RENEE E. WARNER, .

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Grievant, .

.

v. . DOCKET NO. 95-49-201

.

UPSHUR COUNTY BOARD OF .

EDUCATION, .

.

Respondent. .

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D E C I S I O N

The grievant, Renee E. Warner, employed by the Upshur County Board of Education (hereinafter BOE or Respondent) as a teacher at Buckhannon-Upshur High School (B-UHS), filed the following grievance after her employment was terminated in a reduction in force effective at the end of the 1994-95 school year:

> The due process section of the code was not followed during the hearings concerning RIFS. I am asking to be reinstated as the ISS [in-school suspension] teacher at B-UHS with any back pay, interest and benefits due.

The grievant alleged the BOE's actions violated W. Va. Code §§ 18A-2-2 and 18A-4-7a, and denied her procedural due process as guaranteed by the United States Constitution. In her April 1995 statement of grievance, the grievant described the problem and relief sought as follows:

> Prior to the hearings concerning RIFs, I was told that Larry Phillips, Vocational Teacher, would be taking the ISS position at B-UHS. It was explained that his program was being eliminated and that he would be taking my position because I am the least seniored person that his certification would let him bump. I therefore planned my hearing presentation based upon this information. The Board of Education for

Upshur County then kept Larry Phillips' position and did not replace me as ISS teacher stating they were eliminating the ISS position at B-UHS.

After the grievant's immediate supervisor responded that he was without authority to resolve the issue, the Level Two grievance evaluator conducted a hearing and issued a decision denying the grievance. (See footnote 1) Thereafter, the grievant appealed to Level Four, bypassing Level Three as permitted by W. Va. Code § 18-29-3(c)(1992). Subsequently, the parties agreed to submit the case for decision at Level Four based upon the record developed below, and the matter became mature for decision on June 30, 1995, upon the grievant's final submission. (See footnote 2)

Statement of Facts

The facts are neither complicated nor in dispute, and will be outlined briefly in narrative form. The grievant was first employed by the BOE for the 1993-1994 school year, serving as theIn-School Suspension (ISS) teacher at B-UHS pursuant to a probationary contract. She held the same position under a probationary contract during the 1994-1995 school term, but in addition to her ISS assignment she also taught four math classes that year. Immediately prior to employment with the BOE, the grievant had been professionally employed by the Monongalia County Board of Education for four years.

In preparing the budget for the 1995-1996 school year, the Respondent's Superintendent and Assistant Superintendent determined that five professional positions would need to be eliminated for budgetary reasons. The Superintendent decided to recommend to the BOE that a vocational teaching position be eliminated and the teacher occupying the eliminated position, Mr. Larry Phillips, be transferred or "bumped" into the grievant's ISS position. Accordingly, by certified letter dated March 9, 1995, the Superintendent advised the grievant of the plan to recommend that the grievant's contract be terminated at the end of the 1994-1995 school year. This letter further advised the grievant that she would have the right to displace the least senior employee in the county serving in her area(s) of certification, and that if she was the least senior employee she would be placed on the preferred recall list. Grievant's Exhibit 1. The letter further advised the grievant she could request a hearing before the BOE, and provided a date, time and place for the BOE hearing, if such was requested. The grievant and several other employees requested and were afforded a hearing

before the BOE on the evening of March 22, 1995. At this meeting the Superintendent made her recommendation as stated in the March 9 letter. The grievant and her representative expressed their opposition to the Superintendent's proposal to terminate her contract and to transfer Mr. Phillips into her position, contending that Mr. Phillips could not properly bump her out of the ISS position because he was not certified to teach mathematics. The BOE also conducted a hearing for Mr. Phillips, whose position had been recommended for elimination.

Later that evening the BOE went into executive session to discuss a sizeable number of personnel items that had been presented. After reconvening in regular session, the BOE voted to approve the Superintendent's recommendation to terminate the grievant's contract, but, contrary to that recommendation, it also voted to eliminate the grievant's ISS position, rather than Mr. Phillips' vocational teaching position as had been recommended. Mr. Phillips thus retained his teaching position. BOE Exh. 4 (Minutes of Meeting). By certified letter of March 23, the grievant was notified of the BOE's decision to terminate her contract, and to eliminate her position and place her on the preferred recall list. BOE Exh. 3.

