

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 14-57
LOIS FINDLAY)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

University of Vermont employee Lois Findlay (“Grievant”) filed a grievance on July 18, 2014. Therein, Grievant contended that: 1) the University of Vermont (“University”) violated its stated policy concerning post-retirement medical benefit eligibility criteria and wrongfully denied her from retiring prior to June 30, 2014, with full post-retirement benefits; 2) the University engaged in age discrimination in violation of University Policy V.7.3.8; and 3) the University failed to even-handedly put into practice the policy principles of the University Benefits Advisory Council.

The Labor Relations Board conducted a hearing on the merits in the Board hearing room in Montpelier on February 5, 2015, before Board Members Richard Park, Chairperson; James Kiehle and Alan Willard. Grievant’s husband, George Findlay, represented her. Attorney Jeffrey Nolan represented the University. The parties filed post-hearing briefs on February 20, 2015. In the post-hearing brief, Grievant withdrew the allegation that the University failed to even-handedly put into practice the policy principles of the University Benefits Advisory Council.

FINDINGS OF FACT

1. The University Post-Retirement Medical Benefits (“PRMB”) Policy provides in pertinent part:

Current Eligibility Requirements for Post-Retirement Medical Benefits (PRMB)

The following PRMB eligibility requirements are based on age and years of service.

Full-Time Non-Represented Staff . . .

...

Those with a Benefit Service Date from July 1, 1997 to December 31, 2011:

You must be at least 60 with 15 years of continuous full-time employment to be eligible for full post-retirement benefits. You will qualify for continuation of medical, dental and life insurance benefits if you were eligible for them at the time of your retirement. . . .

Overview of Post-Retirement Medical Benefits (PRMB)

...

KEY PRMB PRINCIPLES

The latest details of the University's Post-Retirement Medical Benefits plan and cost share formulas are described below. Note that the current plan continues eligibility for coverage to spouses of eligible staff.

- **Non-Represented Faculty and Staff who, by June 30, 2014, meet** the post-retirement medical benefit eligibility criteria in place on their date of hire, and retire on or before June 30, 2014, are eligible to participate in the University's post-retirement medical benefit under the cost-sharing formula in effect on June 30, 2011.
- **Non-Represented Faculty and Staff who, by June 30, 2014, meet** the post-retirement benefit eligibility criteria in place on their date of hire, but do NOT retire on or before June 30, 2014, will be eligible to participate in the University's post-retirement medical benefit when they do retire, and their premium contribution will be based on their age as follows: those with pre-65 coverage will pay the percentage of premium indicated in Table 1; those with post-65 coverage (the University's Medicare Supplement Plan) will pay the percentage of premium indicated in Table 2.
- **Non-Represented Faculty and Staff** who were hired on or before December 31, 2011 **who do NOT meet** the post-retirement medical benefit eligibility criteria in place on their date of hire by June 30, 2014, will be eligible, when they reach age 65 and 15 years of benefits-eligible service, to participate in the University's Medicare Supplement Plan at the premium contribution rate indicated in Table 2. Individuals in this category who choose to retire before age 65 will be eligible for pre-65 coverage, but they will be responsible for 100% of the premium. At age 65, these individuals will become eligible for the University's Medicare Supplement Plan, but they will be responsible for 100% of the premium.
- **Non-Represented Faculty and Staff who, by June 30, 2014, do NOT meet** the post-retirement medical benefit eligibility criteria in place on their date of hire, but will have reached **15 years of benefits-eligible service** by June 30, 2014, will be eligible for the University's post-retirement medical benefit when they

reach age 62, and they will be responsible for 50% of the premium. At age 65, these individuals will become eligible for the University's Medicare Supplement Plan, and will pay the percentage of premium indicated in Table 2.

...

(Grievant Exhibits, pages 10 -13; University Exhibits 3, 4)

2. Table 1, referred to under "Key PRMB Principles", is entitled "Post-Retirement Medical Benefits (pre-65)". It provides that if salary at retirement is less than \$90,000, the individual's share of premium contribution is 20% (University Exhibit 5).

