EARL SPENCE, JR.,

Grievant,

v. **Docket No. 97-29-244**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

ALEX HUNT, JR.,

Intervenor.

D E C I S I O N

Grievant, Earl Spence, alleges the Mingo County Board of Education ("MCBOE") violated W. Va. Code §§ 18-4-8 and 18-29-2 (m), (n), (o), and (p) (See footnote 1) when it terminated his 261-day contract and then placed him in a 230-day contract in the same position at the same pay scale. (See footnote 2) The relief requested by Grievant is the restoration of his 261-day contract, and the termination of the Supervisor of Transportation with the least amount of seniority. This grievance was denied at Level II and waived at Level III. Upon appeal to Level IV, a hearing was held on August 18, 1997. This case became mature for decisionon September 22, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.

The undersigned Administrative Law Judge makes the following findings based on the record in its entirety.

Findings of Fact

1. Grievant has been employed by MCBOE since 1972, most of that time as a bus operator. For approximately two years in the 1970's, he worked in maintenance as an electrician and as the foreman of the roof crew.

2. In 1992, Grievant became unable to work as a bus operator because of a heart condition, and the medication he was required to take. He was off work for several years. In

1992, he filed a grievance over MCBOE's reclassification of Intervenor Alex Hunt from Foreman/Mechanic to Supervisor of Transportation.

3. On August 3, 1994, the Mingo County Circuit Court ordered MCBOE to rescind the reclassification of Intervenor Hunt, to post and fill the Superintendent of Transportation position, (See footnote 3) and to grant Grievant back pay for approximately two years.

4. In response to this order, MCBOE called Grievant on August 4, 1994, to return to work as Mr. Bill Kirk's assistant, and posted the Supervisor of Transportation position on August 5, 1994.

5. The duties of a Supervisor of Transportation include directing the school transportation activities, and supervising the maintenance and repair of vehicles. Typicallythis individual handles the designing and scheduling of all bus runs and the supervision of all the bus operators and mechanics.

6. Many of the duties identified in W. Va. Code § 18A-4-8 for a Supervisor of Transportation have been assigned to and carried out by Mr. Kirk, since 1982. His title in the Mingo County school system is that of Transportation Director. His title on the certified service personnel list sent to the State Department of Education is Supervisor of Transportation. MCBOE divided this position into two positions, assigning one individual to oversee the bus operators and scheduling, and another individual to supervise the mechanics.

7. Grievant and Intervenor applied for the position of Supervisor of Transportation shortly after it was posted in August 1994.

8. Before the position was awarded, Grievant and Superintendent Everett Conn met several times to discuss alternatives to placing Grievant in the Supervisor of Transportation position. Grievant informed Superintendent Conn he was willing to take the Supervisor of Transportation position at Pay Grade G. Grievant's goal was to obtain a supervisory position with MCBOE. He was not overly concerned about his title at that time.

9. Shortly thereafter, Grievant received a permanent position as Mr. Kirk's assistant. Superintendent Conn informed Grievant he did not care what title Grievant used to describe himself. Grievant's duties were to help with scheduling, organizing bus runs, and working with substitutes. He did not then and does not now work with the mechanics in the bus garage.

Grievant believed his title was Supervisor of Transportation at a Pay Grade G.

10. MCBOE awarded the posted Supervisor of Transportation position to Intervenor at the required Pay Grade, H. **(See footnote 4)** **Intervenor oversees the work of the mechanics, works as a mechanic himself, and occasionally assists Mr. Kirk, in a limited way, with his duties as Transportation Director.**

11. Shortly after Grievant returned to work as Mr. Kirk's assistant, he received a contract to sign. He refused to sign this contract as his position title was not listed on the form.

12. On May 3, 1996, Grievant received another contract and signed it. This contract identified Grievant as an Assistant Transportation Director. Grievant read this contract before he signed it and was aware of the title listed on the form. He did not file a grievance over the contract and the listed title.

