Nos. 32163 and 33296 – *Amanda A. Frymier v. Higher Education Policy Commission and Glenville State College*

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Albright, Justice, dissenting:

I respectfully dissent from the majority opinion in this case. The majority affirms the findings of the lower court based upon the majority's perception that the reduction in force (hereinafter "RIF") statute at issue in this case, West Virginia Code §18B-7-1(b) (2004) (Repl. Vol. 2007), applies only to an "elimination of personnel, whereby the number of employees is diminished." The majority consequently reasons that the RIF statute in question does not apply to the present case, in which an alteration in the terms and conditions of employment occurred, resulting in a reduction in number of hours worked and compensation received by Mrs. Frymier.

The majority addresses the grievance board's discussion of this Court's opinion in *Lucion v. McDowell County Board of Education*, 191 W.Va. 399, 446 S.E.2d 487 (1994), but dismisses that case as "irrelevant to the present situation." Indeed, the *Lucion* decision was based upon evaluation of several statutes applicable to employment decisions by county boards of education, including a RIF statute. Despite the obvious distinctions between the higher education RIF statute and the county board of education RIF statute, the *Lucion* case

provides guidance, particularly with regard to the statutory protections provided by the various statutes and the situations to which a RIF statute might be applicable.

The *Lucion* Court analyzed a county board of education's decision to terminate the contracts of service personnel and then reissue their contracts with altered terms, reducing the salaries of those personnel. The Court examined several statutory requirements, including the non-relegation clause,[1] provisions governing contract termination, and the RIF statute applicable to county board of education decisions. The Court ultimately found that the personnel were not entitled to relief since the board of education had properly terminated the contracts and thereafter reissued separate contracts with reduced terms.

In addressing the guiding statutory framework and underlying principles, the *Lucion* Court explained as follows:

> If a board of education decides to *reduce the number of jobs* for service personnel, the board must follow the reduction

[1]The non-relegation clause at issue in *Lucion* prohibited county boards of education from reducing the salary or benefits of school service personnel continuing in the same job position and classification without an employee's consent. The Court found that the non-relegation clause did not provide relief under the *Lucion* circumstances since the personnel contracts had actually been terminated and thereafter reissued with different employment terms. Justice McHugh, in a dissent, expressed the belief that the non-relegation clause had been violated and that the *Lucion* personnel should have been provided relief by this Court. Justice McHugh wrote: "The legislature has obviously attempted to strike a balance between protecting the rights of the school service personnel to ensure job security and the rights of the board of education to make necessary decisions regarding employment." 191 W.Va. at 405-06, 446 S.E.2d at 493-94 (McHugh, Justice, dissenting).

> in force procedures of *W.Va.Code* 18A-4-8b [1990]. If a board of education decides to *reduce the employment terms* for particular jobs, the board must first terminate the existing contracts by following the procedures of *W.Va.Code* 18A-2-6 [1989], and second fill the job vacancies by following the procedures and requirements of *W.Va.Code* 18A-4-8b [1990]. *In either case*, a board of education must "make decisions affecting promotion and filling of any service personnel positions of employment or jobs. . . on the basis of seniority, qualifications and evaluation of past service." *W.Va.Code* 18A-4-8b [1990].

191 W.Va. at 402-03, 446 S.E.2d at 490-91 (footnotes omitted) (emphasis supplied).

While the case sub judice does not involve county board of education personnel, the guiding principles are similar. West Virginia Code § 18B-7-1(b) and (c), applicable in this case, provide as follows:

> (b) All decisions by the appropriate governing board, the council or 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 desires 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. If an employee refuses to accept a position in a lower job class, the employee retains all rights of recall provided in this section. If two or more employees accumulate identical seniority, the priority is determined by a

> random selection system established by the employees and approved by the institution.
>
> (c) Any employee laid off during a *furlough or reduction in work force* is placed upon a preferred recall list and is recalled to employment by the institution on the basis of seniority. An employee's listing with an institution remains active for a period of one calendar year from the date of termination or furlough or from the date of the most recent renewal. If an employee fails to renew the listing with the institution, the employee's name may be removed from the list. An employee placed upon the preferred list shall be recalled to any position opening by the institution within the classifications in which the employee had previously been employed or to any lateral position for which the employee is qualified. An employee on the preferred recall list does not forfeit the right to recall by the institution if compelling reasons require the employee to refuse an offer of reemployment by the institution.

