BETTY SAMMONS and

SHERRY RIFFE,

Grievants,

v.

DOCKET NO. 96-29-336

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Betty Sammons and Sherry Riffe, filed grievances with the Mingo County Board of Education ("Board") on June 10, 1996, and July 17, 1996, respectively. Grievant Sammons stated:

> I received a letter dated Feb. 28, 1996 stating that my 261 day employment was reduced to 240 because of a projected loss of revenue in the Title I program. The Title I program funding was not cut, therefore I would request at this time to have my employment restored to 261 days. I wrote Mr. Conn a letter on May 24, 1996 concerning this matter but I received no response.

Grievant Riffe stated:

> My RIF should be resinded[sic] because the reasons no longer exists[sic].

These matters were consolidated for hearing at level two on July 18, 1996, and a decision denying the grievance was issued on July 25, 1996. Grievants advanced their appeal to level four on August 1, 1996, and a hearing was held on September 24, 1996. This matterbecame mature for decision on October 21, 1996, the deadline for the filing of proposed findings of fact and conclusions of law.

The material facts are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievant Sammons is employed by the Board as a school service employee. During the 1995-96 school year, Grievant Sammons was employed as a 261-day secretary in the Title I program.

2. Grievant Riffe is a professional employee of the Board, and during the 1995- 96 school year, was employed as a Title I Math teacher at Gilbert Middle School.

3. On or about February 16, 1996, Superintendent Everett Conn received a letter from the State Superintendent of Schools, informing him of an approximate 17% projected loss of revenue in the Title I program for Mingo County for the 1996-97 school year. LIV, G Ex. 1.

4. The Title I program in Mingo County was already in the process of being restructured at the time this letter was received.

5. After receipt of the February 16, 1996 letter, Superintendent Conn asked Charles Cline, the Director of the Title I program, to consider the 17% projected loss and make recommendations for reducing his staff.

6. On February 28, 1996, Grievant Sammons received notification from Superintendent Conn that he was recommending her 261-day secretary contract beterminated, and she be reassigned as a 240-day clerk for the 1996-97 school year, due to the "projected loss of revenue in the Title I program." (See footnote 1) LIV, G Ex. 2.

7. On March 11, 1996, the Board voted to accept the Superintendent's recommendation, and Grievant Sammons was notified of that action by letter dated March 12, 1996. LIV, G Ex. 3.

8. Grievant Riffe was informed by letter dated March 6, 1996, that Superintendent Conn was recommending the termination of her contract based upon "the proposed 17% reduction in Title I funds."

9. Grievant Riffe was informed by letter dated March 22, 1996, that the Board had voted to accept the Superintendent's recommendation to terminate her contract and place her on the preferred recall list for the 1996-97 school year. LII, G Ex. 3.

10. On May 13, 1996, Superintendent Conn received notice that the Title I allocation for the 1996-97 school year had not been cut, as previously expected. LII, G Ex. 4.

11. Charles Cline received the May 13, 1996 letter on or about May 23, 1996, at which time he showed it to Grievant Sammons.

12. Grievant Sammons filed her grievance on June 10, 1996.

13. Grievant Riffe learned that the Title I funds were not being cut as projected through a newsletter sent to the school sometime toward the end of May, 1996. 14. Grievant Riffe sent a letter to Assistant Superintendent John Fullen on or about May 31, 1996, asking that her reduction-in-force be rescinded. Mr. Fullen received the letter, but did not respond to it.

15. Grievant Riffe filed her grievance on July 17, 1996.

Discussion

Grievants allege that, because the justification for their transfer and reduction-in- force, respectively, i.e., the projected loss of revenue in the Title I program, ceased to exist prior to June 30, 1996, the Board is obligated to rescind those actions, relying on this Grievance Board's holdings in Berry v. Logan County Bd. of Educ., Docket No. 95-23-421 (Mar. 29, 1996), and Hollins v. Wyoming County Bd. of Educ., Docket No. 92-55-263 (Mar. 18, 1993).

Initially, the Board argues that Grievant Riffe's grievance was untimely filed. Further, the Board argues that the Title I program was being restructured even before the notice that the funding would be cut; that its action in light of the projected loss of revenue was not arbitrary and capricious; and because of the restructuring of the program, staffing changes were to occur anyway, and the Board should not be obligated to rescind the actions taken against Grievants.

