LEI SHAWN SERGENT,

Grievant,

v. DOCKET NO. 97-26-336

MASON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Lei Shawn Sergent, Grievant, contests her transfer and reassignment, pursuant to a reduction-in-force (RIF) action by the Mason County Board of Education (MCBE) at the end of the 1996-97 school year. Specifically, she argues that MCBE reduced a position which had never validly been created, and consequently all transfers resulting from that RIF were invalid. Additionally, she avers that MCBE engaged in reprisal against her for filing and winning an earlier grievance. She also requests summary judgment, alleging that MCBE failed to meet procedural timing requirements in processing her grievance below, which results in a default under W. Va. Code §18-29-3. As relief, she seeks reassignment to her third grade teaching position at Roosevelt Elementary School (Roosevelt); declaration that Susan Pyles (who was transferred into her third grade teaching position during the RIF) was not in a legally-approved position; Susan Pyles' assignment to the transfer list in Grievant's stead; that in the future MCBE post positions affected by RIFs and transfers; and reimbursement of costs ofpursuing her grievance. (See footnote 1) For reasons explained below, the grievance is denied.

ISSUES

1. Did Respondent default at Level II?
2. Did Respondent effect an intraschool transfer or implement a RIF when it eliminated a teaching position which was not posted?
3. Did Respondent engage in reprisal in transferring Grievant?
4. Did Respondent violate any legal requirement in failing to post the positions affected by its RIF?

FINDINGS OF FACT

1 1. Grievant is certified to teach Elementary Education 1-6 and Multi-subjects K-8. (L II, Admin. Ex. 5.) She taught third grade at Roosevelt since school year 1990-91 (until her transfer, at issue here).

2 2. Grievant was the least senior teacher at Roosevelt.

3 3. Susan Pyles is certified to teach Elementary Education 1-6 and Mathematics 4-8, and is more senior than Grievant. Ms. Pyles has taught at Roosevelt since the 1993-94 school year.

4 4. At the close of the 1992-93 school year, MCBE implemented a RIF. Grievant was given notice that her employment would be terminated, as she was the least senior employee in the county subject to the RIF. Grievant protested that action, and filed agrievance which was denied initially. MCBE thereafter determined that it had defaulted (by failing to provide a timely hearing), so MCBE returned Grievant to her third grade teaching position at Roosevelt.

5 5. As part of the 1992-93 RIF, Ms. Pyles was transferred, or "bumped," into Grievant's third grade teaching position at Roosevelt, as Ms. Pyles was more senior than Grievant and certified to teach third grade. However, as a result of MCBE's default, Grievant was returned the third grade teaching position she had occupied prior to the RIF. As MCBE took no further action regarding Ms. Pyles' situation, Ms. Pyles was assigned various teaching duties by Roosevelt's principal, Vicki Hall.

6 6. Ms. Pyles became an extra teacher at Roosevelt when MCBE chose to maintain Grievant in her third grade teaching position rather than place Ms. Pyles in it. Ms. Pyles was assigned Health, Developmental Guidance, Physical Education and Library Media duties, but was never assigned a classroom, as all classrooms were already occupied. Ms. Pyles' specific assignments varied somewhat over the years in this "floating" position. Generally, Ms. Pyles taught in the school library.

7 7. Ms. Pyles' "floating" position was never posted. No grievance was filed regarding Ms. Pyles' assignment by Ms. Pyles, Grievant or anyone else.

8 8. A second grade position was vacated in 1994-95, and was posted. A first grade teacher at Roosevelt was selected for the second grade position. Consequently, the first grade teachingposition vacancy was posted and filled competitively. Ms. Pyles did not apply for either of these two positions.

9 9. At the close of the 1996-97 school year, it was determined that the projected number of students at Roosevelt did not justify retaining the number of teachers currently on staff. Therefore, Superintendent Larry Parsons determined that a RIF was necessary. It was specifically determined that the "floating" position, held by Ms. Pyles, was the logical one to eliminate at Roosevelt. However,

there was a need to maintain two third grade classes. (See footnote 2)

10 10. At the close of the 1996-97 school year, Grievant was notified that she would be placed on the transfer list, as a result of the RIF action referred to in Finding of Fact 9. Ms. Pyles was to displace Grievant by "bumping" into her third grade teaching position.

11 11. Dr. Parsons recommended that the RIF be implemented as described previously. MCBE approved Dr. Parsons' recommendation. Consequently, Ms. Pyles' former "floating" position at Roosevelt was eliminated, and Grievant was transferred to another teaching position within Mason County. At least one county teacher was placed on the preferred recall list.