3. Table 2, referred to under "Key PRMB Principles", is entitled "Percentage of Retiree (post-65) Health Insurance Premiums to be Paid by Individuals (Based on Final Average Salary and Years of Service)". It provides that a retiree with an average final salary of \$20,000 to \$29,000 with 17 or 18 years of service pays 13% of health insurance premiums, and a retiree with this final average salary with 19 or 20 years of service pays 12% of health insurance premiums (University Exhibit 6).

4. The University Staff Handbook contains a summary of benefits for University staff, including medical benefits. A University employee is considered a full-time employee eligible for benefits if they are in one of the following three groups: 1) Group A – employed in a regular capacity of 100% Full-Time Equivalency ("FTE") of a 12 month year for 37 ½ or 40 hours per week; 2) Group B – employed in a regular capacity of 100% FTE of an academic year of 9, 10 or 11 months for 37 ½ or 40 hours per week; or 3) Group C - employed in a regular capacity of 75 - 99% FTE of a 12 month year for 37 ½ or 40 hours per week. An employee may apply for benefits coverage for a spouse. The University reserves the right under the Staff Handbook to amend, alter or terminate post-retirement benefits at any time for prospective and existing retirees (University Exhibit 7).

5. Full-time employees with 9, 10 or 11 month appointments eligible for medical and life insurance benefits are eligible to receive such benefits during the months of the year they are not working. They pay their share of year-round medical insurance premiums through their regularly scheduled paychecks which they receive during the term of their appointment. Staff members on academic year appointments who have reasonable assurance of reappointment for the ensuing academic year are ineligible for unemployment benefits between academic years (University Exhibit 7).

6. Full-time employees with 9, 10 or 11 month appointments also are covered by dental insurance and long-term disability insurance for months of the year they are not working if they have enrolled in these insurance policies. When they return to work at the beginning of the following academic year, they are not required to take steps a new employee would take such as filling out a W-4 form or an employment application.

7. Grievant is an employee of the University. Her benefit service date is August 31, 1999. Her benefit service date is her date of hire. Grievant attained the age of 60 years old in 2013 (University Exhibit 13).

8. Since September 1, 2009, Grievant has held the position of Office/Program Support Generalist in the University's Office of Admissions. Grievant's position has a 9 month term at 100% full-time employment. When she moved into the position in 2009, the annual salary was \$19,600. Grievant is not in a bargaining unit represented by a union, and is considered "non-represented staff". Grievant is considered a full-time employee eligible for benefits as a Group B employee (University Exhibits 8, 13).

9. Between August 31, 1999, and August 31, 2009, Grievant held the following positions at the University, in chronological order: Secretary II in the Biomedical Technologies

Department (10 month term at 1.0 FTE, i.e., 37.5 hours a week); Office/Program Support Assistant in the Physical Therapy (subsequently Rehab and Movement Sciences) Department (12 month term at .75 FTE, i.e., 28.125 hours a week); and Office/Program Support Assistant in CNHS Student Services (12 month term at .80 FTE, i.e., 30 hours a week) (University Exhibit 13).

10. It has been the University's longstanding practice for purposes of post-retirement medical benefits eligibility to calculate "years of continuous full-time employment" by starting on the employee's benefit service date, which is the date they are hired, and determining how many years they have been employed from that date. The University practice has been to consider a year to constitute 12 months. This practice has been applied regardless of whether employees have 9, 10, 11 or 12 month appointments.

11. On or about February 11, 2014, Grievant met with Megan Boucher, an Employee Advisor in the University's Human Resource Services Department. University personnel advised Grievant that she did not meet the criteria to be eligible for post-retirement medical benefits (University Exhibit 13).

12. On February 28, 2014, Grievant submitted an appeal to Greg Brown, HR Operations Manager, appealing to the University to recognize May 30, 2014, as the date she would complete 15 years of service, thereby making her eligible under PRMB criteria to be fully included in the options available to employees considering retirement by June 30, 2014. As an employee with a 9 month appointment, Grievant's work schedule for the 2013-2014 academic year was to be completed by May 30, 2014 (Grievant Exhibits, pages 018-019; University Exhibit 13).