W.Va. Code § 18B-7-1(b) and (c) (emphasis supplied).

The majority holds that the "Legislature makes clear" that a reduction in work force means "a reduction in the number of employees that is effected by either a layoff or a permanent termination." I disagree regarding that alleged statutory clarity. The statute fails to provide a definition for the phrase "reduction in work force," and the precedent of this Court has not been extensive in this area. However, the principles established in *Lucion*, while admittedly premised upon a substantially more complex set of statutory provisions, remain viable. The *Lucion* standard is clear. In the county board of education setting, the non-relegation clause prohibits reduction of the salary or benefits of service personnel continuing in the same job position and classification without an employee's consent; the RIF

statute must be followed if the number of jobs is reduced; and the statutory termination and reapplication by seniority procedures must be followed if the employment terms are reduced.

That very precise methodology is designed to prevent the thwarting of the purposes underlying the RIF statutory schemes. Yet, Mrs. Frymier's case constitutes a crack in the armor, an amalgam of the types of employment reduction methods discussed in *Lucion*. It is not precisely identical to any one of those methods, it is not a board of education case, and it is not expressly prohibited by the standards this Court enunciated in *Lucion*. Therein lies the reasoning of the majority in denying relief to Mrs. Frymier.

However, the majority's narrow reading of the statute to exclude this situation from coverage of the RIF protections, as well as its disregard of the *Lucion* principles, is in error. As the New Jersey Appellate court succinctly stated, "[n]o one disputes that reduction of a full-time job to part-time is a reduction in force (RIF)." *Bednar v. Westwood Bd. of Educ*., 534 A.2d 93, 94 (N.J. Super. 1987), *cert denied*, 541 A.2d 1371 (1988), citing *Klinger v. Cranbury Tp. Bd. of Ed.*, 463 A.2d 948 (N.J. App. 1982), *cert denied*, 460 A.2d 678 (1983). The *Klinger* court concisely stated: "*Reduction in hours of employment is considered a reduction in force.*" 463 A.2d at 950 (emphasis supplied).

The rationale underlying these cases is simply that a reduction in work force does not necessarily mean an elimination of an entire position. A reduction in work force

can be accomplished more insidiously. The effects may not be as immediate or as overtly detrimental. It may be a gradual shift, reducing hours only a few at a time, but those subtle alterations result in a cumulative effect that is no less damaging to the affected individual and no less violative of the spirit of the statutory protections. The record clearly reflects that Mrs. Frymier lost over thirteen percent of her salary in this decrease in overall employment force. Her hours were reduced by one hour per day, amounting to a reduction of at least twenty hours per month. As the Colorado Court of Appeals explained in *Valdez v. Cantor*, 994 P.2d 483 (Colo. App. 1999), a RIF is considered a "reduction in the net strength of the employing activity." 994 P.2d at 485, quoting *Ritter v. Strauss*, 261 F.2d 767, 771 (D.C. Cir. 1958). I dare say that the honorable majority in this case would be plenty upset if their respective salaries were abruptly reduced by thirteen percent. In their case, the Constitution of this state protects them against such a result. I do not understand why the majority is unwilling to offer Mrs. Frymier like protection under the RIF statute.

The employment alterations in the present case, while not subjecting Mrs. Frymier to outright termination, represent a reduction in the net strength of the employing activity and warrant application of the RIF statute. I therefore respectfully dissent from the majority opinion in this case on that issue.

I also dissent from the majority's finding that Mrs. Frymier has not demonstrated that she was the victim of discrimination and favoritism. The record

demonstrates that Mrs. Frymier and Ms. Gifford were similarly situated. Ms. Gifford retained a full-time position, while Mrs. Frymier's position was diminished in hours and salary. The explanation provided by the employer, to the effect that the cashier's position had to include extended hours to serve the needs of the cashier window, is not a legitimate basis for the employment decision. Mrs. Frymier could have served just as effectively in the cashier position, and she should have been selected for that position based upon her seniority. The employment decision constitutes discrimination against Mrs. Frymier and favoritism toward Ms. Gifford. Based upon the majority's ruling to the contrary, I respectfully dissent on that issue.

I am authorzied to state that Justice Starcher joins in this dissenting opinion.