West Virginia Code § 18-29-4 provides, in pertinent part:

> (a) Level one.
>
> (1) Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.
>
> The conference with the immediate supervisor concerning the grievance shall be conducted within ten days of the request therefor, and any discussion shall be by the grievant in the grievant's own behalf or by both the grievant and the designated representative.
>
> (2) The immediate supervisor shall respond to the grievance within ten days of the conference.
>
> (3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent.

Grievant Riffe wrote to Mr. Fullen on May 31, 1996, after learning that the Title I funds had been restored, asking that her reduction-in-force be rescinded. Grievant received no response from Mr. Fullen. She then waited until June 30, 1996, the final day upon which the Board could rescind her reduction-in-force, before she filed her written grievance on July 17, 1996.

The Board alleges Grievant Riffe knew of the event upon which the grievance is based, the restoration of the Title I funds, at least by May 31, 1996, when she wrote her letter to Mr. Fullen requesting that her reduction-in-force be rescinded. The Board contends the restoration of the Title I funding is the "event" upon which the grievance is based, and thus, May 31, 1996, is the date from which the filing deadline begins to run.

The undersigned agrees with the Board that the date Grievant became aware the funding had been restored was the "event" which triggered the grievance process. At that point, Grievant was aware the justification for her transfer had allegedly ceased to exist. The fact the Board had until June 30, 1996, to rescind the reduction-in-force does not affect the date the "event" became known to Grievant for filing purposes. However, the undersigned finds that Grievant did timely file her grievance when she wrote Mr. Fullen theMay 31, 1996 letter requesting her RIF be rescinded. Grievant Riffe and Mr. Cline testified they had a conversation after the funding was restored, wherein Grievant Riffe asked Mr. Cline whether she could get her job back. Mr. Cline advised Grievant he believed she should, but he did not have the authority to rescind her RIF. Grievant Riffe then wrote Mr. Fullen the May 31, 1996 letter requesting the rescission of her RIF. Mr. Fullen never responded to this inquiry.

The West Virginia Supreme Court of Appeals noted in Duruttya v. Board of Education, 382 S.E.2d 40 (W. Va. 1989), that the education grievance procedure is "intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level." Id. at 42. The Duruttya Court rejected a school board's defense of untimely filing based upon a finding of "substantial compliance" with the grievance procedure time limits set forth in W. Va. Code § 18-29-1, et seq. Id. at 43. Similarly, our Supreme Court of Appeals stated in Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990): "We do not believe that the legislature intended the grievance process to be a procedural quagmire where the merits of the cases are forgotten. In many instances, the grievant will not have a lawyer; therefore the process should remain relatively simple." Id. at 743.

See Stout/Southern v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994).

Consistent with Duruttya and Spahr, Grievant Riffe substantially complied with W. Va. Code § 18-29-4(a)(1) through her conversation with Mr. Cline and subsequent correspondence to Mr. Fullen, which was submitted within 15 days of the date on which the "event" (in this case, the restoration of the Title I funds) became known to Grievant. Given the failure of Mr. Fullen to respond to this correspondence, the Board is nowprecluded from attempting to rely upon the technical letter of the grievance procedure to prevent this matter from being addressed on its merits. Moreover, consistent with Spahr, Grievant Riffe's correspondence to Mr. Fullen effectively tolled the time limits for filing a grievance until the inquiry was answered. Waiting until July 17, 1996, or fifteen days following the last date on which the Board could act to rescind Grievant Riffe's RIF, does not constitute such an unreasonable delay so as to allow the Board to invoke timeliness as a defense. See Stout/Southern, supra.

With regard to the merits of Grievants' allegations that the restoration of the Title I funding obligated the Board to rescind their transfer and reduction-in-force, respectively, this Grievance Board has held that county boards of education must rescind reductions-in- force and transfers of professional and service personnel when the justification for them no longer exists prior to June 30, the end of the school year. Hollins v. Wyoming County Bd. of Educ., Docket No. 92-55-263 (Mar. 18, 1993); Conner v. Kanawha County Bd. of Educ., Docket No. 92-20-204A (Sept. 23, 1992); Barberio v. Harrison County Bd. of Educ., Docket No. 89-17-351 (Feb. 13, 1990).

