THEODORE A. GLANCE

v. Docket No. 93-24-286

MARION COUNTY BOARD OF EDUCATION

DECISION

Grievant, Theodore A. Glance, was advised by letter dated February 26, 1993, that Superintendent Jane M. Rey nolds would recommend that the Marion County Board of Education (Board) terminate one-half of his contract as a school psychologist, effective the 1993-94 school year. Superintendent Reynolds attributed the recommendation, which was part of a county-wide reduction in force, to "reduced operating revenue and decreased student population." A hearing was held by the Board on March 23, 1993, and the recommendation was subsequently approved on March 31, 1993.

Grievant requested an informal conference with his immediate supervisor on April 2, 1993. Administrative Assistant for Special Services Ronald Wood responded that he lacked the authority to grant the requested relief. Grievant proceeded to file the following complaint at levelone:

West Virginia Code, 18A-4-7a clearly provides that when this Board is called upon, for whatever reason, to reduce the number of professional personnel, the professional employee with the least amount of seniority shall be properly notified and released from employment.

The language of this Code section is clear and unambiguous, and the Marion County Board of Education is bound by the clear mandates of the law.

Therefore, since the person with less seniority has not been properly released from employment, your notice of my reduction in my employment is void.

Summary of Specifics: Since Marion County Schools eliminated Fifty percent of the psychology staff (keeping three professionals 1/2 time equaling 1 1/2 positions) the reductions should have gone as follows:

Frank Roman 100% (he was only reduced 50%[.])

Ted Glance 50% (I cannot be reduced until Frank is reduced 100% since I am the second most senior and he the least.)

Karen Edgell 0% reduced (She was reduced 50% and she should no[t] have been reduced at all since she is the most senior.)

Since Frank Roman was only reduced 50% and the time for further reductions has past, there exists an uncorrectable error for the upcoming school year and my contract reduction is void.

Mr. Wood again responded that he lacked authority to grant the requested relief. A level two hearing was conduct ed on April 23 and by letter dated May 10, 1993, Grievant advised Superintendent Reynolds that he was entitled to a default judgment in accordance with W.Va. Code §18-29-3. Superintendent Reynolds responded the following day that "it is our position that the statutory provision relating totimeline violations is not applicable in this circumstance." A level two decision denying the grievance was issued on May 12, 1993. An appeal to level three was filed on May 17, 1993, in which Grievant stated:

See Attached Letter. Subsequently, I received the notice of a denial of my grievance (also at tached). It's my contention that procedural error is present and my contract is voided on this issue as well as my original grievance. I would have no objection to consolidating this grievance with the original and bypassing the informal hearing as well as Level I and Level II.

Counsel for both parties engaged in some discussion as to whether this document constituted a new grievance. Eventu ally, the Board advised Grievant on July 19, 1993, that advancing the matter to level four would likely be the "most effective way to receive a resolution of the differences in our position regarding this matter." Grievant apparently agreed and filed an appeal on July 27, 1993.

The grievance was scheduled for hearing; however, Counsel then agreed that the matter should be held in abeyance at level four pending the outcome of the companion grievance filed by Ms. Edgell. In Edgell v. Marion County Bd. of Educ., Docket No.93-24-192 (December 28, 1993), it was determined that W.Va. Code §18A-4-7a does not provide the option of partially reducing the employment terms of multiple employees during a reduction in force, but rather, the employee(s) must be released from employment full-time in the order of their seniority.

Based upon the Edgell decision the Board requested that the the present matter be dismissed

from furtherconsideration. Grievant opposes the Motion to Dismiss based upon his interpretation that Edgell "clearly demonstrates that the Respondent violated West Virginia Code, 18A-2-2, and as such, all actions taken in violation of State law are void." Specifically, Grievant asserts that the Board could take no action to reduce his employment until after Mr. Roman's employment was terminated. Grievant further suggests that the method utilized by the Board during the reduction in force was due to "loyalty to one of the staff," presumably Mr. Roman, and "if Marion County Schools had known that their loyalty, manifested by their not laying him off, was not possible, then they may have chosen not to lay off anyone." Grievant's second basis for opposing the dismissal is that Edgell did not address the violations of time guidelines set forth in West Virginia Code, 18-29-3(a), and therefore, [he] is entitled to re-instatement as a matter of law.

W.Va. Code §18-29-3(a) states in pertinent part:

If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default. Within five days of such default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong...If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted so as to comply with the law and to make the grievant whole.

The Grievance Board is not empowered to enforce a default which may have occurred at a lower level but is only permitted by statute to hear the claim of an employer that the remedy obtained by the grievant is legally unwarranted. Smith v. Board of Directors/West Liberty State College, Docket No. 93-BOD-051 (Feb. 17, 1993). In the present matter Respondent did not request a level four hearing to show that the remedy was contrary to law or clearly wrong, thus, the Grievance Board lacks any further authority relating to this issue.

Grievant offers no authority, and the undersigned is aware of none, to support his claim that the Board must reinstate him to full-time employment until such time that the employment of the least senior employee is fully termi nated. On the contrary, although Respondent did not utilize the proper procedure to implement the reduction in force, the outcome was correct in Grievant's case. Because Grievant was the second least senior psychologist employed by the Board, fifty percent of his

employment was to be terminated so as to accomplish the objective reduction of one and one-half positions within that classification. Because Grievant's employment was properly reduced by one-half, albeit as the result of an incorrect procedure, he is entitled to no relief.

FINDINGS OF FACT

1. Grievant's employment was reduced from full-time to part-time as part of a reduction in force in which the Board eliminated one and one-half of the three positions of school psychologist.

2. Grievant asserted that he was entitled to a default judgment at level two; the Board did not request a hearingat level four to determine whether the remedy requested was contrary to law or clearly wrong.

CONCLUSIONS OF LAW

1. The Grievance Board is not empowered to enforce a default which may have occurred at the lower grievance levels; rather, the Grievance Board is permitted only to hear the claim of an employer that the remedy obtained by the grievant is legally unwarranted. Smith v. Board of Directors/West Liberty State College, Docket No. 93-BOD-051 (Feb. 17, 1993).

2. Respondent's application of an incorrect procedure when reducing Grievant's employment term was harmless error because the outcome remains the same when the correct procedure is utilized.

Accordingly, this matter is **DISMISSED** and stricken from the docket of the West Virginia Education and State Employ ees Grievance Board.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marion County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to suchappeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and trans mitted to the appropriate Court.

DATED March 31, 1994 _____

SUE KELLER

SENIOR ADMINISTRATIVE

LAW JUDGE

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