13. By letter dated June 18, 2014, Barbara Johnson, Associate Vice President of Human Resource Services, responded to Grievant's appeal. She informed Grievant: "(T)here is no question that your eligibility status in relation to this benefit is determined by a combination of your age and benefit service date, just as is for all UVM employees. As a regular, ongoing University employee, you will complete your fifteen years of service on August 31, 2014, regardless of your nine-month work schedule" (University Exhibits 1, 13).

14. An employee other than Grievant requested of the University that he be allowed to retire with post-retirement medical benefits. This employee was in a grant-funded position. His 15th year anniversary date of his benefit service date would have been July 1, 2014. The grant terminated on June 30, 2014, resulting in there being no grant funds to support him after June 30, 2014. The University granted the employee's appeal because this was viewed as a circumstance beyond the employee's control.

OPINION

Grievant contends that: 1) the University violated its stated policy concerning post-retirement medical benefit eligibility criteria and wrongfully denied her from retiring prior to June 30, 2014, with full post-retirement benefits; and 2) the University engaged in age discrimination in violation of University Policy V.7.3.8.

At the outset, we discuss our jurisdiction to decide this case. The Board has such adjudicatory jurisdiction as is conferred on it by statute. In re Grievance of Brooks, 135 Vt. 563, 570 (1977). In deciding grievances, the Board is limited by the statutory definition of grievance. Boynton v. Snelling, 147 Vt. 564, 565 (1987). The definition provides:

"Grievance" means an employee's, group of employees', or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects

of employment or working conditions under collective bargaining agreement or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors. 3 V.S.A. Section 902(14).

Since there is no applicable collective bargaining agreement here, Grievant must allege and prove the discriminatory application of a rule or regulation. In re Grievance of Gobin, 158 Vt. 432, 434 (1992). Discrimination in this instance means unequal treatment of individuals in the same circumstances under the applicable rule. Nzomo v. Vermont State Colleges, 136 Vt. 97, 102 (1978). Dissimilar treatment due to dissimilar circumstances does not constitute discriminatory treatment. Grievance of Imburgio, 11 VLRB 168, 173 (1988).

Failure of an employer to follow a binding rule is sufficient to result in an actionable grievance. Nzomo, 136 Vt. at 102. Gobin, 158 Vt. at 434. Employer regulations governing procedures, or guidelines mandating procedures, for management constitute binding rules or regulations. Gobin, 158 Vt. at 435.

Grievant first contends that the University has violated its stated policy concerning post-retirement medical benefit plan eligibility criteria and wrongfully denied her from retiring prior to June 30, 2014, with full post-retirement benefits. The applicable policy provides that an employee, by June 30, 2014, “must be at least 60 with 15 years of continuous full-time employment to be eligible for full post-retirement benefits.”

Grievant’s contention in this regard must be analyzed consistent with the above-stated standards on discriminatory application of a rule or regulation. At issue is whether Grievant had “15 years of continuous full-time employment” by June 30, 2014. Grievant contends that she met this standard because her 15th year of full-time employment ended in her nine-month position by the end of May, 2014, before the June 30, 2014 eligibility date. The University asserts to the

contrary that her 15th year of full-time employment for benefit eligibility purposes did not end until the end of August, 2014.

Grievant has not demonstrated that the University has applied a rule or regulation to her in a discriminatory manner. It has been the University's longstanding practice for purposes of post-retirement medical benefits eligibility to calculate "years of continuous full-time employment" by starting on the employee's benefit service date, which is the date they are hired, and determining how many years they have been employed from that date. The University practice has been to consider a year to constitute 12 months. This practice has been applied regardless of whether employees have 9, 10, 11 or 12 month appointments. The University acted consistent with this practice by determining that, since Grievant began employment on August 31, 1999, she would not be eligible to retire until August 31, 2014, after completing 15 years of continuous full-time employment.