12 12. Neither Grievant's former position (into which Ms. Pyles was placed) nor Grievant's new position (into which Grievant was transferred) were posted.

13 13. Grievant timely grieved the action. A hearing was held on the grievance at Level II on June 16, 1997. At the close of thathearing, the hearing examiner requested an extension of time for issuing his decision. Grievant agreed to extend the deadline until June 30, 1997. The Level II decision is dated June 27, 1997; and was mailed on or before June 30, 1997. Grievant received the Level II decision on July 2, 1997. (L II, Tr. p. 97.)

14 14. Grievant appealed to Level III, and refused MCBE's request for an extension of time to process the appeal. MCBE then waived consideration of the matter on July 17, 1997.

15 15. Dr. Parsons' employment with MCBE did not begin until December 2, 1996. He was not aware of Grievant's 1993 grievance until she brought it up during the Level II hearing on this 1997 grievance. He has approved Grievant's selection for two positions for which Grievant applied after initiating this grievance.

16 16. On May 15, 1997, MCBE posted a half-time Physical Education position at Roosevelt and Leon Elementary Schools. It filled the position with an individual specifically certified to teach Physical Education K-12. As a result, both Roosevelt and Leon Elementary Schools have a certified Physical Education teacher. (L II, Tr. pp. 44-46 and Admin. Ex. 5.)

DISCUSSION

In this non-selection grievance, Grievant bears the burden of proving all elements of her grievance by a preponderance of the evidence. W. Va. Education and State Employees Grievance Board Procedural Rules, 156 C.S.R. 1, §4.19; Stout v. Harrison County Bd. of Educ., Docket No. 93-

17-081 (Apr. 12, 1994); see also, W. Va. Code §18-29-6. Thus, Grievant must prove all elements of herallegations of failure to properly implement a RIF, illegal transfer, and reprisal.

1. Did Respondent default at Level II?

Grievant first alleges that, because she did not receive the Level II decision by June 30, 1997, MCBE defaulted under the provisions of W. Va. Code §18-29-3. Subsection a of that Code section reads:

> 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,... the grievant shall prevail by default.

The statute specifically provides for the employer to request a hearing before a Level IV hearing examiner within five days of any default, for the purpose of challenging the remedy received by the grievant. Here, MCBE made no such request, asserting that it did not default. No provision for the grievant's appeal to Level IV is made in the statute.

This Grievance Board has previously held that it is not empowered to enforce a default which may have occurred at the lower grievance levels. Rather, it is permitted only to hear the limited claim of the employer specified by statute. See, e.g., Lake v. Cabell County Bd. of Educ., Docket No. 96-06-256 (May 13, 1997); Smith v. Bd. of Directors, Docket No. 93-BOD-051 (Feb. 17, 1993). (See footnote 3) Because the employer did not request a hearing at Level IV, the statute does not allow action to be taken here. Should Grievantchoose to pursue this issue, enforcement must be sought from the appropriate Circuit Court through a mandamus action, as allowed by W. Va. Code §18-29-9. (See footnote 4)

2. Did Respondent effect an intraschool transfer or implement a RIF when it eliminated a teaching position which was not posted?

A. INTRASCHOOL TRANSFER:

Grievant alleges that MCBE actually undertook an intraschool transfer, pursuant to paragraph 11 of W. Va. Code §18A-4-7a, rather than a RIF. She avers that Ms. Pyles' position was never properly created. As no "real" position was created, it could not later be eliminated, and MCBE must have attempted an intraschool transfer. Respondent asserts that it did not undertake an intraschool transfer, but a RIF.

Paragraph 11 of W. Va. Code §18A-4-7a provides:

> Notwithstanding any other provision of the code to the contrary, where the total number of classroom teaching positions (See footnote 5) in an elementary school does not increase from one school year to the next, but there exists in that school a need to realign the number of teachers in one or more grade levels, kindergarten through six, teachers at the school may be reassigned to grade levels for which they are certified without that position being posted: Provided, That the employee and the county board of education mutually agree to the reassignment. Grievant is correct that newly created positions must be posted and filled competitively, in accordance with W. Va. Code §18A-4-7a paragraph 10. Grievant may even be correct that Ms. Pyles' "floating" position should have been posted in 1993, or that some action to create a position for Ms. Pyles should have been taken. However, at no time did Grievant, Ms. Pyles, or anyone else grieve Ms. Pyles' assignment to Roosevelt, or to specific teaching duties at Roosevelt. Presumably, Grievant recognized how fortunate she was to retain her position in 1993, and did not feel it necessary to challenge whatever MCBE did with Ms. Pyles, so long as MCBE did not place Ms. Pyles into Grievant's third grade teaching position.

