VIRGINIA STUTLER AND NANCY PLANT,

Grievants,

v. DOCKET NO. 97-02-110

BERKELEY COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On January 17, 1997, Virginia Stutler and Nancy Plant, Grievants, originally submitted grievances (Docket Nos. 97-02-030 and 97-02-034, respectively) directly to Level Four challenging their termination by the Berkeley County Board of Education (Respondent). Administrative Law Judge Ronald Wright dismissed the grievances on January 24, 1997. The dismissal order, in pertinent part, provides:

> The grievances were filed on behalf of two individuals who had been hired very recently as substitute service personnel. Both persons were informed by letter from Assistant Superintendent Charles A. Fritsch that they would be removed from the substitute list at Respondent's
>
> meeting scheduled for January 21, 1997. The reason stated in each letter was that they were “Full-time
>
> contracted employee[s] with RESA VIII. As such, you are not eligible to hold a contract as a substitute... .”
>
> Upon review of the documents filed here, it seems apparent that Grievants have improperly bypassed the lower levels of the grievance procedure by filing directly at Level Four. ...
>
> Although W. Va. Code §18A-2-8 allows for a direct appeal to Level Four in certain enumerated situations, none of those circumstances are present in these cases. Section 8 basically involves disciplinary actions. The proposed termination actions at issue here are not disciplinary in nature. Furthermore, substitute service personnel who have not worked for thirty days do not have the same rights pertaining to dismissal as are granted to regular service employees under W. Va. Code §18A-2-8. The last paragraph of W. Va. Code §18A-4-15 provides, in pertinentpart, as follows:

> Substitute service employees who have worked thirty days for a school system shall have all rights pertaining to suspension, dismissal ... as is granted to regular service personnel in sections ... 18A-2-8 ... .

> Grievants in these cases have not worked the required thirty days, and thus the Section 8 procedure is not available to them. Consequently, these grievances were improperly filed directly at Level Four. Both cases are, therefore, DISMISSED and STRICKEN from the Grievance Board's docket. Both grievances may be refiled at Level Two.

On February 4, 1997, Grievants refiled, at Level Two, in the instant grievance (97-02-110), grievance statements identical to the ones they submitted in grievances 97-02-030 and 97-02-034. Again, they alleged they were terminated without due process. As relief, Grievants seek reinstatement as substitutes, and compensation "for missed employment because of the board's action." On February 18, 1997, a Level Two hearing was held by Grievance Evaluator April L. Dowler. Her only finding, in the Level Two Decision, dated February 24, 1997, was that "it is uncontroverted that the Grievants were employed as substitute bus/classroom aides for less than thirty days." Only two

conclusions of law are found in the decision, and are set forth below:

> 1. Substitute service employees who have worked thirty days for a school system shall have all rights pertaining to suspension, dismissal and contract renewal as is granted to regular service personnel in section six, seven, eight and eight-a, [§§18A-2-6, 18A-2-7, 18A-2-8 and 18A-2-8a], article two of this chapter. West Virginia Code section 18A-4-15.

> 2. The Order of Administrative Law Judge Ronald Wright dated January 24, 1997, is dispositive of this matterbased upon his finding that the Grievants had no due process rights under the termination statute West Virginia Code section 18A-4-8.

A Level Four evidentiary hearing was scheduled for May 6, 1997, but was continued for good cause shown by Respondent's counsel. The Level IV evidentiary hearing was rescheduled and held on May 8, 1997, at the Grievance Board's office in Elkins, West Virginia. This grievance became mature for decision on June 10, 1997, with receipt of the Grievants' post-hearing submission. The parties agreed to the following stipulations of fact:

1. Grievants are full-time employees of RESA VIII. (See footnote 1)

2. Grievants were approved and placed on the substitute list on January 7, 1997, and were removed by administrative action of Respondent on January 10, 1997. Grievants were informed by Assistant Superintendent Charles A. Fritsch, Ed. D., that their contracts were terminated because they were full-time contract
employees with RESA VIII. The administrative action was approved by Respondent on January 21, 1997.

3. Grievant Plant worked one day before she was terminated.

4. Grievant Stutler did not work between January 7, 1997, and January 10, 1997.

In addition to the above stipulations of facts, the following Findings of Fact were derived from the record by the undersigned Administrative Law Judge:

1. Neither Grievant has worked thirty days for Respondent.

2. Grievants are 200 day, full time, employees, for RESA VIIIwhich has a schedule similar to Respondent's.

3. Grievants had to ask for time off from their employment at RESA VIII to attend Respondent's substitute aide orientation.

4. Grievants were hired because of an oversight by Respondent. It was not noticed that Grievants were full time employees of RESA VIII. Respondent took swift action to rectify the mistake.

DISCUSSION

Grievants allege, in their grievance statement, that they were terminated without due process. The grievance procedure was created by statute. The last paragraph of W. Va. Code §18A-4-15, which is cited above in the dismissal order provides that appeal procedure in W. Va. Code §18A-28 is not available in termination cases involving substitute employees who have worked less than thirty days. There is no statute which provides Grievants, substitutes who have worked less than thirty days, protection in termination cases, or that require Respondent to follow any designated termination process. Therefore, Respondent did not violate any provisions of W. Va. Code §§18A-2-1 et seq.