According to the Level Two decision, it was discovered during the Level Two hearing on April 19, 1995, that the grievant should have been issued a continuing contract of employment for the 1994-1995 school year based upon her prior employment with the Monongalia County Board of Education. W. Va. Code § 18A-2-2 ¶ 2. Accordingly, the Respondent rectified this error during theafternoon of the hearing by issuing the grievant a continuing contract for the 1994-1995 school term. The Level Two decision also states that the error in issuing the grievant a probationary contract has no bearing on this case, because the BOE followed the procedural requirements applicable to an employee with a continuing contract. W. Va. Code § 18A-2-2.

The grievant does not dispute the foregoing statements in the Level Two decision. The grievant also does not take issue with the BOE's proposed finding of fact number 8, in which it asserts that even if the grievant had been under a continuing contract for the 1994-1995 school year, her contract would still have been terminated, her ISS teaching position would have been eliminated, and her seniority would not have changed in such a way as to enable her to retain a teaching position.

Discussion

In view of the corrective actions taken at Level Two in response to this grievance, and the proposals and arguments presented at Level Four, the principal issue remaining for decision is whether the actions of the BOE and the Superintendent violated the grievant's right to procedural due process. (See footnote 3)

The grievant correctly contends that she acquired a "property" interest in continued uninterrupted employment with the BOE byvirtue of her having acquired continuing contract status or "tenure" under W. Va. Code § 18A-2-2. Duruttya v. Bd. of Educ. of County of Mingo, 181 W. Va. 203, 382 S.E.2d 40 (1989); See Clarke v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169 (1981), for discussion and numerous cases cited. The grievant also correctly acknowledges that the extent to which procedural safeguards must be provided prior to the termination of a tenured employee will vary depending upon the particular circumstances of a given case. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

Our Supreme Court of Appeals recognized in Clarke that due process is a flexible concept which requires Courts to balance competing interests in determining what procedural protection must be afforded to a person facing the deprivation of a constitutionally recognized property right. In Waite v. Civil Serv. Commission, 161 W. Va. 154, 241 S.E.2d 164 (1978), the Court identified certain interests that must be considered:

> The extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interest that will be effected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The gist of grievant's procedural due process claim is that the BOE did not give her proper notice and an opportunity torespond before it terminated her position, because she was never advised her ISS position might be eliminated. At the BOE hearing, the grievant only addressed why she should not be bumped from her ISS position by Mr. Phillips. The grievant therefore maintains she was deprived of any opportunity to contest the elimination of her position.

The BOE argues that the outcome in the grievant's case would be the same regardless of the notice she was given, i.e., she would have been terminated at the end of the school year and placed

on the preferred recall list. It further argues the underlying reason for the grievant's termination was economic in nature and that the grievant would have been terminated in any event because of her extremely limited seniority.

After carefully considering all the evidence, the arguments of the parties and the applicable constitutional principles, the undersigned administrative law judge concludes that the actions of the BOE and the Superintendent do not rise to the level of a constitutional violation for several reasons. First, it is critically important to recognize that the grievant's termination did not become effective until the end of the school year, more than three months later. Indeed, until the 1995-1996 school year begins the grievant apparently will not suffer any lost wages. The loss of employment income goes to the very core of the property interest at stake in employment cases. See Loudermill and Clarke, supra. Second, this is not a disciplinary case in which the grievant has been fired and the employment relationship completelysevered; rather the grievant has been terminated in a reduction in force and placed upon the preferred recall list. Although the grievant's continuing contract has been terminated under W. Va. Code §§ 18A-2-2, she enjoys certain seniority-based recall rights under W. Va. Code § 18A-2-2 and 18A-4-7a, and if she accepts reemployment with the BOE her continuing contract would be resurrected. (See footnote 4) The Court cases involving the dismissal of public employees relied upon by the grievant are thus distinguishable. (See footnote 5) Third, the risk of an erroneous decision in this reduction in force would appear to be minimal. Here, the grievant appeared at a BOE hearing and apparently explained what her duties were and why she could not be bumped out of her ISS position by a particular teacher. (See footnote 6) The facts concerning her employment do not appear to be in dispute. Hence, it appears the BOE should have been well aware of the grievant's particular employment circumstances, as well as that of several other teachers whose jobs were in jeopardy,before it made the decision to terminate the grievant's contract and position. (See footnote 7) The BOE was simply called upon to exercise its broad discretion, within the parameters established by law, to determine how best to eliminate five professional positions for the next school year. Given the time requirements of W. Va. Code § 18A-2-2, it would have been impractical at the very least for the BOE to have given the grievant notice and an opportunity for a hearing on whether her position should have been eliminated.