It is too late now to challenge what was done with Ms. Pyles after the 1993 grievance. Such a challenge is clearly not timely. No excuse is allowed for late filing, because Grievant herself clearly knew of the event when it occurred. The anomaly created by MCBE's default, and its subsequent failure to address Ms. Pyles' situation, cannot be addressed by this Grievant three years after the fact. See Stratton v. Mingo County Bd. of Educ., Docket No. 97-29-387 (Oct. 21, 1997). Even if she could, the issue of whether Ms. Pyles' "floating" position was properly created and posted is irrelevant.

Once MCBE determined that it did not need all of the teachers it had on staff at Roosevelt, MCBE was compelled to reduce the number of positions, regardless of how those teachers came to be on staff. There was not a need to "realign," or maintain the same number of teachers at Roosevelt in a different configuration. There was a need to "reduce" the number of teachers. Simply stated, the provision cited by Grievant is inapplicable.

B. RIF ACTION:

Paragraph 6 of W. Va. Code §18A-4-7a provides:

> 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... Provided, 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.

Inarguably, when a board reduces the number of professional employees in a distinct teaching

area, a RIF occurs. Radcliff v. Marion County Bd. of Educ., Docket No. 93-24-194 (Feb. 25, 1994) at 3, and cases cited therein. Paragraph 12 of that same W. Va. Code §18A-4-7a provides special instructions for elementary school RIFs, which applies here:

> When the total number of classroom teaching positions in an elementary school needs to be reduced, such reduction shall be made on the basis of seniority with the least senior classroom teacher being recommended for transfer: Provided, That a specified grade level needs to be reduced and the least senior employee in the school is not in that grade level, the least senior classroom teacher in the grade level that needs to be reduced shall be reassigned to the position made vacant by the transfer of the least senior classroom teacher in the school without that position being posted: Provided, however, That the employee is certified and/or licensed and agrees to the reassignment. Grievant is the least senior classroom teacher at Roosevelt, and Roosevelt is an elementary school. Thus, it is irrelevant which position at Roosevelt was actually eliminated in the RIF. MCBE was mandated to recommend Grievant, as the least senior teacher, for transfer. Whatever position was eliminated, the teacher in that position would have been more senior than Grievant, and would have been "bumped" into Grievant's third grade position. See Radcliff, supra.

Fortunately for Grievant, she is no longer the least senior teacher in Mason County (as she was in 1993), and thus she remains employed in another teaching position at another school. Ultimately, the simple fact is that Grievant did not establish that she was transferred via a reduction in force while a less-senior classroom teacher was retained; therefore, she did not demonstrate that she was improperly transferred pursuant to the RIF provisions of Code §18A-4-7a. Lane v. Mercer County Bd. of Educ., Docket No. 94-27-231 (Dec. 16, 1994).

3. Did Respondent engage in reprisal in transferring Grievant?

W. Va. Code §18-29-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant makes a prima facie showing of reprisal by establishing that: (1) the grievant engaged in protected activity; (2) the employer was aware of the protected activity; (3) the employer subsequently took an adverse action against the employee; and (4) there was a retaliatory motivation or the adverse action followed the employee's protected activitywithin such period of time that retaliatory motivation can be inferred. Mullins v. Kanawha County Bd. of Educ., Docket No. 94- 20-598 (July 31, 1995) at 5. The general rule is that an employee must prove by a preponderance of the evidence that the protected activity was a significant, substantial or motivating factor in the adverse personnel action. Id.

The employer can rebut a prima facie showing of reprisal by offering evidence of a legitimate, non-retaliatory reason for the adverse action. Should the employer succeed in rebutting the prima

facie showing, the employee must prove that the reason offered by the employer was merely a pretext, in order to prevail. Id. (citing Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994) and Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989)).