In the instant case, the stated justification for Grievants' transfer and reduction-in- force did not cease to exist just because the Title I funds were not cut as expected for the 1996-97 school year. The evidence presented at level four supports the Board's position that the Title I program was in the process of being restructured before the projected loss in revenue occurred, that Mr. Cline was going to make cuts in the program anyway, and that the Mingo County Board of Education, as a whole, is under extreme pressure from the State Board of Education to make cuts in employment, as well as other areas, in order to correct the serious financial deficit under which it is now operating. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. State ex. rel. Melchiori v. Board of Educ., 425 S.E.2d 251 (W. Va. 1992). W. Va. Code § 18A-4-7a provides that,

with respect to the employment of professional personnel, "[n]othing provided herein shall prevent the county board of education from eliminating a position due to lack of need."

With respect to service personnel, the West Virginia Supreme Court has held that "[w]hen a board of education seeks to reduce employment costs, the board may decide that the schools' best interests require either the elimination of some service personnel jobs or the retention of all service personnel jobs but with reduced employment terms." Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994). Further, "determinations of the number of service personnel and the length of their employment terms are primarily management decisions. Without a clear statutory requirement, such determinations should remain with a board of education." Id. at 402. Unlike the situations in Hollins and Berry, supra, or other cases dealing with the cessation of the stated justification of employment decisions, this is not a case where a professional employee was reduced-in-force or transferred shortly before he or she received the necessary certification which would have enabled him or her to remain in their positions. Nor is this is a case where one service employee is reduced-in-force or transferred to make room for a more senior service employee who has been transferred, who then decides not to accept the transfer, thus leaving the affected position open. See, Ramey v. Lincoln County Bd. of Educ., Docket No. 96-22-298 (Oct. 30, 1996). The previous GrievanceBoard decisions on this issue are thus distinguishable from the particular facts present in this case.

Dr. Cline testified that the Title I program was in the process of being restructured at the time the subject employment decisions were made. Further, Dr. Cline testified that the Title I funds are not "ear-marked" for specific line items, e.g., salaries. Thus, even though the Title I allotment for the 1996-97 school year remained intact, that does not necessarily presume that the monies had to be spent in the same manner as previous years. If a determination was made that those monies could be more efficiently and effectively spent on items other than the Grievants' salaries, then that is a financial determination that must rest with the Board and not be subject to second-guessing by this Grievance Board.

Conclusions of Law

1. In a non-disciplinary grievance, the burden of proof lies with the grievants to prove their case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255

(Dec. 22, 1995).

2. When a service or professional employee's transfer or reduction-in-force, otherwise valid, loses its stated justification prior to the end of the school year in which the transfer or reduction-in-force was processed, absent some extraordinary circumstance the employee is entitled to instatement into the position she would have held but for the transfer or reduction-in-force. Ramey v. Lincoln County Bd. of Educ., Docket No. 96-22- 298 (Oct. 30, 1996); Berry v. Logan County Bd. of Educ., Docket No. 95-23-421 (Mar. 29, 1996); Conner v. Kanawha County Bd. of Educ., Docket No. 92-20-204A (Sept. 23, 1992); Barberio v. Harrison County Bd. of Educ., Docket No. 89-17-351 (Feb. 13, 1990). 3. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. State ex. rel. Melchiori v. Board of Educ., 425 S.E.2d 251 (W. Va. 1992).

4. With respect to the employment of professional personnel, "[n]othing provided herein shall prevent the county board of education from eliminating a position due to lack of need." W. Va. Code 18A-4-7a.

5. "When a board of education seeks to reduce employment costs, the board may decide that the schools' best interests require either the elimination of some service personnel jobs or the retention of all service personnel jobs but with reduced employment terms." Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994). "Determinations of the number of service personnel and the length of their employment terms are primarily management decisions. Without a clear statutory requirement, such determinations should remain with a board of education." Id. at 402; 446 S.E.2d at ____.

6. The decision to transfer and reduce-in-force Grievants was based upon financial and economic considerations on how to best serve the schools, a determination which should remain with the Board, and which was not arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

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

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: January 17, 1997

Footnote: 1

Neither Grievant contested, nor does it appear from the facts that the board violated, the notice and hearing provisions of Code §§ 18A-2-2, 18A-2-7, or 18A-4-8b in effectuating the reduction-in-force and transfer in the Spring of 1996.