13. The certified service personnel employment list identifies Mr. Kirk and Intervenor as Supervisors of Transportation at Pay Grade H, and Grievant as a Foreman at Pay Grade G. There is no listing for an Assistant Director of Transportation in W. Va. Code § 18A-4-8.

14. MCBOE has been directed by the State Department of Education ("SDOE") to decrease the number of service and professional positions, as MCBOE is over the state funding formula. Additionally, MCBOE has a large deficit and has been directed by SDOE to correct this problem. Numerous service and professional positions have been eliminated, and many employee contracts have been reduced. 15. SDOE recommended Grievant's position be eliminated in order for MCBOE to come more in line with the state funding formula and to decrease the deficit. MCBOE did not follow this direction, and instead, at first proposed to reduce Grievant's contract to 200-days, and then, in its final action, decreased Grievant's contract to 230-days.

16. Intervenor's contract was not changed, and he continues to maintain a 261- day position, because much of his work on the repair and overhaul of MCBOE's transportation fleet occurs during the summer months.

17. Grievant is physically unable to complete the work performed by Intervenor Hunt. Additionally, Grievant is not classified as a mechanic.

Issues

Grievant alleges he was employed as the Supervisor of Transportation after the position was posted. Grievant also argues if Intervenor is in the position, he is in the position illegally and in contravention of the circuit court order. Further, Grievant argues that even if Intervenor is a Supervisor of Transportation, Grievant is the more senior Supervisor of Transportation and, thus, the employment term of Intervenor should be reduced if there is a need to decrease the contract terms of a Supervisor of Transportation. (See footnote 5)

Respondent maintained Grievant was never classified as a Supervisor of Transportation and knowingly accepted a position as Mr. Kirk's assistant, which is clearly not a Supervisor of Transportation position. Respondent also points out that even if Grievant some how did not understand what his position was in the hierarchy when he washired, he clearly knew when he signed his contract in May 1996, that he was not classified as the Supervisor of Transportation. As he did not grieve this action at the time he allegedly found out about it, apparently he was either pleased with or accepted this position.

Discussion

In a non-disciplinary grievance, such as a reduction in contract terms, a grievant has the burden of proving his case by a preponderance of the evidence. Sanders v. Brooke County Bd. of Educ., Docket No. 93-05-173 (Aug. 27, 1993). When a county school board seeks to reduce the contract terms of a service employee, the board must comply with the procedures set out in W. Va. Code § 18A-2-6. Syl. Pt. 2, Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994), citing Bd. of Educ. of Fayette v. Hunley, 169 W. Va. 489, 288 S.E.2d 524 (1982). MCBOE followed these procedures. Grievant received proper and timely notice of his reduction-in-contract. A board of education has the discretion to determine the number of jobs, and the employment terms of its positions. Lucion at 402. A reduction in employment terms must take into account the seniority of the employees to be reduced within each classification. Berry v. Kanawha County Bd. of Educ., 191 W. Va. 422, 425, 446 S.E.2d 510 (1994).

The first issue to resolve is Grievant's classification. Grievant's contention that he was hired as the Supervisor of Transportation is incorrect. Grievant knew when he accepted the position in 1994 that it was at a Pay Grade G, and the Supervisor of Transportation position

requires compensation at Pay Grade H. Further, even if Grievant did not know his classification or title in September 1994, he certainly knew in May 1996 when he read and signed his contract. He could have grieved the discrepancy at that time,or filed a writ of mandamus to enforce the order of the circuit court, but chose not to do so. In reviewing the classification issue at this time, the undersigned Administrative Law Judge finds Grievant was not classified as a Supervisor of Transportation in 1994, Grievant knew he was not classified as a Supervisor of Transportation, and Grievant was not concerned as he had what he wanted, a supervisory position which he could perform. (Test. at Levels II and IV). Additionally, the duties performed by Grievant do not qualify him for placement into a Supervisor of Transportation position.

