JUDY TEAFORD,

Grievant,

v.

DOCKET NO. 96-41-279

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Judy Teaford, filed the following grievance on or about April 22, 1996:

> An English teacher with less seniority was placed at Shady Spring High School during 1995-96 school year in violation of WV Code 18A-2-2 and 18A-4-7a. To resolve this dispute, I request seniority, experience credit, and back pay for the employment term in dispute.

Following an adverse decision at level one, Grievant appealed to level two, and the matter was scheduled for hearing on May 15, 1996, before Dwight D. Dials, Superintendent of Schools. By decision of June 5, 1996, Superintendent Dials granted the grievance to the extent of granting seniority for the employment term 1995-96, but denied the grievance in all other respects. Grievant appealed the decision, and the Raleigh County Board of Education ("Board") waived participation in the grievance. Grievant then appealed to level four on July 2, 1996, and a hearing was conducted in the Grievance Board's Beckley, West Virginia office, on October 18, 1996. The parties submitted proposed findings of fact and conclusions of law on or about November 27, 1996. Following the parties' submissions, Administrative Law Judge Jerry Wright wrote the parties on April 10, 1997, requesting additional information and legal argument on the issue of mitigation of damages and the possibility of deciding the case de novo. The parties responded on April 29, 1997. Subsequently, this matter was reassigned to the undersigned on November 5, 1997. (See footnote 1)

SUMMARY OF EVIDENCE

Level Two Joint Exhibits

Ex. 1 -

Grievance form and level one response

Ex. 2 -

May 2, 1996 letter from Gary Archer to Dwight Dials

Ex. 3 -

August 29, 1994 Vacancy List for 1994-95 school term

Ex. 4 -

October 25, 1994 Board minutes

Ex. 5 -

Out-of-Field Certification for Karen Rusyniak; November 10, 1994 letter from Joyce O'Dell to Karen Rusyniak

Ex. 6 -

1995-96 English Seniority Roster

Ex. 7 -

1995-96 Language Arts Seniority Roster

Ex. 8 -

1995-96 Oral Communication Seniority Roster

Ex. 9 -

1995-96 Social Studies Seniority Roster

Ex. 10 -

June 5, 1995 Notice of Retirement of Beverley Ann Jarrett and Ann Reese Dye

Ex. 11 -

June 12, 1995 Board minutes

Ex. 12 -

July 25, 1995 Board minutes

Ex. 13 -

Professional Teaching Certificate and Out-of-Field Authorization for Karen Rusyniak

Ex. 14 -

Professional Commitment for Permit Teachers for Karen Rusyniak, dated August 15, 1995

Grievant's Exhibits

Ex. 1 -

1995-96 Raleigh County Schools Reductions In Force

Ex. 2 -

1996-97 Raleigh County Schools Reductions In Force

Ex. 3 -

1995-96 Master Schedule for Shady Springs High School

Level Four

R. Ex. 1 -

W. Va. Bureau of Unemployment Compensation Statement of Charges (See footnote 2)

Testimony

Grievant testified in her own behalf and presented the testimony of Mitzi Akers. Respondent offered the testimony of James Richmond.

ISSUE

The issues before the Grievance Board are 1) whether Grievant has proven by a preponderance of the evidence that she is entitled to back pay and benefits for the 1995- 96 school term, and 2) whether the Board has proven that Grievant failed to mitigate her damages during that time.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is an English teacher, and a substitute for the Board, and was originally hired on September 25, 1989.

2. At the end of the 1994-95 school year, five English teachers, including Grievant, and one English/Social Studies teacher, Karen Rusyniak, were reduced in force.

3. Ms. Rusyniak taught English and Social Studies at Shady Spring High School during the 1994-95 school year. Her seniority date is January 18, 1990, and she is less senior than Grievant. 4. In June 1995, two English teachers employed by the Board submitted their notices of retirement, effective September 1995.

5. Subsequently, but before July 1, 1995, the Board rescinded the reduction in force of the three most senior English teachers, and the reduction in force of Ms. Rusyniak.