Applying the above standards to this grievance, the evidence is not sufficient to prove a prima facie case of reprisal. While Grievant proved she had engaged in protected activity in filing her 1993 grievance, and that MCBE subsequently took an adverse action against her in 1997, she did not prove that any retaliatory motivation existed or could be inferred from the circumstances. While it must be presumed that MCBE was aware of the prior grievance, having granted that grievance in 1993 for procedural reasons, it is also clear that no awareness existed on the part of Dr. Parsons, the primary decision-maker here. Dr. Parsons was not aware of Grievant's protected activity when he made his RIF and transfer recommendations. Four years elapsed between the 1993 grievance and the 1997 RIF action. Proximity in time between the protected activity and the adverse treatment is often cited as giving rise to the inference of a causal connection. See, e.g., Conner v. Barbour County Bd. of Educ., Docket No. 93-01-421 (Apr. 20, 1994) ; and Robateau v. Cabell County Bd. of Educ., Docket No. 95-06-213 (Mar. 15, 1996). In these circumstances, the elapsed time period between the actions is not short enough to give rise to an inference of retaliation. Also, the fact that MCBE took similar action in 1993 and in 1997 in no way proves reprisal, and may indicate that its determination to undertake the RIF in 1997 was reasonable. See Townshend v. Grant County Bd. of Educ., Docket No. 91-12-222 (Sept. 27, 1991) (where RIF of principal was invalidated one year, but was found non- retaliatory and was upheld when implemented again the following year).

Even if some retaliatory motive was implied, MCBE presented credible evidence of its legitimate, non-retaliatory reason for the personnel action. It had excess teachers at Roosevelt, and it determined that Physical Education at Roosevelt should be taught by a subject-certified teacher, as it is at other schools in Mason County. Consequently, the position occupied by Ms. Pyles was logically eliminated. As Grievant was the least senior teacher in the elementary school, and Ms. Pyles was certified to teach Grievant's third grade position, Ms. Pyles was rightly assigned to that position. Grievant was then necessarily placed on the transfer list, and was subsequently transferred to a teachingposition elsewhere in MCBE's school system. MCBE's actions were entirely reasonable.

Grievant did not offer any evidence that the reasons given were merely a pretext for taking action against her in retaliation for her 1993 grievance. Grievant's reprisal argument must fail. See Bass v.

Kanawha County Bd. of Educ., Docket No. 92-20-214 (Oct. 1, 1992) (where grievants were RIFed improperly and were therefore retained at the end of school year 1990-91, but were then properly RIFed again at the end of the 1991-92 school year).

4. Did Respondent violate any legal requirement in failing to post the positions affected by its RIF?

Grievant cites several prior Grievance Board decisions in support of her argument that her transfer is illegal, as MCBE failed to post the positions affected by the RIF. In stating that MCBE was required to post positions where incumbents changed during the RIF, she primarily cites Cutlip v. Wood County Board of Education, Docket No. 90-54-391 (Feb. 7, 1991) and Davis v. Summers County Board of Education, Docket No. 45-87-119 (Oct. 13, 1987) aff'd sub nom Summers County B. of Educ. v. Davis, Civil Action No. 88-AA-246 (Cir. Ct. Kanawha County, Apr. 26, 1989). Both these cases applied paragraph 10 of W. Va. Code §18A-4-7a to RIF/transfers. That provision states, in pertinent part, that "Boards shall be required to post and date notices of all openings in established, existing or newly created positions... No vacancy shall be filled until after the five-day minimum posting period." Cutlip and Davis both held that the statute did not specifically identify RIF/transfers as exceptions to the posting requirement,and therefore held that the various positions affected by RIF/transfers must be posted as vacancies. In Cutlip, it was assumed that when the "least senior... teacher in the county was removed from her position... [this action] creat[ed] a vacancy." Finding of Fact 3, Cutlip. Grievant makes the same assumption here.

However, Cutlip (and therefore its predecessors, including Davis) was explicitly overruled in Lloyd v. Kanawha County Bd. of Educ., Docket No. 91-20-327 (Oct. 29, 1991) at 10, aff'd sub nom Kanawha County Bd. of Educ. v. Lloyd, Civil Action No. 91-AA-251 (Dec. 6, 1993). (See footnote 6) The rationale behind overruling Cutlip is that, if the board is required to post and fill RIF-affected positions competitively, through assessment of relative qualifications pursuant to the statute, there is no guarantee of continued employment for RIF-affected teachers. Such a result cannot have been intended by the Legislature. Consequently, the statutorily provided RIF/transfer process (found in the same section requiringposting of vacancies) must be excepted from the posting requirement. RIF/transfer situations must not require posting and competitive filling of positions directly affected.

In affirming the Grievance Board's decision in Lloyd, Chief Judge MacQueen succinctly stated that "the posting of such positions is not necessary because those positions are not actually

`openings' but involve moving one employee into another's position in order to effectuate the RIF provisions." Kanawha County Bd. of Educ. v. Lloyd, Civil Action No. 91-AA-251, n. 1 (Dec. 6, 1993). No vacancy is actually created, as one position is eliminated within the school system for every employee who is terminated. Thus, Cutlip and Davis are no longer good law. The current and better construction of the statute creates an exception to the posting requirement for RIF-related actions, which allows boards to place RIF-affected employees into RIF-affected positions without posting. MCBE's action here, in not posting the positions involved, was appropriate.

