JANET NEWHOUSE

v. Docket No. 93-24-212

MARION COUNTY BOARD OF EDUCATION

DECISION

Grievant, Janet Newhouse, employed by the Marion County Board of Education (Board or Respondent) as a secretary, filed a level four grievance appeal on June 11, 1993, in which she alleged violations of W.Va. Code §§18A-2-6, 18A-4- 8b "and perhaps other sections" when her contract as a Secretary III with a 261-day employment term was terminated. Grievant was reemployed with a 200-day contract and placed on the transfer list. She asserts that three secretaries with less seniority were allowed to retain their 261-day terms and sixteen secretaries with less seniority were not transferred. Reinstatement of the 261-day employment term is the relief requested by Grievant. (See footnote 1)

A level four hearing was conducted on August 23, 1993. On September 10, Grievant's counsel filed a motion to reopenthe hearing in light of new evidence relevant to the issue of whether the position previously held by Grievant was properly identified as an "excess" position subject to elimination. Said motion was granted and a supplemental hearing was held on December 3, 1993. Proposed findings of fact and conclusions of law were filed by both parties on or before January 25, 1994.

Under cover letter dated July 13 Grievant's counsel submitted the decision rendered by the West Virginia Supreme Court of Appeals in the matter of Berry v. Kanawha County Bd. of Educ., Slip Opinion No. 21957 (June 16, 1994), which he argues is controlling in the present case. Respondent filed a statement of its position regarding Berry on August 9, 1994, and Grievant submitted a response on August 19, 1994, at which time the matter became mature for decision.

The facts of this matter are undisputed.

1. During the 1992-93 school term Grievant was employed by the Board as a Secretary III

assigned to the central office, Special Education and Maintenance departments, one-half time each. Grievant was employed pursuant to a 261-day employment term.

2. In February 1993 Superintendent Jane M. Reynolds advised Grievant that her position had been determined to be "excess" and that the Superintendent would recommend the termination of her 261-day contract and reemployment for 200days. The Board approved this recommendation on March 31 and placed Grievant on the transfer list.

3. Grievant subsequently was reassigned as a Secretary II at Miller Junior High School.

4. On September 2, 1993, a position was posted for Secretary III in the Special Education Department. The employment term for this position is 200 days and applicants were advised that the position was funded by a one year discretionary grant and would be terminated at the end of the 1993-94 school year.

5. Grievant applied for and received the Secretary III position in the Special Education Department.

Grievant argues that she is entitled to reinstatement of her 261-day employment term for three reasons. First, she did not consent to the termination or modification of her prior employment term; therefore, the Board action to that effect was in violation of W.Va. Code §18A-2-6. Second, allowing other 261-day secretaries with less seniority to retain their positions and/or the failure to implement the reduction on the basis of seniority was in violation of W.Va. Code §18A-4-8b. Third, the September posting for a Secretary III at the Special Education offices establishes that her prior position was not "excess" and should not have been abolished.

Grievant asserts that her second argument is fully supported by the Berry decision. In Berry the employee had been assigned as a Clerk II with a 261 day-employmentcontract in the Board's central office and had earned twelve years seniority. During a reduction in force, Ms. Berry's position was eliminated. Subsequently, her continuing contract was terminated and she bid on and received another Clerk II position outside the central office with a 225-day employment contract. In a grievance resulting from the transfer, Ms. Berry contended that the Board had unlawfully reduced her contract term in violation of W.Va. Code §§18A- 2-6 and 18A-4-8, and that the reduction further violated Code §18A-4-8b because a less senior Clerk II was allowed to maintain her 261-day contract.

The Court determined that the elimination of Ms. Berry's position was in fact a reduction in force

which requires that the employee with the least amount of seniority within the classification be released. Since class titles with Roman numeral designations are considered a single classification of employment, the contracts of least senior employees with job titles of Clerk I and Clerk II must be terminated. Because at least one other employee had less seniority than Ms. Berry, she should not have been released.

The Board argues that the present matter may be distinguished from Berry in that Grievant never worked in the school secretary position which she bid into off the transfer list, but rather, she bid upon and received a full- time special education position which involved some of the duties which she had previously held. The Board assertsthat Grievant waived any defect by her voluntary bid into a posted position at an agreed upon contract term without ever working in the position to which she was first transferred.

The Board next distinguishes Berry by noting that it did notify and release from employment the least senior secretary in the reduction in force and that Grievant was never subject to release; therefore, she was never entitled to the protection of the reduction in force statute. Had one of the least senior secretaries held a 261-day contract Grievant would have retained that employment term, the Board asserts; however, it argues, the position currently held by Grievant does not require a 261-day employment term. Because Grievant was not released from employment, but incurred only a reduction in the number of days in her employment term, the Board argues that Berry is not controlling in this matter.

Although the Board processed this matter consistent with the law as heretofore defined, Berry has expanded the field of factors to be considered when implementing a reduction in force and/or reduction of employment terms for service employees. The factual scenario in Berry is remarkably similar to the present case. In both matters the employee was assigned to the central office, their positions were eliminated and they both were transferred to positions outside the central office with shorter employment terms. The least senior employees in both counties had been terminated to accommodate the displaced senior employees;however, in both instances, less senior employees in the affected classification were allowed to retain positions with longer employment terms.

In Berry the Court noted that another Clerk II assigned to the central office with only two years of seniority was allowed to retain her position while Ms. Berry, with twelve years seniority, had been reassigned to a position with a lesser employment term. In its conclusion, the Court noted that clearly

Ms. Berry was not the least senior clerk and should not have been released when her position was eliminated. Since an earlier reference therein had stated that the least senior clerks had been terminated during the reduction in force, the holding in Berry now requires that length of employment terms must also be considered when implementing a reduction in force. Just as Ms. Berry could not be terminated when there were less senior employees in her classification with the same employment term, neither may Grievant herein be subject to a termination of her contract and reassignment under a contract with a shorter employment term while the Board employs other Secretary IIIs with less seniority than Grievant.

In addition to the foregoing facts and discussion it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. When a board of education decides to reduce the number of positions for service personnel it must follow the reduction in force procedures of W.Va. Code §18A-4-8b and apply all appropriate criteria within specifically designated employment terms.

2. The Board failed to release from employment the Secretary III with the least seniority in the 261-day employment term category.

Accordingly, the grievance is GRANTED and the Board Ordered to instate Grievant into the position held by the Secretary III, 261-day employment term, with the least seniority. Grievant shall also be awarded backpay, and any other benefits to which she may be entitled, for the period of time she has been assigned the lesser employment term.

August 30, 1994 SUE KELLER

SR ALJ

Footnote: 1

Prior to advancing the appeal to level four, the grievance had been denied at levels one and two; the Board waived consideration at level three.