6. Grievant then remained as the most senior English teacher on the preferred recall list.

7. After the rescission Ms. Rusyniak was assigned to Shady Spring High School to teach English and Social Studies for the 1995-96 school year, in response to a posting for an English/Social Studies vacancy.

8. Prior to the commencement of the school year the Master Schedule of Shady Spring High School was finalized, and Ms. Rusyniak was not assigned to teach Social Studies but instead taught English and basic skills.

9. Grievant learned in April of 1996 that Ms. Rusyniak was only teaching English, and filed this grievance. (See footnote 3)

10. Grievant was offered a year-long substitute position as an English teacher in the first semester of the 1995-96 school year at the Alternative School, for a teacher on leave of absence, but declined that assignment. (See footnote 4)

11. Grievant substituted during the first semester of the 1995-96 school year at Woodrow Wilson High School in a year-long English and Journalism position for a teacheron leave of absence,

which included the teacher's salary and a stipend for yearbook. However, she left that assignment after two weeks, because the Board failed to provide her with assistance with the yearbook.

12. Grievant did not substitute at all during the second semester of the 1995-96 school year.

13. Grievant accepted a position as an adjunct professor at Beckley College during the 1995-96 school year, for which she received $4,000.00 in compensation.

14. Grievant received unemployment compensation benefits for a period of time during the 1995-96 school year.

15. Superintendent Dials granted the grievance on June 5, 1996, on the ground that Grievant was more senior than Ms. Rusyniak, and should have been placed in the English and basic skills assignment at Shady Spring High School. However, he limited the relief to awarding Grievant seniority only for the 1995-96 school year. He based his decision to deny Grievant back pay on the basis that she failed to mitigate her damages by declining offers of employment during the 1995-96 school year.

16. Grievant appealed that decision, asking that she be awarded back pay and benefits, as well.

DISCUSSION

The Board first argues that Grievant “presupposes that she is entitled to damages in matters in this nature,” citing Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989), which determined that back pay awards are only relevant in discharge or termination proceedings where the wrongful discharge was proven to be malicious. The Board also interprets Mason County v. State Sup't of Schools, 170 W. Va. 632, 295 S.E.2d719 (1982), to mean that back pay in wrongful discharge cases is confined to cases where the discharge is malicious. Mason County does not stand for such a limited holding. Mason County, in fact, held that where the discharge is malicious, the plaintiff is entitled to a flat back pay award, and no set off will be subtracted from that award. Mason County, at 725. On the other hand, where the discharge is not found to be malicious, set off of the damage award is appropriate. It does not stand for the proposition espoused by the Board, that no back pay award is allowed unless the discharge was malicious. Further, the education employee's grievance procedure provides hearing examiners with the authority to make grievants whole for wrongs caused by a board of education, which would necessitate an award of back pay. W. Va. Code

§§ 18-29-3(a); 18-29-5(b).

The Board next argues that if Grievant is entitled to an award of back pay, that award must be set off by the amount of wages actually earned in other employment, as well as by the amount of wages she could have earned by accepting other similar employment during the 1995-96 school year.

The general rule regarding mitigation of damages is set forth in Mason County Bd. of Educ. v. State Sup't of Schools, 170 W. Va. 632, 295 S.E.2d 719 (1982). Although the obligation to mitigate one's damages is often referred to as a “duty” to mitigate, an employee is, in fact, under no affirmative “duty” to seek employment; he may seek it or not, at his pleasure. Mason County, 295 S.E.2d at 724. The Court in Mason County, supra, held that, unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locallyavailable, will be deducted from any back pay award. Syl. Pt. 2, Mason County Bd. of Educ. V. State Supt. of Schools, 170 W. Va. 632, 295 S.E.2d 719 (1982). The plaintiff will only be charged with what he could have earned in another position of the same grade, in the same line of work, and in the same locality. Id. at 723-24. Addressing the issue of mitigation in Mason County, the West Virginia Supreme Court of Appeals recognized that

> with regard to teachers and school administrators, the only available work that is exactly comparable to the work from which they have been discharged, at least in the same locality, will obviously be in the same school system from which they were discharged. If we were to hold that teachers and school administrators have an obligation to mitigate their damages only if they can find work in education, we would effectively eliminate almost all obligation to mitigate damages.