This practice applied to Grievant was not an unreasonable construction of what constituted "years of continuous full-time employment". Full-time employees with 9 month appointments such as Grievant, as well as those with 10 or 11 month appointments, are eligible for medical, dental, life, and disability insurance benefits during the months of the year they are not working. They also are ineligible for unemployment benefits between academic years and are not required to take steps a new employee would take when they return to work at the beginning of each academic year. The providing of benefits for a full calendar year, ineligibility for unemployment benefits, and otherwise being treated as a continuing employee are consistent with a year of continuous full-time employment at the University constituting 12 months for benefit eligibility purposes.

There is evidence of one exception to this practice by the University. The University granted the appeal of an employee in a grant-funded position to be allowed to retire with post-retirement medical benefits under circumstances where his 15th year anniversary date of his benefit service date would have been July 1, 2014, one day after the June 30, 2014, eligibility date. The grant terminated on June 30, 2014, and there were no grant funds to support him after June 30, 2014.

Grievant has not demonstrated that this constituted unequal treatment of her because she was not in the same circumstances under the applicable rule. The other employee actually had completed 15 years of full year employment on June 30, 2014, and would have been eligible to retire on the following day if grant funds existed to support his employment on that date. Grievant, on the other hand, was two months short of completing 15 years of full year employment, and being eligible to retire, on June 30, 2014. Dissimilar treatment due to dissimilar circumstances does not constitute discriminatory treatment, and this is the case with respect to Grievant and the other employee.

If we were to accept Grievant's construction of the post-retirement medical benefits eligibility policy, the result would be significant differences in eligibility for post-retirement benefits for employees with 9 month appointments versus those who work 12 months. 12 month employees who started work on the same date as Grievant, August 31, 1999, would not be eligible for post-retirement medical benefits because their employment year would not be complete until after June 30, 2014. Yet, Grievant would be eligible for these benefits because her employment year would have a different measurement of being completed when she completed her appointment for the year prior to June 30, 2014. We do not believe that the post-retirement

medical benefits policy would create such a result absent specific language so providing in the policy.

Grievant next alleges that Grievant has been subject to disparate treatment age discrimination concerning post-retirement medical benefit cost-sharing eligibility prior to age 65 in violation of the University's Policy V.7.3.8 which provides: "the University will . . . recruit, hire, train, and promote persons in all positions and ensure that all other personnel actions are administered without regard to unlawful criteria including . . . age." Grievant maintains that this policy prohibiting age discrimination has been violated by the University post-retirement medical benefits policy which provides in pertinent part:

Non-Represented Faculty and Staff who, by June 30, 2014, do not meet the post-retirement medical benefit eligibility criteria in place on their date of hire, but will have reached 15 years of benefits-eligible service by June 30, 2014, will be eligible for the University's post-retirement medical benefit when they reach age 62, and they will be responsible for 50% of the premium. At age 65, these individuals will become eligible for the University's Medicare Supplement Plan, and will pay the percentage of premium indicated in Table 2.

Grievant asserts that this policy sets up a disparate treatment violation in that all employees having reached both the age of 62 and the necessary years of full-time employment to meet eligibility requirements do not have equal benefits, because some employees (including Grievant) have no benefits at all. Grievant contends that this preferential eligibility for benefits is keyed to an employee's age, namely that of being less than 60 years old on June 30, 2014, and therefore is discriminatory.

In determining whether an employee was discriminated against on account of the prohibited factor of age, the VLRB has adopted the analysis developed by the U.S. Supreme Court, which has set forth the basic allocations of burden and order of presentation in disparate treatment cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Grievance of Day, 14

VLRB 229, 286 (1991). The Court has made it clear that the burden of proof remains at all times with the plaintiff. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The central focus of inquiry in a disparate treatment case is always whether the employer is treating "some people less favorably than others because of" the prohibited factor. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). To establish a disparate treatment claim, "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." Grievance of Butler, 166 Vt. 423, 431 (1997); *citing* Burdine, 450 U.S. at 258.