This is not to say that all of MCBOE's actions appear to have been aboveboard in 1994, for it does appear Intervenor was placed into a W. Va. Code § 18A-4-8 classification that does not fit his duties, after the circuit court ordered this problem corrected. However, the circuit court order did not address the issue of whether MCBOE could divide the duties of the Supervisor of Transportation into two positions as MCBOE has chosen to do. Additionally, at this point in time, it does appear Intervenor does more closely perform the duties of that class title than he did in 1992, as he occasionally assists Mr. Kirk with his duties.

MCBOE properly reduced Grievant's contract terms. MCBOE was required to reduce contract terms on the basis of the seniority of the employees within the classification. There was no one else in Grievant's classification; much less someone who was less senior than he. Newhouse v. Marion County Bd. of Educ., Docket No. 93-24-212 (Aug. 30, 1994). The other individuals employed in supervisory or management positions in the Transportation Department were classified as Supervisors of Transportation. Mr. Kirk's contract was reduced to 240-days. Intervenor did not have his 261-day contract reduced, as the bulk of his work occurs in the summer when the buses are available formajor overhauls. Accordingly, Grievant's position was properly reduced due to severe financial constraints, and MCBOE's failure to fall within the established funding formula for employees. Berry, supra; Newhouse, supra. Further, it was not arbitrary and capricious for MCBOE to maintain the contract terms of Intervenor given his required duties.

. The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In a non-disciplinary grievance, a grievant has the burden of proving his case by a preponderance of the evidence. Sanders v. Brooke County Bd. of Educ., Docket No. 93-05-173 (Aug. 27, 1993).

2. MCBOE properly followed the W. Va. Code § 18A-4-8b procedures to reduce Grievant's contract terms.

3. A board of education has the discretion to determine the number of jobs, and the employment terms of its positions. Syl. Pt. 2, Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994).

4. A reduction in employment terms must take into account the seniority of the employees to be reduced within each classification. Berry v. Kanawha County Bd. of Educ., 191 W. Va. 422, 425, 446 S.E.2d 510 (1994).

5. As there was no one else in Grievant's classification and numerous employees had their contract terms reduced, MCBOE's action did not violate W. Va. Code § 18A-4-8b and was not arbitrary and capricious. Newhouse v. Marion County Bd. of Educ., Docket No. 93-24-212 (Aug. 30, 1994). 6. Grievant's position was properly reduced due to severe financial constraints and the failure of MCBOE to fall within the established funding formula for service personnel employees. Berry, supra; Newhouse, supra.

7. Grievant was aware of his classification, at least by May 1996, and failed to take any action to clarify or rectify the issue. The duties Grievant performs would not qualify him for placement into a Supervisor of Transportation position.

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.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 6, 1998

Footnote: 1

No information was presented to prove the charges of discrimination, harassment, favoritism, or reprisal. Additionally, these issues were not addressed in Grievant counsel's proposed findings. Given this state of affairs, these allegations are considered abandoned.

Footnote: 2

The April 4, 1997 notice Grievant received stated he would be terminated from his position as an Assistant Director of Transportation and reassigned to a 230-day contract as a Bus Operator. The parties agreed, at hearing, that Grievant would remain in his present position as the assistant to Mr. Bill Kirk, the Transportation Director, and at Pay Grade G.

Footnote: 3

The Mingo County Circuit Court found Mr. Hunt did not perform the duties identified in the W. Va. Code § 18A-4-8 definition of Supervisor of Transportation.

Footnote: 4

The parties were to send the minutes of MCBOE's meeting to confirm these facts. Since this information was not forwarded to the undersigned Administrative Law Judge, these findings are based on the record presented at the hearing.

Footnote: 5

Although Grievant originally asked for the Intervenor's contract to be terminated, this request was modified to request Intervenor's contract be reduced.