Mason County, at 725.

Thus, the Court found that “teachers and school administrators are suited by education and training for numerous jobs outside of the school system that have working conditions and status comparable to positions in education. For example, it would not be unreasonable to expect a wrongfully discharged classroom teacher to accept employment as a training officer in the education department of a corporation.” Additionally, the Court found that “in instances where an employee has secured work at the same salary or a higher salary than the one he or she was making at the time of discharge, so that effectively all damages are mitigated, the employee is still entitled to his or her

reasonable attorneys' fees and expenses of the litigation leading to his or her reinstatement." (See footnote 5)

The burden of establishing mitigation is an affirmative defense and rests solely on the defendant. While mitigation of damages is an affirmative defense that must be provedby the party that has breached the contract, nonetheless, the wrongfully discharged employee who has not secured employment must be prepared to demonstrate that he or she did not make a voluntary decision not to work, but rather used reasonable and diligent efforts to secure acceptable employment. See also, Paxton v. Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990). Referring to its previous holding in Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1983), that an employee cannot be "accused of failing to fulfill her duty to mitigate damages by not applying for other jobs at a time in which she was still employed", the Court clarified that "Orr does not stand for the proposition that a person who has a reasonable expectation of being reinstated is not required to look for work." Should employment similar to that interrupted by his breached contract be locally available to him, he will be charged, in mitigation of his damages, the amount of the salary he would have earned at that employment. In addition, actual wages received, regardless of their source, are always an offset to damages unless they were earned in a job entirely incompatible with continued employment under the contract.

In support of its argument that Grievant failed to mitigate her damages with respect to back pay, the Board contends that Grievant was offered two substitute assignments during the fall of 1995, at the Alternative School and at Woodrow Wilson High School, each of which would have provided her with a full year's employment. (See footnote 6) Grievant argues she should not be penalized for declining the two substitute assignments, because thegrievable event had not yet been discovered, they were of an undetermined length, and would require her to take a substantially reduced salary with no benefits or seniority. (See footnote 7)

The above examples illustrated by the Court evidence an acknowledgment that a teacher or school administrator simply is not going to find equivalent work as that from which he was discharged, unless it is outside his current school system. Nevertheless, the Court has found that the educator is still obligated to look for and accept other similar employment, not necessarily at the same salary, in his local area, if available. Inherent in this holding is the realization that other employment for the educator obviously will not include school seniority or benefits similar to that which the educator had with the school system. Thus, Grievant's argument that a full-time, long-term substitute teaching

position would not be comparable or similar to a regular teaching assignment because it would not include seniority or benefits of a regular teaching position, is not reasonable and not justification to decline such employment if available and offered.

Addressing the issue of whether an offer of a long-term substitute assignment is similar work to Grievant's regular teaching position, the West Virginia Supreme Court found, in an unemployment compensation case, that being placed on a substitute list, in general, would not “constitute an offer of regular employment, given the fact that being placed on a substitute list does not mean that an employee will necessarily work at all. He would actually have worked only if a substitute position was available.” Mercer Cty. Bd. of Educ. v. Gatson, 412 S.E.2d 249 (W. Va. 1991). The Court's finding in that case isinstructional. Clearly, merely placing a discharged teacher on a substitute list is not a guarantee of employment. However, in the instant case, Grievant was offered two different long-term substitute teaching positions with the Board, which were guaranteed employment.