SUMMARY

Respondent did not err in eliminating, through implementation of a RIF, a position which may not have been validly created. It was not required to post the positions affected by the RIF and attendant transfers. Grievant, as the least senior teacher at Roosevelt Elementary School, was appropriately transferred to a teaching position elsewhere in the county.

CONCLUSIONS OF LAW

1 1. County boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, that discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

2 2. MCBE did not act in an arbitrary and capricious manner when it decided that it was in the school's best interests to eliminate one position at Roosevelt Elementary School through a reduction in force.

3 3. Paragraph 12 of W. Va. Code §18A-4-7a provides, in part:

> When the total number of classroom teaching positions in an elementary school needs to be reduced, such reduction shall be made on the basis of seniority with the least senior classroom teacher being recommended for transfer...

4 4. School law requires that a board of education post notices of position vacancies and openings, but there is no requirement to do so when a legitimate vacancy does not occur. RIF-affected positions are not "vacancies" within the meaning of the statute. Lloyd v. Kanawha County Bd. of Educ., Docket No. 91-20-327 (Oct. 29, 1991) at 10, aff'd sub nom Kanawha County Bd. of Educ. v. Lloyd, Civil Action No. 91-AA-251 (Dec. 6, 1993).

5 5. Grievant failed to make a prima facie showing of reprisal under W. Va. Code §18-29-2(p). Even if Grievant could make an initial case of reprisal, Respondent proved that it had legitimate, non-retaliatory reasons for its personnel action, and Grievant did not prove that those reasons were merely a pretext for a retaliatory motive. 6 6. Grievant failed to prove that MCBE improperly implemented its RIF, or improperly transferred her.

Accordingly, this grievance is **DENIED**.

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

Dated: October 23, 1997 _____

JENNIFER J. MEEKS,

Administrative Law Judge

Footnote: 1

The grievance was denied at Levels I and II, and was waived at Level III pursuant to W. Va. Code §18-29-4(c). A hearing was held at Level IV on September 12, 1997, at which time the matter matured for decision. References to proceedings at Level II are identified by "L II" and "Tr. p. __" for the transcript, "G. Ex. __" for Grievant's Exhibits, or "Admin. Ex. __" for Respondent's Exhibits.

Footnote: 2

Dr. Parsons' L IV testimony indicated that other positions in the county were also reduced during this RIF.

Footnote: 3

Although not specified in these decisions, the basic premise behind them is that the Grievance Board was created by the Legislature and, being a creature of statute, has only the jurisdiction, power and authority conferred by statute. See Eureka Pipe Line Co. v. Public Service Com'n, 148 W. Va. 674, 137 S.E.2d 200 (1964).

Footnote: 4

Mandamus is also the proper procedure to follow, should Grievant seek to compel the Grievance Board to assume

jurisdiction over default issues. See e.g., State ex rel. Rowe v. Ferguson, 165 W. Va. 183, 265 S.E.2d 45 (1980).

Footnote: 5

"Classroom teacher" is defined as "[t]he professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his time in this capacity." W. Va. Code §18A-1-1. Clearly, Ms. Pyles' position was that of a "classroom teacher" under this definition, despite the fact that she did not have an assigned, regular classroom.

Footnote: 6

Other cases relied upon by Grievant are distinguishable. Friend v. Nicholas County Bd. of Educ., Docket No. 34-87-286-4 (Jan. 19, 1988), involved filling a coaching position which had been vacated by the prior incumbent's resignation, without posting. No RIF was involved, and the board's attempt to "reassign" its staff in filling the vacancy was negated. In Adkins v. Logan County Bd. of Educ., Docket No. 95-23-406 (Sept. 26, 1996) and Jackson v. Mason County Bd. of Educ., Docket No. 94-26-011 (Apr. 27, 1994), the Grievance Board held that a "realignment" of elementary school teachers does not really occur when one teacher resigns or dies, and such vacancies must be posted. Murphy v. Mingo County Bd. of Educ., Docket No. 29-86-341-4 (May 28, 1987), involved a vacancy created when a teacher retired, and that vacancy was filled inappropriately through an intra-school transfer without posting. These cases did not address the RIF/transfer process, and did not involve the shuffling of incumbents in existing positions which is caused by a RIF. They merely confirm that true vacancies, created by teacher resignations, retirements and deaths must be posted and filled competitively.