JOHN VANTROMP, et al.,

Grievants,

v. **DOCKET NO. 94-17-1066**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants John VanTromp and John Christian initiated grievances against the Harrison County Board of Education ("HBOE") on or about October 14, 1994, and October 20, 1994, respectively. Both Grievants alleged a violation of W. Va. Code §18A-4-7a. In addition, Grievant Christian alleged a violation of W. Va. Code §18A-2-2. (See footnote 1) Grievants assert they should have been placed on a preferred recall list, and that a posted assistant principal position at Nutter Fort Intermediate School should have been filled from the preferred recall list. As relief, Grievant VanTromp seeks to be placed in the subject assistant principal position. Grievant Christian, who has less seniority than Grievant VanTromp, seeks "[r]ecall RIF'ed administrators back pay, benefits, and interestdue." However, Grievant Christian does not allege he should have received any particular position in support of his claim for relief.

The parties agreed to submit this matter for decision on the Level II records, (See footnote 2) and this matter became mature for decision on March 3, 1995, with the filing of the last of the proposed findings of fact and conclusions of law. (See footnote 3)

Because Grievants were retained by HBOE in classroom teaching positions pursuant to the provisions of W. Va. Code §18A-4-7a, the applicable statute does not allow either Grievant to be placed on a preferred recall list. This grievance must therefore be denied.

The following facts, which are undisputed, were developed at Level II.

Findings of Fact

1. Grievant VanTromp is employed by HBOE as a Social Studies teacher at Bridgeport High

School.

2. On March 2, 1993, Grievant Van Tromp received a notice that his position was being eliminated in a reduction in force ("RIF"). Thereafter, on March 15, 1993, HBOE approved termination of his contract as principal of Linden Elementary School, and approved his transfer and assignment as Social Studies teacher at Bridgeport High School for the 1993-1994 school term. He did not grieve the termination of his contract or his transfer to a classroom teaching position.

3. Grievant VanTromp has nine years of administrative seniority.

4. Grievant Christian is employed by HBOE.

5. By letter dated January 24, 1990, Grievant Christian was notified that his "current continuing contract as a principal in the Harrison County School system will be terminated and you will be placed on the transfer list". Grievant's Exhibit No. 1. He did not grieve the termination of his contract, or his placement on a transfer list.

6. Rather than accepting the transfer into a teaching position in his area of certification (a music teacher at Adamston Elementary), Grievant Christian chose instead to bid for, and he was awarded, a teaching position at Bridgeport High School.

7. Grievant Christian has six years of administrative seniority with HBOE. Grievant Christian has less seniority than Grievant VanTromp.

8. On or about September 8, 1994, the position of assistant principal at Nutter Fort Intermediate School was posted. Both Grievants applied for the position. The successful applicant, Ben Guido, was not an employee of HBOE at the time he applied for the position.

Discussion

The question presented in this case is whether a RIF'd administrator, retained by the county board of education in a classroom teaching position, can also be placed on a preferred recall list. The statute cited by Grievants, W. Va. Code §18A-4-7a, states when a RIF'd employee is to be placed on a preferred recall list as follows:

> All professional personnel whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list.

Conversely, according to this provision, those professional personnel whose seniority is sufficient

to allow their retention by the county board are not eligible to be placed on a preferred recall list. Grievants were RIF'd administrators (professional personnel) who continued to be employed by HBOE in classroom teaching positions. Grievants, however, believe they could both continue to be employed by HBOE, and remain on the preferred recalllist because their continued employment was not in administrative positions.

W. Va. Code §18A-4-7a also addresses in what type of positions a RIF'd administrator may be placed to constitute his "retention by the county board":

> Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment pursuant to the provisions of section two [§ 18A-2-2], article two of this chapter... Provided, however, That an employee subject to release shall be employed in any other professional position where such employee is certified and was previously employed or to any lateral area for which such employee is certified and/or licensed, if such employee's seniority is greater than the seniority of any other employee in that area of certification and/or licensure: Provided further, That, if an employee subject to release holds certification and/or licensure in more than one lateral area and if such employee's seniority is greater than the seniority of any other employee in one or more of those areas of certification and/or licensure, the employee subject to release shall be employed in the professional position held by the employee with the least seniority in any of those areas of certification and/or licensure. (Emphasis added.)