Another significant factor relevant to the procedural due process inquiry in this case is the availability of a post-termination procedure for educational employees to challenge their terminations,

W. Va. Code §§ 18-29-1, et seq. Indeed, the grievant invoked that procedure to challenge the BOE's actions and obtained some relief at Level Two prior to the effective date of her termination. During the grievance process, the grievant has been given an opportunity to demonstrate why her position should not have been eliminated, prior to any actual deprivation of a property interest. The grievant, however, has not attempted to carry the heavy burden of showing the BOE abused its discretion in eliminating her position. It is, therefore, concluded that the grievant's procedural due process rights have not been violated.

Even if the grievant's procedural due process rights had been violated, the proper remedy would not be instatement to her former position for the 1995-96 school year, which, among other things,has been requested as relief in this case. See Scragg v. Bd. of Directors/W. Va. State Coll., 93-BOD-436 (Dec. 30, 1994)(remedy for procedural due process violation).

The grievant's final contention is that once the BOE decided not to eliminate the vocational teaching position held by Mr. Phillips, the reason for her termination disappeared (his bumping into her position), and the BOE then had a duty to retain her in the ISS position. The grievant relies on the rule announced in Brown v. Logan County Bd. of Educ., Docket No. 90-23-177 (Oct. 31, 1990): When a proposed transfer of a teacher loses its stated justification prior to the end of the school year in which the transfer is being processed, the employee is entitled to be returned to his/her previous position, absent extraordinary circumstances.

It is concluded that the grievant cannot prevail on this claim. It is readily apparent that the primary reason for the Superintendent's proposed reduction in force was the lack of funding. The BOE's underlying reason for termination of the grievant's position did not change or disappear; therefore, the Brown rule is not applicable to the facts of this case.

Conclusions of Law

1. Because this is not a disciplinary matter, the grievant bears the burden of proof.

2. The grievant did not prove the BOE violated either W. Va. Code § 18A-2-2 or the reduction in force provision contained in W. Va. Code § 18A-2-7a ¶ 6.

3. The grievant failed to prove the BOE denied her procedural due process in the termination of her teaching position.

4. The grievant has not established that the BOE had a duty to rescind its decision terminating her continuing contract and eliminating her teaching position.

Accordingly, this Grievance is **DENIED** .

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Upshur 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 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.

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RONALD WRIGHT

Administrative Law Judge

Dated: July 17, 1995

Footnote: 1 Ms. Lynn E. Westfall, the Superintendent of the BOE, served as the grievance evaluator.

Footnote: 2 The evidentiary record consists of the Level Two transcript and seven exhibits introduced at the hearing on April 19, 1995. Both parties filed simultaneous proposed findings of fact and conclusions of law. The BOE filed a Reply to the grievant's proposals on June 23, and the grievant was permitted to file a Rebuttal to the Reply by July 7, 1995.

Footnote: 3 Although the grievant quotes a portion of both W. Va. Code §§ 18A-2-2 and 18A-4-7a in her proposed conclusions of law, the grievant presented no argument concerning how these provisions were violated. Given all the circumstances, it appears the grievant has abandoned these allegations. In any event, it is concluded that the grievant received adequate notice and has not proven a violation of either provision.

Footnote: 4 W. Va. Code § 18A-2-2 provides that when a teacher is recalled from the preferred recall list and accepts reemployment "[s]uch reemployment shall be upon a teacher's preexisting continuing contract and shall have the same effect as though the contract had been suspended during the time the teacher was not employed." Furthermore, under W. Va. Code § 18A-4-7b(c)(1993), if the grievant were reemployed by the BOE in a full-time professional position, she would be entitled to receive credit for all seniority previously accumulated.

Footnote: 5 The Supreme Court of Appeals recently ruled that a tenured school employee cannot ordinarily, consistent with due process principles, be dismissed from employment under W. Va. Code § 18A-2-8, without affording the

employee a limited pre-termination hearing. Syllabus Point 3, Board of Educ. of County of Mercer v. Wirt, 453 S.E.2d 402 (W. Va. 1994).

Footnote: 6 According to the record, no transcript was made of the BOE hearing held on March 22, 1995.

Footnote: 7 According to the BOE's minutes, the meeting held on March 22 did not end until after midnight.