The U.S. Supreme Court articulated the burdens of proof in disparate treatment cases, distinguishing between the burden of proof in a "mixed motive" case and a "pretext" case involving alleged discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In a "pretext" case, the issue is whether the legitimate business reason offered by the employer for the adverse action is a pretext for the real reason of discrimination. Id. The issue in pretext cases is whether illegal or legal motives, but not both, were the true motives behind the decision. Id.

The complainant carries the initial burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination. Id. The burden of establishing a *prima facie* case of disparate treatment is not onerous. Burdine, 450 U.S. at 253. Grievance of Lowell, 15 VLRB 291, 330 (1992). The complainant must prove by a preponderance of the evidence that he or she was subject to an adverse employment action under circumstances that give rise to an inference of discrimination. Id.

If the employee succeeds in proving the *prima facie* case, then the burden is shifted to the employer to articulate a legitimate non-discriminatory reason for the adverse action. Burdine, 450 U.S. at 253. Grievance of Smith and Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO, 12 VLRB 44, 53 (1989). Finally, if the employer carries this burden, the

employee must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. Burdine, 450 U.S. at 253. McDonnell Douglas, 411 U.S. at 804. Grievance of Rogers and Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO, 11 VLRB 101, 126 (1988).

In analyzing this as a “pretext” case, we conclude that Grievant has not met the burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination. Under the University’s policy, an employee must have completed at least 15 years of service by June 30, 2014, and must be at least 60 by that date. The combination of years of service with age to determine eligibility for post-retirement benefits is a common feature of retirement benefit plans, and does not in and of itself raise an inference of age discrimination.

When the specifics of Grievant’s claim concerning the pertinent post-retirement medical benefits policy provision are examined, we conclude that Grievant has not demonstrated that she was treated unequally to similarly situated employees. Grievant compares herself – without 15 years of full-time employment by June 30, 2014 – to dissimilarly situated employees with 15 years of continuous full employment by that date. For example, an employee who is currently 59 with fifteen years or more years of continuous full-time employment on June 30, 2014, will have a different benefit than Grievant at age 62. This is because of having 15 or more years of service as of June 30, 2014, and Grievant had less than 15 years of service at that point. There are other younger employees than Grievant that have the same retirement benefits as her because they too had less than 15 years of continuous full-time employment on June 30, 2014.

Similarly, employees who are the same age as Grievant are eligible for post-retirement medical benefits because they had at least 15 years of continuous full-time employment as of June 30, 2014. She is ineligible because she lacked such service.

Grievant has not been subject to impermissible age discrimination. Instead, her ineligibility for post-retirement medical benefits is due to the permissible factor of having insufficient years of service to warrant the benefit. In sum, Grievant was not subject to an adverse employment action under circumstances that give rise to an inference of discrimination.

Grievant fares no better when this is examined as a “mixed motive” case. In such a case, the employee challenges an adverse employment decision on the grounds that the decision was the product of a mixture of legitimate and illegitimate motives. Price Waterhouse, 490 U.S. at 244- 249. Grievance of VSCFF (Re: Yu Chuen Wei), 18 VLRB 261, 294 -295 (1995). Once an employee shows that a prohibited factor, such as age discrimination, played a motivating or substantial part in an employment decision, the burden shifts to the employer to prove that the same decision would have been made if the prohibited factor had not played such a role. Id. Grievance of McCort, slip op. at 11-15 (Vt. Supreme Court, Docket No. 93-237, 1994).

Grievant has not shown that age discrimination played a motivating or substantial part in her ineligibility for post-retirement medical benefits. As discussed above, the combination of years of service with age to determine eligibility for post-retirement benefits is a common feature of retirement benefit plans. Such a plan does not in and of itself indicate that age discrimination played a motivating or substantial part in Grievant’s ineligibility for benefits. Also, an examination of the specific components of the post-retirement medical benefits policy does not contribute to such a conclusion. Instead, Grievant’s ineligibility for post-retirement medical benefits is due to the permissible factor of having insufficient years of service to warrant the benefit.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Lois Findlay is dismissed.

Dated this 31st day of March, 2015, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Acting Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Alan Willard

Alan Willard