The evidence establishes that substitutes in Raleigh County receive 80% of their base rate of pay for the first 10 days of their employment. From 11 to 30 days of substitute employment, the substitute receives 80% of the county scale, and after 30 days, the substitute receives 100% of the county scale. Thus, in either the Alternative School or the Woodrow Wilson High School position, Grievant would have eventually received 100% of her county pay scale, plus benefits, absent regular seniority. Both positions were English teaching positions, and both positions were located in Raleigh County. Thus, the two positions offered Grievant fall within the “same grade, in the same line of work, and in the same locality.” Indeed, Grievant had even accepted the Woodrow Wilson High School position, but left voluntarily after two weeks, because of the additional yearbook responsibilities.

Looking to other jurisdictions for guidance on this issue, the general rule seems to be that discharged teachers have an obligation to try to mitigate their damages by accepting other, similar, employment. In Assad v. Berlin-Boylston Reg. Sch. Com., 550 N.E.2d 357 (Mass. 1990), the Massachusetts high court held that an employee, including a teacher reduced-in-force, has an obligation to use reasonable efforts to secure other similar work, and that “such employees cannot voluntarily remain idle and expect to recover the compensation stipulated in the contract from the other party.” Assad, at 362. In Gross v. Bd. of Educ., 574 N.E.2d 438 (NY 1991), the Court held that a teacher discharged through a reduction-in-force, and later reinstated, was “obligated to take reasonable steps to avoid or minimize her loss by accepting the board of education's tender to teach

part-time in the same area." The Court found the board had not acted in bad faith or for improper reasons when it discharged the teacher and the fact that the position paid a salary less than her previous position was of no consequence. Specifically, the Court held that the "discharge was wrongful only because of the Board's mistaken assumption that she was the tenured teacher with the least seniority." P. 440. The Court further found that, "in these circumstances, it is consistent with the economic purposes underlying the statute to require petitioners to lessen the economic impact of her erroneous discharge by accepting Respondent's reasonable tender of employment," further stating that the:

> [P]urpose behind the legislative grant of power to the school districts to abolish positions and excess teachers, notwithstanding their tenure rights, is economic. Imposition of an obligation on the teacher to undertake reasonable steps to mitigate any financial harm associated with an erroneous discharge is entirely consistent with this purpose; indeed, it is a necessary corollary of the statute's underlying objective of conserving public funds.

Id., at 441.

Finding that the part-time job offer paid a salary less than the plaintiff's real position, the Court found that it "is of no consequence since the school district remains liable for any difference. The Petitioner was free to reject the employment for personal reasons, but she cannot now be heard to say that she is entitled to recover the amount of back pay she would have earned during that time had she accepted it." P. 441. On the other hand, the New York high court, in Gladding v. Kings Park Cent. Sch. Dist., 523 N.Y.S.2d 877 (A.D.2 Dept. 1988), found that a "per annum" substitute teaching position was not a "vacancy" contemplated by education law which the petitioner was obligated to accept. In that case, the school board determined that, since the reduced-in- force teacher on preferred recall refused a substitute assignment, she was not interested in working, and so it did not call her off preferred recall to a regular vacancy for which she was eligible. It appears the Court did not care to sanction the Board's rather unusual thought-process by finding the teacher had failed to mitigate her damages by refusing the substitute assignment.

If the above line of cases support anything, it is that a discharged educator has an obligation to find other similar work, and if they choose not to, they cannot be heard to come back and claim they are entitled to the salary they would have received had they been working. Thus, it does not really matter when Grievant learned she was improperly reduced-in-force. The real issue is what did she do

in the interim to minimize her economic harm.

The evidence shows she was offered two full-time, long-term substitute positions, one at the Alternative School, and one at Woodrow Wilson High School in the same area in which she regularly taught, the only difference being an added yearbook responsibility. Based upon the above line of cases, it was unreasonable for Grievant to quit the Woodrow Wilson High School English teaching position on the sole basis that it had yearbook responsibilities that she did not want. (See footnote 8) Grievant voluntarily quit that assignment after onlytwo weeks, stating the board refused to get anyone to help her with the yearbook assignment. The evidence shows that the Board had a resource person available to her to help with the yearbook project. It seems clear that Grievant simply did not want to do the project at all, but expected the resource person to do it for her. That was Grievant's choice, but she cannot now come back and say she should receive back pay for a period of time in which she could have been employed teaching the same subject she taught in her regular position. Thus, Grievant's back pay award should be set off by the amount of pay Grievant would have received as a long-term substitute teacher at Woodrow Wilson High School for the 1995-96 school year.