Pursuant to this provision, in a RIF, the least senior employee is no longer employed, unless he falls within one of the two quoted provisos. The first proviso not only allows the employee to be placed in a lateral position if he has more seniority, but also quite clearly provides that the employee "shall be employed in any other professional position where such employee is certified and was previously employed" if he possessesseniority. (Emphasis added.) The parties do not dispute that a classroom teaching position is not lateral to the position of principal. However, it is clear that classroom teachers are professional personnel. W. Va. Code §18A-1-1. Therefore, a principal could be returned to a classroom teaching position if, 1) he is properly certified for the position, 2) he was previously employed in that certification area as a classroom teacher, and, 3) he had sufficient seniority.

The foregoing statutory language (previously found in W. Va. Code §18A-4-8b) was addressed by the Supreme Court of Appeals of West Virginia in Bd. of Educ. of Harrison County v. Bowers, 396 S.E.2d 166 (W.Va. 1990), which found that:

> barring certification or licensure **and** seniority which would permit bumping into a lateral administrative position, an administrator subject to a RIF transfer must return to the classroom. (Emphasis in original.)

Grievants have the burden in this case of proving the allegations of their complaints by a preponderance of the evidence. Vance v. Logan County Bd. of Educ., Docket No. 92-23-045 (May 21, 1992); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). Grievants failed to prove the classroom teaching positions to which they were transferred by HBOE did not fall within the proviso cited above. Therefore, Grievants do not fall within the category of professional personnel "whose seniority with the county board [was] insufficient to allow their retention by the county board during a reduction in work force." Grievants were properly retained by HBOE in classroom teaching positions pursuant to W. Va.Code §18A-4-7a, and neither Grievant could have been placed on the preferred recall list.

Accordingly, this grievance is **DENIED**.

Conclusions of Law

1. In order to prevail, Grievants must prove the allegations in their complaint by a preponderance of the evidence. Vance v. Logan County Bd. of Educ., Docket No. 92-23-045 (May 21, 1992); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Grievants failed to prove their transfer to classroom teaching positions was not in accordance with the proviso of W. Va. Code §18A-4-7a, which requires HBOE to retain an administrator in either a lateral position or a classroom teaching position for which he was certified, had previously been employed, and in which his seniority was greater than the seniority of any other employee in that area of certification.

3. HBOE retained Grievants during a reduction in work force, and therefore, Grievants could not be placed on a preferred recall list. W. Va. Code §18A-4-7a.

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

BRENDA L. GOULD

Administrative Law Judge

Dated: April 25, 1995

Footnote: 1 Grievant VanTromp initially also alleged a violation occurred when the county interviewed a person who did not meet the minimum qualifications of the posting. This complaint was not pursued at Level IV and is considered abandoned.

Footnote: 2 Grievant VanTromp's grievance was denied at Level I on October 17, 1994, and at Level II on November 10, 1994, after a Level II hearing was held November 1, 1994. Grievant Christian's grievance was denied at Level I on November 3, 1994, and at Level II on January 19, 1995, after a Level II hearing was held December 21, 1994. Level III was waived by both Grievants. Grievant VanTromp appealed to Level IV on November 16, 1994, and appeal was made to Level IV by Grievant Christian on January 26, 1995, at which time he suggested that his grievance be consolidated with that of Grievant VanTromp. No objection to consolidation was received, and these grievances were consolidated for decision on March 21, 1995.

Footnote: 3 Grievant VanTromp, in his sixth conclusion of law, proposed that a county board of education must "employ the most qualified applicant for the position vacancy." It appears Grievant is arguing he was more qualified than the successful applicant. This argument was not raised below, nor was it raised when Grievant appealed to Level IV. "A grievant cannot raise new claims in his or her Level IV proposals, for the employer has not had any opportunity to defend against them." Scurlock v. Fayette County Bd. of Educ., Docket No. 93-10-164 (Aug. 3, 1993). Notwithstanding the fact that this argument must be rejected because it was not properly raised, no evidence of the qualifications of Grievants or the successful applicant for the position was placed into the records below, and Grievant would not have met his burden of proof.