However, Grievants also asserted that the West Virginia Constitution provides them with due process protections. Grievants have not suffered a deprivation of a property interest.

In Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978), the Supreme Court of Appeals of West Virginia adopted the two-step analysis for determining a constitutional claim espoused in Bd. of Regents v. Roth, 408 U.S. 546, 33 L. Ed. 2d 548, 92 S.Ct. 2701 (1972), and Perry

v. Sindermann, 408 U.S. 593 33 L. Ed. 2d 548, 92 S. Ct. 2694 (1972). The first step is to determine whether Grievants' interest rises to the level of a property interest. “If the answer is no, the second step becomes unnecessary because [Grievants' have] no claim warranting constitutional protection.” Waite, supra.

A property interest includes “not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings.” Id. at Syl. Pt. 2. In this case, the undersigned Administrative Law Judge does not find that Grievants “have a legitimate claim of entitlement.”

Grievants possessed a contract that provided them with only an expectation of substitute employment. This is not an entitlement. As the facts in this case reveal, Grievants are full-time employees of RESA VIII, and have to take some type of leave (compensatory, sick, or annual) to be able to substitute for Respondent.

Moreover, although RESA VIII does not always adhere to its policy of requiring twenty-four hours notice before one can take compensatory or annual leave, there are not going to be many occasions where Grievants will have that much notice before Respondent calls them to substitute. As Assistant Superintendent Frisch testified, employees do not usually call in sick early the same morning a replacement is needed.

Therefore, Grievants' due process argument fails. Grievants do not have property right which requires the constitutionalguarantees of due process, as that term has been defined by the Courts.

Moreover, Grievants received adequate due process in this case, even if they had a property interest. If there is a deprivation of

> life, liberty or property which is based on disputed facts or issues, then the individual whose interest are affected must be granted a fair procedure before a fair decision-maker. However this principle does not mean that the individual has the right to a hearing before the action is taken or even to any personal hearing at any time. What is required is a procedure, not necessarily a hearing.

Nowak, Rotunda, and Young, Constitutional Law, §13.8, at 489.

First, the United States Supreme Court decided that there is no requirement of a procedure to determine the basis for an action which affects an individual where there are no factual issues in dispute. See Codd v. Velger, 429 U.S. 624, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977). In Codd, at 627, that Court stated that:

> [a]ssuming all of the other elements necessary to make out a claim of stigmatization

> under Roth and Bishop, (See footnote 2) the remedy mandated by the Due Process Clause of the Fourteenth Amendment is “an opportunity to refute the charge.” 408 U.S., at 573. “The purpose of such notice and hearing is to provide the person an opportunity to clear his name, “ [I]d., at 573 n. 12. But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation.

In the instant case, Grievants failed to allege any factual dispute. Respondent terminated Grievants because each held a full- time employment contract with RESA VIII. Moreover, Grievants werenot terminated because of any wrong doing on their part. Grievants' reputations have not been harmed, and no stigmatization has attached to either of them because of their termination.

Second, Grievants have availed themselves of the grievance procedure. They had hearings at Levels II and IV before fair decision-makers who possessed the authority to grant Grievants' claim. Therefore, even though these hearings occurred after Respondent's decision to terminate, Grievants have received sufficient due process.

Although Grievants' due process argument fails, and Respondent had a legitimate and rational reason for their terminations which was not arbitrary or capricious, Respondent did violate the one year contract in question. The parties litigated the breach of contract claim at Levels II and IV, and addressed it in their proposed findings of fact and conclusions of law. Therefore, the undersigned will address the issue, even though it is not contained in grievance statement.

Assistant Superintendent Frisch testified that Grievants would not have been hired if it was known that they were current RESA

VIII employees. However, Grievants did not mislead Respondent concerning their employment with RESA VIII. Grievants should be made whole, and paid for the time that they spent attending the orientation session even though Respondent does not compensate its employees for orientation. Even with a passing score on the test,Grievants would not have attended the orientation session unless they thought there would be opportunities to substitute later.

Grievants failed to offer evidence of damages, if any, which might have occurred during the course of the contract. In this case, damages during the course of the contract are uncertain, and speculative at best. Therefore, no further damages are awarded.

In addition to the foregoing stipulation of facts by the parties, and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievants have the burden of proving their case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

2. There is no requirement of a procedure to determine the basis for an action which affects an individual where there are no factual issues in dispute. See Codd v. Velger, 429 U.S. 624, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977).

3. Grievants failed to prove, by a preponderance of the evidence, that they were not afforded sufficient due process protections.

4. Each Grievant proved, by a preponderance of the evidence, that Respondent violated their one year substitute contract.

Accordingly, the grievance is **GRANTED IN PART, and DENIED IN PART**. Respondent is **ORDERED** to compensate Grievants Plant and Stutler for the time they spent attending the orientation sessionat the rate Respondent would have paid them if they had been substituting. All other relief is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Berkeley 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 are 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.

DATED: 8/28/97_____ _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

RESA is an acronym for Regional Educational Service Agency.

Footnote: 2

Bishop v. Wood, 426 U.S. 341 (1976).