 114 were state stores. The law did mandate that we create zones.... [T]he Division of Personnel actually

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<sup>4</sup>In Grievant's note of September 30, 1991, he stated, "Please find enclosed a passage from the West Virginia Code which supports my case[,]" and enclosed a copy of Code §5F-2-4, transferring an agency's property and personnel with it when such agency is transferred to a different department. That provision has no applicability to this matter; no such transfer is involved.

mandated to this agency, the ABC Commission, how we would initiate the layoffs within each zone. They did so based on a reduction of force on a store by store basis and... it also required that we would close each store down within a zone within seven days after the first store was closed. For instance, if we had three stores in one zone, we were to close all three of them down, after the first one, within seven days.

Level III (III) Tr. 4-5.

At the Level IV hearing ABC submitted into evidence a memo from Harry G. Camper, Jr., ABC Commissioner, to Michael T. Smith, Director of Personnel, dated July 9, 1990, requesting that "the layoff be on a store-by-store basis to avoid disruptive and time-consuming 'bumping' situations[,]"<sup>5</sup> and a July 23, 1990, memo from Mr. Smith advising Commissioner Camper,

At its meeting on July 19, 1990, the Personnel Board approved the Stores Division within the Alcohol Beverage Control Commission as the organizational unit for the proposed reduction-in-force, to be effective between September 4, 1990, and October 31, 1990, on a store-by-store basis.

Grievant broadened his argument to claim that under Code §29-6-10(5) he had been entitled to be moved to some other position in the Department of Tax and Revenue for which he is qualified by classification,<sup>6</sup> if filled by a less senior employee. He conceded that ABC's layoff procedures

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<sup>5</sup>The memo opined that another option, of laying off by market zone, would be "problematic in that there can be as much as a seven (7) day difference in the closure of stores within a zone and it is not practical to go through the bumping process for such a limited amount of time."

<sup>6</sup>Grievant additionally argued that he was entitled to any such position in all of state government. That contention was rejected at hearing and is here confirmed.

conformed with Section 13.04, "Layoff," of the Administrative Rules and Regulations of the West Virginia Civil Service System (Civil Service Rules), which allows an agency to propose to Personnel a layoff plan, including "the organizational unit(s) in which the proposed layoff will take place," and to implement such plan upon Personnel's approval. Accordingly his argument was that the regulations were inconsistent with the statute. He testified that since March 1991 he has been employed by the Department of Energy and that he had been a Store Manager II for ABC. It was stipulated that the Store Manager classifications were used only by ABC.

Code §29-6-10(5) provides in pertinent part:<sup>7</sup>

In the event that the agency wishes to lay off a more senior employee, the agency must demonstrate that the senior employee cannot perform any other job duties held by less senior employees within that agency in the 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, such employee shall retain all rights of recall as hereinafter provided.

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<sup>7</sup>The first part of Code §29-6-10(5) provides, For layoffs by classification for reason of lack of funds or work, or abolition of a position, or material changes in duties or organization, or any loss of position because of the provisions of this subdivision and for recall of employees so laid off, consideration shall be given to an employee's seniority as measured by permanent employment in the classified service or a state agency.

While Grievant's argument was not clear, at the Level IV hearing he indicated he thought that part provided him substantive rights. Suffice it to say that it essentially defines seniority and requires its consideration when the second part is applied; it does not support Grievant's claim in any way.

Firstly, Grievant's reliance on Code §29-6-10(5) as providing him a right to a position outside ABC is misplaced. "Agency," as used there, is defined as "any administrative unit of state government, including any authority, board, bureau, commission, committee, council, division, section or office." Code §29-6-2(b). Clearly ABC would be the "agency" in this matter, not the entire West Virginia Department of Tax and Revenue. Grievant's remaining argument therefore is that Code §29-6-10(5) entitled him to continued employment with ABC as long as a less senior ABC employee anywhere in West Virginia remained in a position for which Grievant was qualified by classification.<sup>8</sup>

Firstly and most importantly, Respondent is correct in arguing that Code §29-6-10(5), read in conjunction with Code §5F-2-2(d),<sup>9</sup> allows the division of an agency into

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<sup>8</sup> Respondent's brief also addresses whether Grievant was properly afforded his recall rights. While the undersigned does not discern that Grievant made any argument that he was denied such that was not ruled on at hearing, it is noted that Respondent is correct that no impropriety regarding Grievant's recall was established.

<sup>9</sup> Code §5F-2-2 is titled, "Power and authority of secretary of each department." The part Respondent relies on provides,

The layoff and recall rights of employees within the classified service of the state as provided in subsections five and six, section ten [§ 29-6-10(5) and (6)], article six, chapter twenty-nine of this code shall be limited to the organizational unit within the agency or board and within the occupational group established by the classification and compensation plan for the classified service of the agency or board in which the employee was employed prior to the agency or board's transfer or incorporation into the department[.]

organizational units and the limiting of an employee's layoff (and recall) rights to his unit. See Owens v. W.Va. Alc. Bev. Control Comm'r, Docket No. 90-ABCC-003 (Apr. 30, 1990). Moreover, Code §29-6-10 recognizes that the state personnel board "shall have the authority to promulgate, amend or repeal rules, in accordance with chapter twenty-nine-a [§29-A-1-1 et seq.] of this code, to implement the provisions of this article[,]" which of course includes Code §29-6-10(5), and administrative notice is taken that Section 13.04, along with the other Personnel Rules, was promulgated as a legislative rule, as required by Code §29A-1-1 et seq. It therefore cannot be said that the Personnel Rules do not properly implement Code §§5F-2-2 and 29-6-10(5).<sup>10</sup> Since, as Grievant conceded, ABC's making the store the organizational unit for layoff purposes conformed with the requirements of Section 13.04, Grievant had no layoff rights once the store at which he worked was closed and his layoff has not been proven to be improper in any way.

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<sup>10</sup>It is noted that there is an issue whether the undersigned would have authority to declare the regulation invalid since it is a legislative rule, had Grievant's argument prevailed. Compare Akers v. W.Va. Dept. of Highways, Docket No. 89-DOH-605 (May 22, 1990), where it was held that this Grievance Board does not have authority to declare a statute unconstitutional and therefore invalid. Such issue need not be addressed, however, due to the fact that Grievant's argument failed.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion, the following are appropriate:

Findings of Fact

1. In July 1990 Personnel approved ABC's proposal that each ABC store be the organizational unit for layoff purposes.

2. Grievant was laid off from employment as a Store Manager with ABC in October 1990 when the store at which he had worked was closed.

Conclusions of Law

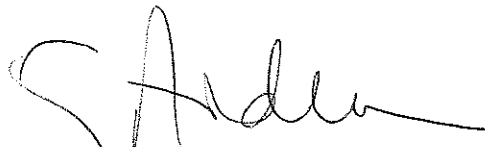
1. Grievant's layoff was carried out consistently with Section 13.04 of the Administrative Rules and Regulations of the West Virginia Civil Service System.

2. Section 13.04 is consistent with W.Va. Code §§5F-2-2(d) and 29-6-10(5).

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," 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. Any appealing party must

advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

A handwritten signature in cursive script, appearing to read "Sunya Anderson", written in black ink.

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**SUNYA ANDERSON**  
**ADMINISTRATIVE LAW JUDGE**

January 23, 1992