Grievant also taught during the day at Beckley College in the Spring semester, a portion of which would be incompatible with her employment at the Board, and her actual wages received, $4,000, should be set off from any back pay award. Finally, Grievant's unemployment benefits will not be deducted from her back pay award. Unemployment compensation benefits may not be used to reduce an award of damages under the collateral source rule. Powell v. Wyoming Cablevision, Inc., 403 S.E.2d 717 (W. Va. 1991); Orr v. Crowder, 315 S.E.2d 593 (W. Va. 1983).

CONCLUSIONS OF LAW

1. The level two grievance evaluator determined Grievant had proved by a preponderance of the evidence that the Board violated W. Va. Code § 18A-4-7a when it reduced her in force for the 1995-96 school year, and thus, she was entitled to back pay, benefits, and seniority for that violation. 2. Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer. Syl.

Pt. 2, Mason County Bd. of Educ. V. State Supt. of Schools, 170 W. Va. 632, 295 S.E.2d 719 (1982). The plaintiff will only be charged with what he could have earned in another position of the same grade, in the same line of work, and in the same locality. Id., at 723-24.

3. The Board has proven by a preponderance of the evidence that Grievant was offered, accepted, and then voluntarily quit a long-term substitute assignment teaching English at Woodrow Wilson High School, which was similar in type, pay and locality to Grievant's regular English teaching position in Raleigh County.

4. Unemployment compensation benefits may not be used to reduce an award of damages under the collateral source rule. Powell v. Wyoming Cablevision, Inc., 403 S.E.2d 717 (W. Va. 1991); Orr v. Crowder, 315 S.E.2d 593 (W. Va. 1983).

Accordingly, this grievance is **GRANTED** to the extent that Grievant is entitled to back pay and experience credit for the 1995-96 school year for the English position held by Karen Rusyniak at Shady Springs High School. However, the back pay award shall be set off by the $4,000 in earnings from Beckley College, and the amount Grievant would have received had she accepted the Woodrow Wilson High School English teaching position for the 1995-96 school year.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh 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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MARY JO SWARTZ

Administrative Law Judge

Dated: February 4, 1998

Footnote: 1 *By Order dated November 25, 1997, the undersigned ruled that the decision of the level two grievance evaluator granting the grievance, not having been appealed by the Board, was final and binding upon the parties, and the only issue to be decided at level four was the appropriate relief, if any, to the Grievant.*

Footnote: 2 *The parties submitted additional documentation regarding Grievant's earnings during the 1995-96 school year following the close of the level four hearing, including Grievant's W-2 Form for 1995, and an estimate of earnings had she accepted a long- term substitute assignment with the Board.*

Footnote: 3 *The Board raised a timeliness defense at level two, which Superintendent Dials denied on the ground that Grievant only became aware that Ms. Rusyniak was not teaching Social Studies in April 1996.*

Footnote: 4 *The Alternative School is a school for students presenting severe disciplinary problems.*

Footnote: 5 *The Grievance Board does not have authority to award attorneys' fees in grievance proceedings.*

Footnote: 6 *The county superintendent . . . shall have the authority to employ and assign substitute teachers to any of the following duties: . . . (b) to fill a teaching position of a regular teacher on leave of absence, ... W. Va. Code § 18A-2-3.*

Footnote: 7 *Upon completion of one hundred thirty-three days of employment in any one school year, substitute teachers shall accrue seniority exclusively for the purpose of applying for employment as a permanent, full-time professional employee. W. Va. Code § 18A-4-7a.*

Footnote: 8 *Because I find the Woodrow Wilson High School substitute teaching assignment was of a similar type, with similar pay, and in the same locality, it isunnecessary to address whether a teaching position at the Alternative School would be considered comparable to a regular teaching position.*